

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 42
3087752

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| BETWEEN | JYOTIKA DEVI Applicant |
| AND | ECLIPSE RECRUITMENT LIMITED Respondent |

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|------------------------|---|
| Member of Authority: | Marija Urlich |
| Representatives: | Lawrence Anderson, representative for the applicant Emma Monsellier, representative for the respondent |
| Investigation Meeting: | On the papers |
| Submissions received: | 11 January 2021 from Applicant 8 January 2021 from Respondent |
| Determination: | 4 February 2021 |

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 18 December 2020 which declined Ms Devi's claim.¹ The issue of costs was reserved and a timetable set for filing memoranda if costs were intended to be sought. The parties attempted but were unable to resolve the issue of costs themselves. Eclipse Recruitment Limited (ERL) now applies for a costs order to be made in its favour.

¹ *Jyotika Devi v Eclipse Recruitment Limited* [2020] NZERA 522.

ERL's claim for costs

[2] Submissions filed on behalf of ERL appear to seek a costs award of \$35,396.14. Though the investigation meeting lasted one day, albeit a longer than usual day, ERL says it is entitled to recover the full costs of representation given it made a number of settlement offers including a *Calderbank* offer and Ms Devi unreasonably declined those offers². ERL says it was unreasonable for Ms Devi to decline the offers and in particular the *Calderbank* offer because the offer (\$2000.00) was “extremely generous”, the parties had not yet been to mediation and had not yet incurred preparation costs, Ms Devi has been unsuccessful in her claim before the Authority and her claim was frivolous. ERL says given these circumstances the Authority should take a steely approach to setting costs and has referred the Authority to relevant judgments of the Employment Court and determinations of the Authority for guidance³.

[3] ERL says the level of costs it has incurred are reasonable and steps have been taken to manage this matter as cost-effectively as possible. A schedule of costs has been provided which lists when work was performed, a description of the work, the fee earner who undertook the work, the hourly rate and time involved. The schedule lists the final invoice amount as \$35,396.14.

[4] ERL proposes time or deferred payments if Ms Devi is unable to pay any costs order.

Ms Devi's response

[5] In the memorandum filed on her behalf Ms Devi submits ERL is entitled to a costs award of no more than half a day notional daily tariff (\$2,250):

- (i) the starting point for costs is the notional daily tariff;
- (ii) ERL are not entitled to an uplift because the *Calderbank* offers were reasonably rejected;
- (iii) the April offer was unclear because it was framed as a “global” inclusive of costs;

² ERL made settlement offers to Ms Devi on 18 April 2020 of \$2,000.00 and on 4 November 2020 of \$5000.00. The basis of the July offer referred to by ERL is unclear.

³*Bluestar Print Group (NZ) v Mitchell* [2010] NZCA 385 and *Marshall v W Gartside Limited* [2020] NZERA 400.

- (iv) the November offer was within a week of the investigation meeting when no costs could be saved;
- (v) Ms Devi's claims were not frivolous and vexatious and did not fail entirely;
- (vi) The hearing time was extended because ERL unreasonably disputed the true nature of the employment relationship and its conduct during the hearing significantly extended the time taken to hear the matter;
- (vii) Proof of actual costs incurred by ERL has not been provided and the costs schedule includes costs not associated with the Authority hearing – costs for mediation, reading the determination, researching and preparing the costs memorandum; and
- (viii) ERL's representatives' hourly rates of \$425.00, \$350.00 and \$275.00 respectively are unreasonable given they are not lawyers⁴.

Costs principles

[6] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the Employment Court set out principles guiding the Authority's approach to costs which include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.⁵

⁴ *MacDonald v TKR Properties Limited* [2017] NZERA Auckland 240.

⁵ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 8080, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

Costs analysis

[7] ERL was the successful party. It is usual that costs will follow the event and the unsuccessful party will be required to make a contribution towards the successful party's costs. It is accepted ERL have incurred actual costs in respect of this matter. ERL should receive a contribution to the actual costs incurred. Ms Devi's submission is accepted that costs incurred for mediation and costs on costs are not relevant in a costs consideration. Having reviewed ERL's invoice it appears its actual costs incurred in respect of the investigation meeting are approximately \$25,000.

[8] The notional daily tariff is a starting point. The applicable daily tariff is \$4,500. Factors to consider next are matters which would lead to an increase or decrease from the tariff. The first of which is the actual hearing time which though one day was a longer than normal day⁶. Given this, the starting point for costs is assessed as \$5,500.

Indemnity costs?

[9] Next is a consideration of whether this is a case where indemnity costs are appropriate⁷. I find they are not. The Authority did not find Ms Devi's claim was frivolous or vexatious. Her case involved genuine legal and factual issues as to the nature of the parties' employment relationship and how it ended.

Decrease of the tariff?

[10] Detailed submissions have been lodged on behalf of Ms Devi critical of ERL's approach to the investigation meeting which she submits, unnecessarily extended the hearing time and warrants a decrease in the daily tariff. There was no conduct which could be characterised as heel-dragging on ERL's part. Interlocutory matters were dealt with efficiently. It is not unusual that additional documents are produced during the course of an investigation meeting and the volume produced in this matter was not outside an acceptable range. Other issues raised are fairly characterised as differences in style which do not warrant a decrease in the tariff. A decrease in the daily tariff is not justified.

⁶ The investigation meeting commenced at 9.30am and concluded at 6.15pm with usual breaks taken during the day.

⁷ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 159 at [8].

Settlement offers justifying uplift in daily tariff?

[11] ERL seeks an uplift in the daily tariff based on Ms Devi's refusal to accept the April settlement offer. ERL's submissions referred to other offers made in July and November evidence of which have not been provided to the Authority.

[12] The April offer is a relevant factor to consider in a costs setting. It was sufficiently clear on its face including that it may be raised in a costs setting. The offer was made in response to a settlement proposal from Ms Devi and she was represented. It is axiomatic if Ms Devi had accepted the settlement offer she would have achieved a more favourable outcome than that achieved before the Authority. An increase to the daily tariff is warranted for the settlement offer which should be sufficiently 'steely' to mark a failure to accept a settlement offer. In addition such an increase should be proportionate to other relevant factors including the hearing time, the actual costs incurred and reasonableness thereof, the relative complexity of the issues before the Authority, and the overarching principle that costs in the Authority should be modest. Taking into account all the relevant factors an uplift of \$1000 is allowed.

Conclusion

[13] Jyotika Devi is ordered to pay Employment Recruitment Limited \$6500 as a contribution to its costs within 21 days of the date of this determination.

Marija Urlich
Member of the Employment Relations Authority