

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 602  
3102752

BETWEEN                      DIANE WATERMAN  
   Applicant  
  
AND                                MASONIC CARE LIMITED  
   Respondent

Member of Authority:        Rowan Anderson  
  
Representatives:              Peter McKenzie-Bridle, counsel for the Applicant  
   Paul McBride, counsel for the Respondent  
  
Investigation meeting:        On the papers  
  
Submissions received:        14 September 2022 and 6 October 2022 from Applicant  
   20 September 2022 from Respondent  
  
Determination:                17 November 2022

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The determination**

[1]     On 31 August 2022 a determination was issued by the Authority in which the Authority Member found that Mrs Waterman was unjustifiably dismissed from her employment.<sup>1</sup> The Authority ordered Masonic Care Limited (MCL) to pay Mrs Waterman the following sums:

- (a) Seven weeks and five and a half days ordinary time remuneration under s 128 of the Employment Relations Act 2000 (Act), being three months' (thirteen weeks) ordinary time remuneration less forty percent.
- (b) Compensation of \$12,000, being \$20,000 less forty percent.

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<sup>1</sup> *Diane Waterman v Masonic Care Limited* [2022] NZERA 431.

[2] The determination of the Authority on the substantive matter noted that Mrs Waterman was legally aided and that she had sought only reimbursement of the filing fee and the costs of preparing the statement of problem.<sup>2</sup> However, the issue of costs was reserved, and the parties have not been able to agree on costs.

### **Submissions for Mrs Waterman**

[3] Counsel for Mrs Waterman submitted that her total costs were \$11,611. Mrs Waterman seeks a total contribution towards her costs of \$6,250 based on the current daily tariff and an investigation meeting duration of one- and one-half days. Mrs Waterman also claims reimbursement of the \$71.56 filing fee and \$85.80 for the costs of preparing a bundle of documents.

[4] Costs are sought notwithstanding comment in the Authority's substantive determination as to Mrs Waterman seeking only reimbursement of the filing fee and costs associated with preparing the statement of problem. Mrs Waterman relies on the Authority's Practice Note on Costs and the Authority's equity and good conscience jurisdiction.

[5] Counsel for Mrs Waterman submits that she was "vindicated" by the Authority's determination, that MCL was found to have failed to act in good faith, and that Mrs Waterman's decision to reject a Calderbank offer was entirely reasonable.

[6] Mrs Waterman also seeks an order requiring MCL to pay interest on the compensatory sums awarded in the substantive determination. The compensatory sums were ordered pursuant to s 128 (lost wages) and s 123(1)(c)(i) (hurt and humiliation). Counsel for Mrs Waterman submits that she is entitled to \$687.87 in interest from the date of termination to the date the Authority's substantive determination was issued.

### **Submissions for MCL**

[7] MCL submits that no award of costs should be made against it, and that instead, the Authority should make an order as to the costs it would otherwise have made against Mrs Waterman.

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<sup>2</sup> *Diane Waterman v Masonic Care Limited* [2022] NZERA 431, at [67].

[8] MCL took issue with the supporting documents provided by counsel for Mrs Waterman as to the issue with costs and submitted that a legal aid correspondence did not detail whether the stated costs also related to representation outside of the Authority's process.

[9] MCL submits that Mrs Waterman's success in her dismissal claim was by a narrow margin, that she was successful only to an extent, and that unrealistic claims made by her were rejected by the Authority.

[10] MCL seeks an order as to the costs that would have been awarded but for legal aid.<sup>3</sup> It submits that a \$16,000 Calderbank offer was made on 1 December 2020,<sup>4</sup> and that the offer was directly comparable to the award made by the Authority in the substantive determination. Additionally, MCL submit that the investigation meeting could have been completed in a single day but for Mrs Waterman's unsuccessful pursuit of a discrimination claim.

[11] MCL submit that the starting point in terms of any tariff approach is \$4,500, but that an uplift to the daily tariff would be appropriate having regard to unnecessary steps taken by Mrs Waterman resulting in additional costs to MCL,<sup>5</sup> the rejection of a Calderbank offer, and the need for written submissions following the investigation meeting. MCL seek an uplift in costs to \$11,500. MCL claim its total costs as being \$17,810 and disbursements of \$39.48.

[12] In relation to Mrs Waterman's claim to payment of interest, MCL submit that interest cannot properly be awarded. It submits that the Authority is, subject to matters specifically reserved, *functus officio*, that advance notice needed to be given as to any claim for interest, that there is no legal basis for the Authority to now consider the issue, and that s 25 of the Interest on Money Claims Act 2016 precludes such claim now being made after the fact.<sup>6</sup>

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<sup>3</sup> By reference to s 45(5) of the Legal Services Act 2011.

<sup>4</sup> Approximately ten months prior to the investigation meeting commencing on 14 September 2021.

<sup>5</sup> These included a need to reply to multiple revisions of the statement of problem, multiple conference calls, conflicting proceedings lodged by the applicant, and unrealistic financial claims made by the applicant.

## **Analysis**

### *Costs principles*

[13] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.<sup>7</sup>

[14] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that Calderbank offers may be taken into account in setting costs, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.<sup>8</sup>

[15] The daily tariff is usually taken as a starting point,<sup>9</sup> although is not to be used in a rigid manner, with principled adjustments made having regard to the particular characteristics of a case.

### *Costs to follow the event*

[16] I consider that Mrs Waterman was successful in terms of the primary claim, that of whether her dismissal was justifiable. Therefore, the starting presumption is that she is entitled to an award of costs.

[17] The only basis on which this presumption might be displaced, and costs awarded to MCL, is if there is a valid Calderbank offer.

### *Calderbank offer*

[18] An offer of settlement for \$16,000 was made on 1 December 2020, some considerable time prior to the investigation meeting. Mrs Waterman was provided a reasonable opportunity to consider and respond to the offer. The settlement offer was made on the basis that acceptance would resolve "...both sets of proceedings (and any other matters arising out of or relating to the employment)...". The settlement offer expressly denied any liability on the part of MCL.

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<sup>7</sup> Employment Relations Act 2000, Schedule 2, clause 15.

<sup>8</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

<sup>9</sup> Practice Note 2: Costs in the Employment Relations Authority, issued 29 April 2022.

[19] I consider there was a proper basis on which the offer could be rejected and consider the offer was not unreasonably rejected. The reasons for this include:

- (a) Whilst MCL submit that the amounts are “comparable”, the offer made was \$1,896.80 short of the sum ultimately awarded. I do not consider that an insignificant difference;
- (b) The offer made was conditional on settlement of not only the proceedings in question, but also other proceedings in the Authority. I am not convinced that the offer should be taken into account given its relationship with other proceedings;
- (c) The offer was conditional upon resolution of not only the two proceedings in the Authority, but also “...any other matters arising out of or related to the employment...”. Such a condition lacks clarity, purports to additionally resolve other unspecified potential claims, and is imprecise;
- (d) I consider that the express denial of liability in the settlement offer distinguishes the case from *Bluestar Print Group (NZ) Ltd v David Mitchell* [2010] NZCA 385. In *Bluestar* the offer was not accompanied by an acknowledgement of wrongdoing or apology. Here, MCL’s offer expressly disavowed any liability whatsoever. In such circumstances it cannot be said that the proposed settlement sum “...might well be regarded as conveying a distinct element of vindication...”; and
- (e) In rejecting the offer, Mrs Waterman not only recovered a sum more than that offered, but also some degree of vindication that was not available through acceptance of the offer made (given the express denial of liability).<sup>10</sup> That is so notwithstanding the findings as to contribution in the substantive determination.

[20] Therefore, the Calderbank offer made is not relevant to the question of costs being awarded to MCL and as there is no other basis on which costs can be awarded to MCL, the starting point remains that Mrs Waterman is entitled to receive costs from MCL.

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<sup>10</sup> *Binnie v Pacific Health* 1 ERNZ 438 at [31].

### *Application of the daily tariff*

[21] The substantive proceeding involved a one-and-a-half-day investigation meeting.<sup>11</sup> An application of the daily tariff approach would see a contribution of \$6,250.

### *Adjustment to the daily tariff*

[22] No uplift is sought by Mrs Waterman.

[23] MCL submits that Mrs Waterman was only partially successful and that a claim of unlawful discrimination was dismissed. MCL, albeit in the context of submitting that Mrs Waterman should contribute to its costs, also submits that unrealistic financial claims were rejected by the Authority and that MCL was put to unnecessary expense having regard to what are described as the consequences of Mrs Waterman advancing claims “diametrically opposed” to other proceedings lodged by her.

[24] Having considered the matters raised by MCL I consider that a modest downwards adjustment is appropriate in the amount of \$1,000 on account of the Mrs Waterman not being successful in terms of its discrimination claim<sup>12</sup> and the additional work resulting from amendments to her claims.

### *Disbursements*

[25] I am not satisfied that there is a basis for payment of the claimed disbursements as to the preparation of a bundle and as such make no order. However, the applicant was successful in their primary claim and is entitled to reimbursement in the sum of \$71.56 of the filing fee.

### *Interest on Money Claims Act 2016*

[26] I decline to make the order sought by Mrs Waterman as to interest on the compensatory ordered in the substantive determination. I accept the submissions made by MCL as to this issue. The Authority has issued its determination as to the substantive matter, reserving only the question of costs, and I do not consider there any basis on which the Authority could make such a further order.

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<sup>11</sup> Including a half day was scheduled for submissions by video.

<sup>12</sup> The pursuit of the claim involved the calling of at least one witness and arguably more time than would otherwise have been required for the investigation meeting

[27] In addition to the above, the interest sought relates to compensatory sums ordered in terms of s 128 (lost wages) and s 123(1)(c)(i) (hurt and humiliation). Those sums only became payable in accordance with the orders made in the substantive determination, and not, as submitted on behalf of Mrs Waterman, a debt payable from the date of the termination of Mrs Waterman's employment. As such, there has been no "...delay in the payment of money" in terms of s 10(1) of the Interest on Money Claims Act 2016.

[28] I consider a downwards adjustment of \$250 to the daily tariff is appropriate on account of the additional costs of MCL having regard to Mrs Waterman's belated and unsuccessful claim for payment of interest on the compensatory sums ordered in the substantive determination.

### **Orders**

[29] For the above reasons I order Masonic Care Limited to pay Mrs Waterman:

- (a) \$5,000 as a contribution towards the costs she incurred; and
- (b) \$71.56 in reimbursement of the filing fee.

[30] Payment is to be made within 28 days of this determination.

Rowan Anderson  
Member of the Employment Relations Authority