

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 675  
3137902

BETWEEN SYLVIA WELLS  
AND CASHMERE CLUB INC

Member of Authority: Antoinette Baker  
Representatives: Paul Mathews, advocate for the Applicant  
Benjamin John Austin for the Respondent  
Submissions received: 1 December 2022 from the Applicant only  
Determination: 19 December 2022

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] I issued a determination on 7 November 2022<sup>1</sup> finding the applicant Ms Wells was unjustifiably disadvantaged and dismissed in her employment by the respondent, CC. I awarded \$20,000.00 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and \$1,520.00 gross under s 123(1)(b) of the Act.

[2] The parties were asked to resolve costs between themselves. Costs have not been resolved. Ms Wells has now applied for an award of costs. No submissions have been received from CC within the timetable set by the Authority.

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<sup>1</sup> *Sylvia Wells v Cashmere Club Inc* [2022] NZERA 578

[3] A party should receive a reasonable contribution to costs incurred in achieving a successful result. Costs are discretionary, modest, and are not a mechanism to punish the other party. Some cases may require costs to lie where they fall. <sup>2</sup>

[4] The Authority uses a notional daily tariff adjusting this up or down as appropriate depending on the case. Such an adjustment may take into consideration a liable party's means to pay costs, additional preparation required if a case is complex, and any conduct of a party that has unnecessarily increased costs.

[5] The current tariff applied for a one-day Authority investigation meeting is \$4,500.00. This amount is considered a starting point for assessing a reasonable contribution to the costs incurred by a party preparing for and taking part in an investigation meeting.

#### **What costs should be awarded here?**

[6] Ms Wells succeeded in both her grievance claims and was awarded remedies. She is entitled to a contribution towards her costs. I accept that the starting point is \$4,500.00 based on the Authority's tariff guidance based on an almost full day investigation meeting.

[7] At the end of the investigation meeting held on 20 July 2022 (the investigation meeting) I timetabled for the provision of further information with written submissions timetabled to follow. Only Ms Well's provided information and then submissions.

[8] It has been submitted for Ms Wells that there are two grounds for asking for an uplift to the daily tariff of \$4,500.00 to \$9,000.00:

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<sup>2</sup> Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 106-108.

- a. There were three without prejudice “Calderbank” offers made.
- b. CC caused delays being that it did not provide the information asked for at or after the investigation meeting and Ms Wells had to do so incurring her extra costs; that because further information was required this delayed submissions from oral ones at the meeting and as such incurred Ms Well’s extra costs.

[9] While CC has not provided submissions in response to this application there is reference in emails on the Authority file about CC’s financial situation and this was something Mr Austin described generally to me in his oral evidence at the investigation meeting. However, if CC wanted to have its financial position considered in relation to costs it had the opportunity to put forward information to support this beyond general statements. It has not taken this opportunity and I am not satisfied that this is a factor I can now consider.

#### *Calderbank offers*

[10] The Employment Court<sup>3</sup> has observed that while Calderbank offers are ‘front and centre’ for the Court when considering costs, the Authority’s discretion is broader and sits within the context of a jurisdiction ‘intended to be low level, costs effective, readily accessible and non-technical’.

[11] Ms Wells has provided the following ‘without prejudice save as to costs’ emails between the parties:

- a. 1 April 2021, an offer from Ms Wells’ representative to CC’s then instructed legal representative, to settle for \$7,000.00 plus \$3,500.00 (+GST) in costs;
- b. On 26 November 2021 by CC to Ms Wells’ representative to settle for \$4,000.00 plus \$2,000.00 (+GST) in costs; and

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<sup>3</sup> *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].

- c. In response on 26 November 2021 an offer from Ms Wells' representative to CC, to settle for \$5,500.00 plus \$3,000.00 (+GST)
- d. On 3 February 2022 (10.49am) an offer from Ms Wells' representative to Mr Austin for CC to settle for \$5,500.00 plus \$3,500.00 (+GST) in costs.

[12] It is submitted for Ms Well's that all of the offers she made (which were not accepted) were "very early on in the process" and as such she could have avoided later costs. However, only the 1 April 2021 offer came before both parties had lodged evidence pending the investigation meeting.<sup>4</sup> I note further that the tariff is set at a modest level to cover the type of likely costs relating to preparation and attendance at the investigation meeting. I do not see that the substantive matter held anything that was complex or difficult. I do not find this ground warrants an uplift to the tariff.

*The additional cost of written submissions*

[13] It is submitted that because more information was required from CC after the investigation meeting this caused submissions that could otherwise have been heard orally at the investigation meeting. It is submitted this caused Ms Well's to incur further costs because her representative then needed to prepare and send in written submissions. However, it is not unusual to timetable written submissions after the investigation meeting for a variety of reasons. The submissions received for Ms Wells were very brief and not much beyond a single page with mostly single line points to summarise Ms Wells' position. While helpful submissions, it is difficult to see how these written submissions would have added significantly to Ms Well's costs beyond the usual tariff.

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<sup>4</sup> There was then an adjournment to the first scheduled 23 February 2022 investigation meeting due to COVID-19 reasons.

*Extra costs incurred for provision of information that CC should have provided*

[14] It is submitted that Ms Wells incurred extra costs sending in payslips after the investigation meeting that CC should have provided. Ms Wells explained to me she had this information on her computer. This would have primarily then been her task, albeit the provision of them to the Authority was through her representative. It is difficult to see how this would have added significantly to Ms Well's costs beyond the usual tariff.

[15] Considering the above I find the daily tariff is a reasonable contribution to Ms Wells' costs. I am not satisfied there should be an uplift.

**Orders**

[16] Cashmere Club Incorporated is to pay Sylvia Wells \$4,500.00 as a contribution to her costs together with \$71.56 for the Authority's filing fee within 28 days of the date of this determination.

Antoinette Baker  
Member of the Employment Relations Authority