IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 133
3026417

	BETWEEN	ANGELA WARD Applicant
	AND	EDENVALE HOME TRUST BOARD Respondent

Member of Authority:	David G Beck
Representatives:	Applicant in person Nathan Tetzlaff, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	30 March 2022 and 6 and 7 April 2022 from the Applicant 5 and 6 April 2022 from the Respondent
Date of Determination:	7 April 2022

COST DETERMINATION OF THE AUTHORITY

The Determinations

[1] In a 31 January 2022 preliminary determination, I found that Angela Ward had not made out sufficient exceptional circumstances under s 114 Employment Relations Act 2000 (the Act) to allow her to pursue a personal grievance claim for an unjustified disadvantage related to an assertion that an Edenvale Home Trust Board (Edenvale) employee had inappropriately reported her to the New Zealand Nursing Council. Following this in a

determination of 10 March 2022, I found that Edenvale had acted in an unjustified manner causing Ms Ward to suffer a disadvantage in her employment. I ordered Edenvale to pay Ms Ward compensation of $3,000 and lost wages of $2,200 (gross). Ms Ward's initial compensatory award was reduced by 10% to reflect her contribution to the matters giving rise to her personal grievance.

[2] I reserved costs in the preliminary determination and encouraged the parties to agree on such. It would now appear that no agreement was achieved but the parties failed to apprise the Authority of this fact and neither filed costs submissions within the timeframe I had set. Edenvale's counsel in his costs submission on the second determination has asked that I extend the timeframe for consideration of costs flowing from the preliminary determination. I concur with this suggestion and pragmatically will look at costs arising from both determinations.

[3] The proceedings have been protracted with a one-day investigation meeting being held on 22 July 2021 that was adjourned part-heard, the preliminary matter being dealt with on the papers and then a further half day investigation meeting on 17 February 2022 to complete the substantive matter. Ms Ward utilised counsel at the first investigation meeting but thereafter was self-represented. Edenvale utilised counsel in all the proceedings.

Submissions from the parties

[4] Ms Ward's submissions although initially discursive and covering matters not within my ambit for a costs determination eventually concentrated on a claim for tariff-based costs for one and a half days and countered Edenvale's reliance on an earlier Calderbank offer (discussed below). Ms Ward claimed she should be at least provided with a costs contribution of $2,000 for the first investigation meeting when she was represented by counsel and a claim of $1,750 for the second half-day when Ms Ward was self-represented (noting the tariff-based approach is normally $4,500 for first day and $3,500 thereafter).

[5] By contrast Edenvale's counsel, Mr Tetzlaff pointed to Ms Ward's partial success, delays incurred due to Ms Ward's conduct of proceedings and primarily a submission that costs be awarded in Edenvale's favour due to Ms Ward turning down a timely Calderbank offer of 22 December 2020 that exceeded the amounts that Ms Ward obtained by litigation. Edenvale counsel's submission invited me to either consider reducing any tariff-based award

to Ms Ward by 20% due to her 'mixed success' or should I consider it appropriate to take a steely approach to the Calderbank offer then Edenvale be awarded a minimum of 50% of indemnity costs ($22,295.80) or given Ms Ward's conduct of her application 75% of indemnity costs ($33,443.70).

Costs principles

[6] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [1] including that costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority. [2] These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*. The principles include:

(a) There is a discretion as to whether costs will be awarded and in what amount.
(b) The discretion is to be exercised in accordance with principle and not arbitrarily.
(c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
(d) Equity and good conscience is to be considered on a case by case basis.
(e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
(f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
(g) Costs generally follow the event.
(h) Without prejudice offers can be taken into account.
(i) Awards will be modest.
(j) Frequently costs are judged against notional daily rates.
(k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances. [3]

[1] *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.
[2] Section 160 (2) Employment Relations Act 2000.
[3] *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

The dilemma of 'mixed success'

[7] To assess costs where one party has only mixed success can be problematic as it is arguable that Ms Ward's successes was partial and compensation modest as she failed to establish her predominant claim for compensation based on an assertion that an Edenvale employee had unnecessarily besmirched her professional reputation by making an allegedly malicious complaint to the New Zealand Nursing Council in a manner that Ms Ward describes as an 'injurious falsehood'.

[8] However, Judge Smith in *William Coomer v JA McCallum and Son Limited* noted (omitting citations):

> Where both parties have had a measure of success determining which of them is entitled to costs is often a nuanced assessment of competing considerations. In *Weaver,* the Court said that the appellants were the only party to have succeeded by any 'realistic appraisal'. That conclusion followed because they obtained a monetary award ….. It was immaterial that they had not succeeded to the full extent of their claim because' … success on more limited terms is still success. [4]

The settlement offer

[9] The making of a settlement offer, in the form of a 'Calderbank' offer or 'without prejudice except as to costs' approach, is a relevant factor when considering costs where such does not better the award made by the Authority. Whilst generally the Authority has a low-level jurisdiction hence a focus on scale costs, there is authority to suggest a 'steely' approach is sometimes required in the broader public interest. [5]

[10] Here though, the letter of offer of 22 December 2020 provided by Edenvale's counsel does not provide any vindication of Ms Ward's situational grievances or an acknowledgment of the hurt caused to Ms Ward by the referral to the New Zealand Nursing Council. Further the offer does not address Ms Ward's legal costs and the timeframe for acceptance is unnecessarily short (one day) although I acknowledge it was the subject of a timely counter offer.

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[4] *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC at [37] – [43].
[5] *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18] – [20].

[11] If those above elements had been present in the offer, I would have been more minded to assess the gap between the settlement offer and the eventual outcome as being decisive but even if I do so, there is still only a modest difference between the offer and what Ms Ward achieved in litigation (around $3,000) and Ms Ward also pointed to an earlier offer that was confined to the narrower issues of her employment dispute and less than what she achieved through litigation.

Assessment

[12] Taking all the factors identified in submissions into account and applying the Authority's discretion I consider that Ms Ward is entitled to an Authority tariff based cost contribution for the first investigation meeting of $4,500 when she was represented by counsel but considering Edenvale's success on the preliminary matter and their early offer to settle matters and the protracted nature of proceedings and Ms Ward's limited success, I balance matters by reducing the tariff amount and fix the final amount at $2,500 exclusive of GST. I decline to award any further costs or disbursements for the period Ms Ward was self-represented.

Awards

[13] I order Edenvale Home Trust Board to pay Angela Ward the sum of $2,500 as a contribution to her legal costs.

David G Beck
Member of the Employment Relations Authority