

Attention is drawn to the order at paragraph 10 prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 543
3061832

BETWEEN RACHEL TODD
Applicant

AND CRAIG POTTON GALLERY
LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Nicole Ironside, counsel for the Applicant
Anjela Sharma, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 3 September and 1 October 2021 from the Applicant
24 September 2021 from the Respondent

Date of Determination: 3 December 2021

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 3 August 2021 I upheld Rachel Todd's claim to have been unjustifiably dismissed and unjustifiably disadvantaged by actions of her employer, Craig Potton Gallery Limited ("CPG" or "the Gallery").¹ CPG was ordered to pay Ms Todd compensation totalling \$28,000 and lost wages of \$7,184.63.

¹ [2021] NZERA 345.

[2] I reserved the issue of costs and encouraged the parties to try to resolve the issues between themselves. They have not been able to do so and Ms Todd now seeks a contribution of \$27,095.99 to the costs she incurred in bringing the matter to the Authority. This includes disbursements; costs for the preparation of the costs memorandum; and two further items.

[3] Those further items relate to an investigation and report Ms Todd commissioned from a computer forensic specialist following an accusation CPG made that she had manufactured evidence after the termination of her employment and the commencement of proceedings. The matter is discussed in the substantive determination and does not need to be repeated here. I note, however, that the concessions made by CPG in the course of the Authority's investigation are relevant to a consideration of costs. Ms Todd is seeking reimbursement in full of the costs she incurred in response to the accusation of having manufactured evidence.

[4] With regard to the other costs she incurred in bringing her claims against CPG, Ms Todd, through counsel, asks the Authority to apply its notional daily tariff with an uplift of \$1,000 per day to recognise the Calderbank offer she made to resolve matters at an early stage in the proceedings. She cites *Fagotti v Acme & Co Ltd*, in which a full court of the Employment Court found the Authority's uplift of the daily tariff by \$1,000 had been appropriate in a situation where Calderbank offers made by the Applicant had been rejected, leading to greater costs being incurred.²

[5] CPG submits Ms Todd has provided no information to support her application for an increased daily tariff. Counsel for CPG provided some recent information regarding the financial position of the Gallery to support its submission that it cannot afford to pay the scale of costs award Ms Todd is seeking.

[6] Counsel for CPG submits Ms Todd's claims in respect of costs are excessive and the Authority must be guided by applying a daily tariff approach to costs. She asks the Authority to exercise its equity and good conscience jurisdiction and award Ms Todd no more than \$8,000, being the tariff rate for a two day investigation meeting.

Discussion

[7] The Authority's discretion to award costs arises from clause 15 of Schedule 2 to the Employment Relations Act 2000 (the Act). The principles relevant to costs awards are well-

² [2015] NZEmpC 135.

settled and are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*.³ They were endorsed after a full reconsideration by the Employment Court ten years later in *Fagotti v Acme & Co Ltd*.⁴ The principles are well-known and include the following:

- There is a discretion as to whether costs would be awarded and what amount;
- The discretion is to be exercised in a principled manner and not arbitrarily;
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct that increased costs unnecessarily can be taken into account in inflating or reducing an award;
- Costs generally follow the event;
- Awards will be modest; and
- they are frequently judged against a notional daily tariff.

[8] Ms Todd was generally successful in her claims and it is appropriate that she be awarded a contribution to her costs which will be set with regard to the Authority's notional daily tariff. The tariff is currently \$4,500 for the first day of a hearing and \$3,500 for each subsequent day.

[9] The investigation of Ms Todd's claims took place over four days, the first two of which were in person in Nelson, with the latter two taking place by telephone. The fourth day of telephone investigation was slightly shorter than the other days and I will treat that as seventy-five percent of a day. Accordingly, that would result in the starting point for a tariff-based costs award of \$14,125.

[10] It is relevant now to consider whether there is any reason for an upwards or downwards adjustment to be made to the daily tariff. CPG, in asking the Authority to use its equity and good conscience jurisdiction and award no more than the daily tariff for a two day investigation meeting, is ostensibly seeking a downwards adjustment of \$6,125. The submission is based on the Gallery's financial position. Counsel for CPG provided some limited financial information relating to the Gallery's position from 1 April 2021 to 31 July 2021. A non-publication order has been made in respect of this information.

³ [2005] 1 ERNZ 808.

⁴ N1.

[11] Counsel for Ms Todd in her reply submissions referred to observations made by the Employment Court in *O'Hagan v Waitomo Adventures Ltd* where Judge Inglis, as she then was, observed:

The fundamental principle of an award of costs is to recompense a party who has been successful in litigation for the cost of being represented in that litigation by counsel. I consider that care needs to be taken not to over-extend the reach of a "hardship" approach. It runs the risk of distorting generally accepted principles of costs and placing an unnecessary burden on the opposing party of shouldering the costs of defending an unsuccessful claim. It may encourage claims that lack merit but which are pursued on a nothing-to-lose basis. The successful party may, itself, be financially stretched and struggling to meet the costs of litigation that it may not have initiated."⁵

[12] In that situation, Mr O'Hagen had unsuccessfully challenged a determination of the Authority and argued that an award of costs should be nominal to reflect his financial position. The court noted the amount he proposed represented a significant discount for financial hardship which, in the Judge's observation, would "largely defeat the underlying principles relating to costs...". She rejected his submission and found the case was not one that justified a discount for financial hardship.

[13] After considering the submissions of the parties and relevant caselaw I am not persuaded it would be reasonable to reduce any costs award to Ms Todd on the basis of CPG's financial situation.

[14] The question next arises whether there should there be an uplift to the daily tariff to reflect Calderbank offers.⁶ Both parties made efforts to resolve the matter in December 2019 and January 2020, with CPG making the first Calderbank offer.

[15] Ms Todd rejected that offer by letter dated 20 December 2019, in which she made her own Calderbank offer to CPG. She did not specify her reasons for rejecting CPG's offer, but it is clear from the financial component of her offer to settle, which was more than four times higher than the sum CPG had offered, that financial considerations formed part of her reasoning.

⁵ [2013] NZEmpC 58 at [34].

⁶ A Calderbank offer is an offer made by one party to another to settle a matter on terms the offering party proposes. It is expressed as an offer made "without prejudice save as to costs" and remains confidential to the parties until the matter has been determined and the question of costs arises at which point the offering party may bring the offer to the attention of the Authority (or court). The Calderbank offer may be relevant to the assessment of a party's application for costs where the offer was unreasonably rejected by the other party.

[16] CPG did not accept Ms Todd's offer but increased the financial component of its offer in January 2020. The increased amount still fell far short of what Ms Todd had indicated she would accept and she did not accept it during the one week timeframe it remained open.

[17] I am satisfied it was reasonable for Ms Todd to reject CPG's two Calderbank offers, which were both low in relation to the result she received from proceeding with her claims to the Authority. I consider it is appropriate to take Ms Todd's Calderbank offer of 20 December 2019 into account in this assessment of costs. The offer was validly made, and was open for a reasonable period when viewed in the context of the timeframe the Authority had set for filing evidence in the lead up to the investigation meeting.⁷

[18] CPG had ample time to consider the offer and make a pragmatic assessment of its merits. Had it accepted Ms Todd's offer, which was for a considerably lesser compensation amount than the Authority awarded her, there would have been a significant saving of costs for both parties.

[19] There is merit to counsel for Ms Todd's submission that her Calderbank offer to resolve the matter warrants an uplift to the tariff, and I accept it. I consider a \$1,000 per day uplift for the first three days to be appropriate, and a \$750 uplift for the fourth (shorter) day. On the tariff-based costs, the award will be \$17,875. I decline counsel for Ms Todd's request for further uplifts of \$500 to reflect the time spent on preparation of costs memoranda and \$1,000 in relation to the unsuccessful attempt by CPG to introduce further briefs of evidence and a new witness after the completion of the first two days of the Authority's investigation.

[20] As noted earlier in this determination, Ms Todd seeks reimbursement of all the computer forensic specialist costs she incurred in defending herself against CPG's accusation that she had manufactured evidence. Counsel for Ms Todd has invoices totalling \$2,401 from Computer Forensics New Zealand Limited (CFNZ). Counsel has also attached her own invoice of \$2,875 for professional services specifically relating to CPG's accusation.

[21] Based on the concessions made by CPG in the investigation meeting, which I referred to in my substantive determination, I consider it appropriate that CPG pays the CFNZ costs as a disbursement. I am not convinced that it should separately pay for Ms Todd's services in relation to that matter. I consider the uplifted daily tariff is adequate to encompass the work

⁷ The Authority's investigation meeting was scheduled for 31 March and 1 April 2020 before the Covid-19 Alert Level 4 lockdown resulted in its postponement.

undertaken by counsel and that there would be an element of doubling up on costs if I were to order otherwise.

[22] Additionally, Ms Todd has sought disbursements for the printing, copying and posting costs of the agreed bundle of documents she provided to the Authority and CPG; and for the Authority's filing and hearing fees. The requests are reasonable, other than for the hearing fees which, due to administrative error, were not charged.

Orders

[23] Craig Potton Gallery Limited is ordered to pay Rachel Todd as a contribution to the costs she incurred in bringing her personal grievances to the Authority for resolution:

- (a) \$17,875 as costs; and
- (b) \$2,801.01 as disbursements comprising:
 - (i) \$2,401 being computer forensic specialist fees;
 - (ii) \$71.56 filing fee;
 - (iii) \$328.45 being printing and postage.

Trish MacKinnon
Member of the Employment Relations Authority