

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 28  
5379147

BETWEEN                      SANDRA WILSON  
   Applicant  
  
AND                                PET STAY LIMITED  
   Respondent

Member of Authority:      P R Stapp  
  
Representatives:            Jenny Murphy for Applicant  
   Geoff O’Sullivan for Respondent  
  
Investigation Meeting:      11 October 2012  
  
Submissions received by:   14 February 2013  
  
Determination:                18 March 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This determination completes an application for costs reserved by the Authority in a determination [2012] NZERA Wellington 153.

[2] The respondent has asked for more than the daily tariff based on notice that full costs would be claimed in the event the applicant was unsuccessful. The notice was supported by a “without prejudice save for costs” letter dated 21 June 2012. The respondent has claimed \$17,689.75 costs.

[3] The applicant has requested that costs lie where they fall.

## Determination

[4] Costs follow the event. The starting point is the notional daily tariff applied by the Authority. The following factors are relevant for moving the tariff.

(i) *That the applicant wanted to go to mediation first. As the respondent was not willing to attend mediation voluntarily an application was filed in the Authority. The Authority directed the parties to attend mediation.*

[5] This is a balancing factor. Both parties need to meet their own costs for mediation because there was no reason for there not to be any mediation in what the applicant thought was a genuine employment relationship problem. Also, the respondent whilst having genuine beliefs about the merits of the matter could be expected to use mediation as a way to save costs instead of incurring litigation costs. The respondent also put the applicant on clear notice of its intention to pursue costs if it had to.

(ii) *That the costs claimed by the respondent have not been itemised.*

[6] This prevents full costs being awarded. The claim as presented is an indication of what costs the respondent faces from its representative. In general terms the list of costs as presented indicates that the respondent has incurred costs.

(iii) *That a Calderbank letter was sent to the applicant with an offer to settle before the investigation meeting. The applicant declined the offer and made a counter offer.*

[7] As the respondent was successful then costs follow the event. This is not a matter for full indemnity costs. Costs are not worked out on the basis of what would happen in a trial and applying 2/3rds of costs in the Authority. The Authority's practice is to apply a notional tariff for costs and to then adjust it according to the circumstances. The Calderbank offer was made clearly to save costs and must have been timely for the applicant to counter offer. The applicant was put to the expense of pursuing mediation where the respondent genuinely believed that there was nothing to

mediate. The position was entirely reasonable considering that mediation should be a low level engagement between parties to sort out employment relationship problems without incurring much in costs. The applicant has not shown that the offer of \$500 would not have covered her costs to that point, but I do accept that it does not appear that the offer was made with an attempt to cover the applicant's costs to the date of the offer. Also this has to be balanced by the respondent's genuine position that the applicant had no case.

*(iv) That the conduct of the parties is a factor.*

[8] There were problems in the conduct of the parties putting each other to the cost of the Authority's involvement in an investigation, but nothing unusual with timetabling and documents being provided. The required witness statements and documents were received and any difficulty was more a matter of inconvenience than the cause for incurring costs unreasonably.

[9] Otherwise the conduct of the parties involved nothing unusual except that the applicant wanted to go to mediation first, and that when offers to settle were a discussion point around costs there was no settlement. There is no obligation on a respondent to pay money, and in this case the applicant did have a major problem of exposure. Since the applicant genuinely brought an employment relationship problem to the Authority she was entitled to have it tested and the respondent was as much entitled to defend its position. In doing so successfully the respondent is entitled to costs and as the applicant would have got something if she did settle she now has to face the reality that having not succeeded at all the offer was more than her outcome in the Authority where she received no money at all.

[10] I have decided that the tariff should be increased, but only proportionately because the investigation meeting was one day as scheduled. Although the applicant has claimed that she has an inability to pay costs I am not satisfied that the obligation to pay costs can not be met sometime in the future. I accept that the applicant is in a financially precarious position and I have taken this into account. I award the respondent \$4,000 costs.

**Orders of the Authority**

[11] Sandra Wilson is required to pay Pet Stay Limited \$4,000 costs.

P R Stapp  
Member of the Employment Relations Authority