

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 9
5441824

BETWEEN ANGELA WATSON
 Applicant

AND CAPITAL & COAST DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Michele Ryan

Representatives: Andrew McKenzie, Counsel for Applicant
 Paul White, Counsel for Respondent

Submissions received: 14 August 2015 from the Applicant
 28 August 2015 from the Respondent
 21 October 2015 'In reply' from the Applicant

Determination: 20 January 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 4 May 2015¹ a portion of Ms Watson's claims were successful and I held she had been unjustifiably disadvantaged by her employer's actions over two separate issues. Capital and Coast District Health Board (CCDHB) was ordered to reimburse four months' lost wages and \$9,000 was awarded in compensation. Costs were reserved.

[2] Ms Watson, via counsel, now applies for representative costs and says these amount to \$15,000 excluding mediation. A contribution of \$10,000 to costs plus disbursements of \$2,170.77 is sought.

[3] CCDHB refers to two *Calderbank* offers made to Ms Watson which it says would have provided Ms Watson with a better outcome than achieved at the

¹ *Watson v Capital & Coast District Health Board* [2015] NZERA Wellington 47

Authority. It says that Ms Watson's rejection of reasonable offers to settle, together with her conduct in progressing her claims and her only partial success at the Authority, warrants a reversal of the costs position. CCDHB submits a contribution of \$10,000 should be ordered in its favour. Alternatively it says costs should lie where they fall.

Issues

[4] The following issues are to be determined:

- i. should either of the *Calderbank* letters be considered in an assessment as to costs in the circumstances of this case;
- ii. should costs be awarded and if so to whom;
- iii. are there any factors which warrant an uplift or decrease in costs;
- iv. if disbursements are awarded what should these be.

Principles

[5] The principles that guide the Authority's approach to assessing costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*². The quantum of the tariff is currently set at \$3,500 per day but may then be raised or lowered depending on the particular circumstances of the case.

[6] Relevant to this matter, it is generally accepted that costs follow the event. Conduct that increases costs unnecessarily may be taken into account, as can offers to settle prior to the Authority's investigation.

Should either of the *Calderbank* offers be considered in an assessment as to costs in the circumstances of this case?

[7] A fundamental benefit of an offer to settle on a "without prejudice basis except as to costs" (a *Calderbank* offer) prior to proceeding with litigation is so both parties can reduce costs associated with the proceedings and reach an outcome similar to that which may be ordered by the Authority or Court.

[8] The first *Calderbank* letter was sent on 28 August 2013. Whilst the terms of that offer significantly exceeded the monetary amounts ultimately ordered by the

² [2005] ERNZ 808

Authority, the offer lapsed prior to CCDHB's decision that Ms Watson could not return to Ward 2, and is the event that prompted Ms Watson's application to the Authority. In those circumstances I do not regard the *Calderbank* offer as material to an assessment of costs corresponding to Ms Watson's application before the Authority.

[9] The second *Calderbank* letter was sent on 11 August 2014, after the Authority's investigation meeting had been concluded but before final submissions were due. I agree that the second *Calderbank* offer cannot operate as a factor in my assessment where costs associated with Ms Watson's claims had already been incurred.

Who should receive costs or should they lie where they fall?

[10] The parties dispute the success of Ms Watson's application at the Authority.

[11] CCDHB submits that of the five matters that resulted in determination Ms Watson was successful with only two.

[12] Ms Watson challenges CCDHB's appraisal. One of her claims was set aside to allow a concurrent matter before the Human Rights Review Tribunal to conclude. She accepts that not all claims were upheld but notes her primary claim for reinstatement was effectively endorsed by the finding that Ms Watson had a contractual right to return to Ward 2.

[13] Ms Watson was largely successful with her substantive claim and I find costs should follow the event. I agree however that the costs that would normally be awarded should be discounted to reflect Ms Watson's success was only partial.

Are there any factors which warrant an uplift or decrease to an award of costs?

[14] An award of costs should not be used as a mechanism to punish or express disapproval. The Authority should consider only such conduct that increases the investigation/meeting time and therefore impacts on costs incurred.

[15] I accept CCDHB's submission that Ms Watson's conduct in presenting her claims is a factor that should sound in a reduction to costs. Notably, Ms Watson's

claims as recorded in an initial statement of problem and an amended statement of problem remained generalised³ despite three requests by the Authority for particulars.⁴

[16] The inexact nature of Ms Watson's claims resulted in three full days of investigation occupied largely in establishing, amongst many areas of dispute (and corresponding evidence), what issues required determination.⁵ The problem was exacerbated by the number of documents produced (approximately 1500 pages not including briefs of evidence) but not placed in chronological order as had been requested. Locating and cross referencing material documents was time consuming. The combined effect of these matters significantly prolonged the investigation unnecessarily.

Determination as to contribution to costs

[17] Taking into account the factors referred to about above and the overall outcome of this matter, I consider the daily tariff should be reduced to \$2,000 per day applied to each of the three investigation days.

Disbursements

[18] Ms Watson seeks reimbursement of disbursements of \$2,170.77.

[19] Both Ms Watson's instructing solicitor and her barrister live in Christchurch. She was entitled to instruct counsel as she sees fit but I am not persuaded she was unable to instruct counsel in Wellington given the range of representatives available in the region and is where she was employed and lives.⁶ I am unwilling to order disbursements associated with travel and accommodation in these circumstances.

[20] I accept she is entitled to the filing fee cost of \$71.56 and to the cost of photocopying, stationary and couriers (\$718.79).

[21] Given my finding that that the investigation was prolonged by Ms Watson's approach to the Authority's investigation I consider reimbursement of the fees

³ Between March 2012 and 23 October 2013 Ms Watson raised 8 separate notices of personal grievance claims with CCHDB, each covering a range of matters. It was unclear from the documents lodged with the Authority which, of the many personal grievance claims made, she wished to pursue.

⁴ During case management calls 10 December 2013, 4 March 2014, and 23 May 2014.

⁵ At the conclusion of evidence I set out the issues that appeared to be of importance to Ms Watson and the parties agreed to have those matters determined.

⁶ *Baker v St John Central Regional Trust Board* [2013] NZEmpC 109 at [45]

associated with an investigation meeting, set at the rate of \$153.33 for each half day after day one, should be reduced by half to \$306.66⁷.

Orders

[22] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act I order the Capital & Coast District Health Board to pay the Ms Watson the sum of \$6,000 as a contribution to costs, plus \$1,097.01 towards disbursements.

Michele Ryan
Member of the Employment Relations Authority

⁷ Ms Watson was invoiced \$613.32 in hearing fees (the sum equal to 4 half days at the Authority)