IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 204
5384116

	BETWEEN	FIONA WALKER Applicant
	A N D	DELTA COMMUNITY SUPPORT TRUST Respondent

Member of Authority:	Helen Doyle
Representatives:	Linda Ryder, Counsel for Applicant Rick Hargreaves, Counsel for Respondent
Submissions Received:	26 July 2013 from Respondent 9 August 2013 from Applicant
Date of Determination:	30 September 2013

COSTS DETERMINATION OF THE AUTHORITY

A. The applicant is ordered to pay to the respondent the sum of $12,600 costs together with disbursements in the sum of $3135.93.

The application for costs

[1] The Authority in its determination dated 8 July 2013 found that the applicant did not have a personal grievance that she was unjustifiably disadvantaged or dismissed from her employment. Costs were reserved.

[2] The respondent seeks an award of costs and disbursements for the three day investigation meeting. The applicant says that costs should lie where they fall.

The respondent's submissions

[3] Mr Hargreaves submits that the respondent's actual costs are $34,520.13 and that these were incurred following the making of a *without prejudice save as to costs*

offer on 5 December 2012 of $25,000 under s 123 (1)(c)(i) of the Act which was rejected by the applicant on 7 December 2012.

[4] The respondent seeks an award of costs based on the daily tariff of $3500 per day for three days in the sum of $10,500 (plus GST if any) and an uplift of 20%, in recognition of the increased costs incurred since the rejection on 7 December by the applicant of the settlement offer, of $2,100 (plus GST if any). The respondent also seeks disbursements in the sum of $6,753.13 made up of travel, accommodation, expenses and expert fees.

[5] Mr Hargreaves refers the Authority to the leading judgment of the Full Court of the Employment Court in *PBO Limited v Da Cruz* [2005] 1 ERNZ 808 in which the Employment Court stated at [44] that the Authority has since its inception held to some basic tenets when considering costs. Mr Hargreaves sets these out in his submissions including that frequently costs are judged against a notional daily rate. Mr Hargreaves notes in his submission the Court stated in *PBO* that each case is to be considered in light of its own circumstances and that the daily tariff approach was approved on this basis.

[6] Mr Hargreaves submits that the actual costs were reasonably incurred given the issues were factually complex and required expert evidence.

[7] Mr Hargreaves submits that the award the respondent seeks for costs of $12,600 is reasonable and takes into account the applicant's position and that there is no basis to reduce the costs claimed given that the respondent is only seeking the daily tariff with a small increase to recognise the rejection of the *without prejudice save as to costs* offer as to settlement. He submits that disbursements in the sum of $6,753.13 should be awarded in full.

The applicant's submissions

[8] Ms Ryder submits that costs should lie where they fall and that the applicant was justified in challenging her dismissal. She submits that the applicant was vindicated in relation to 4 of the 14 allegations as the Authority did not find that they were established and instead of finding serious misconduct in relation to the allegations found there were some serious performance issues on the applicant's part. Ms Ryder submits that the reputational matters in this case in light of the allegations

(failing to account for funds) were more important to the applicant than economic considerations and that the applicant was justified in rejecting the Calderbank offer and it should not be taken into account in determining a costs award because vindication and reputational issues were not addressed. Ms Ryder submits that these factors weigh in favour of a determination that each party pay their own legal costs and she also asks that the Authority takes account that the applicant has been out of work since her dismissal in May 2012 and is in receipt of a benefit and caring for a dependent.

[9] Ms Ryder referred the Authority and Mr Hargreaves to a recently released Employment Court judgment in *Etimoa Fifita aka Eddy Bloomfield v. Dunedin Casinos Ltd* [2013] NZEmpC 171. In *Fifita* the Employment Court considered the effect that a Calderbank offer made by the defendant should have. The plaintiff employee in that case had his claim for unjustified dismissal upheld but received less than was offered in the Calderbank offer. In finding that there should be no award of costs Judge Couch placed considerable weight on the fact that the offer was made subject to a condition of confidentiality and therefore whilst the sum offered was reasonable no inference of vindication could be drawn by anyone other than the parties.

[10] Ms Ryder also submits that it is not possible to ascertain whether costs incurred were the actual and reasonable costs of the respondent. She submits that there was an indication the respondent's costs were being paid by a third party and it is not the usual practice of the Authority to allow GST as part of a costs award.

[11] Ms Ryder submits that the applicant does not accept that the respondent's disbursements incurred by it are recoverable. She submits there are no invoices or receipts provided and does not accept that there should be reimbursement of travel expenses for out of town counsel. In that regard Ms Ryder refers to *Gini v Literacy Training Ltd* [2013] NZEmpC 25.

[12] Ms Ryder submits that the invoice rendered by the expert witness was not produced and it is not possible to assess the reasonableness of the fees incurred. The Authority requested a copy of the invoice and it was subsequently provided. She refers the Authority to *Detection Services Ltd v Pickering (No 2)* [2013] NZEmpC 36. Ms Ryder further submits that it is not appropriate to make an order that the applicant

pay the costs incurred by the respondent for calling its expert. Ms Ryder submits that it would have been sufficient for the information obtained from the expert to simply be used for cross-examination. She submits that the expert called by the respondent was of limited assistance because she was unaware of the allegation raised against the applicant.

[13] The applicant submits that costs should lie where they fall.

Determination

[14] The usual principle is that costs follow the event. The respondent was the successful party. Ms Ryder submits that that there should be no award of costs because the applicant achieved vindication about some of the allegations and her challenge to the dismissal was therefore justified. I am not satisfied in this case that there should be a departure from the usual principle that the respondent as the successful party is entitled to costs. The daily tariff of $3500 is the appropriate starting place for a cost award for a three day matter.

[15] There is then an issue as to whether there should be an uplift because of the *without prejudice save as to costs* offer made on 5 December 2012 by the respondent which was rejected. The rationale behind making Calderbank offers is for the party facing a claim against it to obtain some means of limiting exposure to costs by making an offer to settle the claim. This has been recognised as a sensible approach - *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

[16] The applicant was completely unsuccessful in this case. I have considered whether the Authority in the exercise of its discretion in those circumstances can still give weight to the 5 December 2012 offer to settle. Obiter comments in *Shanks v Agar (t/a Rod Agar & Co)* [1996] 2 ERNZ 578 by the then Chief Judge Goddard were to the effect that a pre-trial offer was of little weight when the employee was completely unsuccessful. It was stated by Chief Judge Goddard the purpose of such an offer is to shift the risk of future costs from the respondent/defendant to the applicant/plaintiff, but the applicant/plaintiff who loses will at all times have been at risk of an award of costs in the event of losing and the Calderbank offer makes no difference. *Da Cruz* provides that the Authority can have regard in exercising its discretion to conduct which increased costs unnecessarily and also to without prejudice save as to costs offers. In *Da Cruz* the Court took into account a settlement

offer in the nature of Calderbank offer made by Ms Da Cruz who was successful with her claim and in resisting a significant counterclaim. The Employment Court concluded at [59] that one of the offers was a reasonable compromise of the claim and had it been accepted it would have spared both parties further expenditure of costs. I am satisfied that the without prejudice offer save as to costs made by the respondent is a matter therefore I can have regard to notwithstanding the applicant was unsuccessful.

[17] It was emphasised in *Da Cruz* that the award is unique to the particular circumstances of the case and is not to be regarded as increasing the tariffs applied by the Authority even in cases in which without prejudice offers are made. The Authority must consider the facts of this case in the exercise of its discretion.

[18] I accept Ms Ryder's submission that there were some reputational factors for the applicant that went beyond simply economic considerations. I find that there was some recognition of this in the offer. As well as the monetary offer there was an offer that the applicant's dismissal be withdrawn and replaced by her resignation effective from the date of dismissal and that neither party make disparaging comments about the other to any third party. I find the settlement offer went further to addressing reputational issues than the Calderbank offer did for example in *Fifita* .

[19] On all fours though with *Fifita* there was a requirement in the offer that settlement was without admission of liability and was to be confidential to the parties. In *Fifita* at [34] it was stated that a Calderbank offer is a factor to be taken into account to a greater or lesser extent depending on the circumstances of the case.

[20] A reasonably significant sum was offered to the applicant by the respondent at an early stage before the parties faced the expense of preparation for the investigation meeting. If the offer had been accepted then neither party would have had to incur further costs. The offer went some way towards addressing the reputational factors that would have I accept been of concern to the applicant. Although the offer was to be confidential it is difficult to see on any sensible analysis that the offer to withdraw the dismissal and replace it by a resignation effective from the date of dismissal, would have also been confidential. That point in any event was not clarified by Ms Ryder when the offer was rejected. The email from Ms Ryder dated 7 December 2012 simply advised that the offer was not acceptable to the applicant.

[21] The respondent was successful. In the circumstances of this case I find it appropriate to take the offer into account. The respondent has asked that the Authority do so to the extent of an uplift of $2,100 or $700 per day to the daily tariff. I find that the proposed uplift is both reasonable and sensible. It takes into account the applicant's position as known to the respondent and is not an excessive claim in all the circumstances by any measure.

[22] I accept Ms Ryder's position that there should not be an award of GST. Ms Ryder questioned whether the costs were actually incurred. There is no reason for the Authority to conclude they were not. The reasonableness of the costs is less of an issue because the award is based on the daily tariff with a modest uplift well below actual costs.

[23] The amount claimed by the respondent I find does take into account Ms Walker's personal circumstances. In *Fifita* at [22] the Court accepted as sound as a matter of general principle a submission that the Court should have regard to the ability of the plaintiff to pay any award of costs which may be made. Judge Couch stated that the principle can only apply where there is proper evidence of the plaintiff's financial position, including income, expenditure, assets and liabilities. That was not before the Court in *Fifita* and it is not before the Authority in this case.

[24] In all the circumstances I find that a fair and reasonable contribution towards the respondent's costs is the daily tariff of $3,500 for three days with an uplift for each day of $700. That is the sum of $12,600.

[25] I turn now to the disbursements claimed. The total claimed including GST is $6,753.13. Ms Ryder does not accept that there should be any recovery by the respondent of Mr Hargreaves' travelling and accommodation expenses. These account for $1665.30 of the $6,753.13 claimed for disbursements. Ms Ryder relies on the Employment Court judgment of *Gini v Literacy Training Ltd* [2013] NZEmpC where a claim for airfares and incidental travel and accommodation referred to at [35] of the judgment was not allowed. Judge Ford upheld an objection on the basis that they are not normally awarded by the Court and that there was no reason why the plaintiff who resided in Wellington could not have instructed a Wellington counsel. In this case the respondent was based in Christchurch and could have instructed local counsel. The Trust was entitled to instruct an out of town counsel but I do not find

that the applicant should bear the cost of that decision. I do not allow the claim for accommodation and air fares.

[26] The disbursement for the deadline courier of $10.93 is allowed as it is a payment to a third party. The other claim simply stated as expenses for $189.40 is not allowed as it is unclear what it relates to.

[27] The balance of the amount claimed by way of disbursements is for the expert's fee in the sum of $4,887. In *Detection Services Limited* the Employment Court was amongst other matters considering an application for a stay of a costs determination of the Authority. As part of that application there was some comment by Judge Inglis about the award made for the expert fees in the Authority determination of $66,658 as part of its costs determination. Judge Inglis stated at [46] about the expert fee that; *On any analysis the award is high and it is not immediately apparent, on the face of the determination that detailed consideration was given to whether or not the expenses were reasonably incurred.* Judge Inglis accepted that there are a number of arguments that are likely to weigh in favour of the applicant's challenge to the costs determination including *whether full reimbursement of expenses for expert witnesses is appropriate having regard to the intended cost effective, low level, and speedy nature of proceedings in that forum.*

[28] I accept Ms Ryder's submission that the Authority needs to consider whether the fees of the expert were reasonably incurred. Mr Hargreaves provided a copy of the invoice rendered by the expert. I will not mention the profession of the expert witness as the Authority did not disclose these details in its substantive determination as requested by the applicant.

[29] Ms Ryder submits that the respondent could have used the information obtained by its expert witness in a different way rather than require her to attend by telephone at the Authority hearing. Ms Ryder submits that the expert witness was of limited assistance.

[30] The respondent was facing a significant claim by the applicant and was entitled to call its own expert witness to respond to the evidence of the expert called by the applicant. The Authority found the expert witness called by the respondent to be helpful. Her attendance by telephone saved the expense of a flight from Auckland to Christchurch and return.

[31] The expert witness rendered an invoice inclusive of GST in the sum of $4887. In total the number of hours billed was 17 at an hourly charge out rate of $250. I am not satisfied that is an unreasonable hourly rate given the experience of the expert witness. I have had regard to each component of the invoice and assessed its reasonableness. The invoice records a claim for 3 hours consulting with counsel and then 3.5 hours reviewing the material. I think it reasonable to allow 3.5 hours for both those matters. It seemed to me that there could be some duplication of time for those claims. 1.5 hours is recorded for preparing a discussion document and 5 hours for a report. I find 5 hours is reasonable. The attendance at the hearing of 3 hours and travel for 1 hour are both reasonable. I find that there should be reimbursement of the expert's fee in this case for 12.5 hours at $250 per hour. I do not include GST on that amount as the Trust will no doubt be registered for GST and able to recover this amount. The sum therefore for reimbursement for the expert witness is $3125.

[32] In conclusion the respondent is entitled to be reimbursed for the disbursements in the sum of $3135.93 as follows:

(i) Reasonably incurred fee for expert witness in the sum of $3,125.00.

(ii) Courier fee in the sum of $10.93.

[33] Fiona Walker is ordered to pay to Delta Community Trust the sum of $12,600 costs together with $3135.93 disbursements.

Helen Doyle
Member of the Employment Relations Authority