

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 203  
3123394

BETWEEN	CASSANDRA JAMISON Applicant
AND	PETS IN THE CITY MT WELLINGTON LIMITED Respondent

Member of Authority: Marija Urlich

Representatives: Ruth Pettengell, for the Applicant  
Emma Monsellier and Sheridan Climo

Investigation Meeting: On the papers

Submissions received: 28 April, from the Applicant  
21 April, from the Respondent

Determination: 18 May 2022

---

**DETERMINATION OF THE AUTHORITY**

---

[1] Pets in the City Mt Wellington Limited (PCMWL) seeks an award of indemnity costs against Ms Jamison or in the alternative a reasonable contribution to actual costs incurred of the scheduled two hearing days calculated at the usual notional daily rate plus a substantial uplift. It says Ms Jamison unreasonably declined settlement offers and then withdrew her claim after PCMWL had incurred substantial costs including the cost of filing witness statements while on notice that it would seek an award of costs. It says Ms Jamison's conduct was unreasonable and unnecessarily increased costs, that she was motivated by an ulterior motive and did so in wilful disregard of the known facts.

[2] Ms Jamison says she has been steadfast in her claim and sincerely wished to pursue it but her personal circumstances have changed, and she is no longer able to continue with her claim. She says she has taken reasonable steps to engage with PCMWL to resolve her claim, any award of costs would cause her financial hardship and costs should lie where they fall. Ms Jamison has put PCMWL on notice that due to her parlous financial circumstances, if a costs award is made against her she will seek to reopen her wage arrears claim. In respect of the actual costs PCMWL has incurred she says it could have avoided much of these costs and points to the filing extensions sought to the timetable, that the costs are 'over-inflated', that it has created extra unnecessary work for itself and Ms Jamison including filing statements for introducing different witnesses and opposing a direction to mediation.

### *Background*

[3] The parties have been represented throughout. After the filing of the initiating documents they were referred by the Authority to mediation because they had not yet attended. This did not resolve the employment relationship problem. The application was duly allocated to me and a case management conference was convened with the parties during which a timetable for filing evidence was agreed and investigation meeting dates scheduled for 26 and 27 April 2022.

[4] In late January 2022 PCMWL's representative changed. Ms Jamison sought and was granted a two-week extension to the timetable for filing the common bundle of documents to it is understood accommodate liaising with the new representative. On 14 February a direction to mediation to a particular timeframe to accommodate Ms Jamison's personal circumstances (the imminent birth of her child) and vacation of the April investigation meeting dates were sought on what was held out to be a joint basis. Later that day the directions sought were granted and the parties advised of new investigation meeting dates held in June. As is usual practise the directions were made with the caveat that they were subject to variation on application. No variation to the directions was sought at that time including vacation of the timetable for filing witness statements.

[5] On 1 March 2022 the Authority was advised PCMWL had appointed a third representative (its current representative) who sought a two-week extension to the timetable to file witness statements to 17 March 2022. The extension was granted as

sought that day and the Authority facilitated the new representative's access to the file at their request.

[6] On 8 March 2022 PCMWL sought release from the direction to mediation on the basis it had not, in fact, been sought by consent and attending further mediation would unnecessarily increase costs. On 17 March 2022 PCMWL sought a further two-week extension to file its evidence.

[7] On 22 March 2022 a case management conference was convened with the parties to progress matters including the extension sought, the direction to mediation, Ms Jamison's request to file a statement for an additional witness and PCMWL's request for a third amended statement of problem to be filed to clarify the remedies sought including wage arrears. Directions followed including discharge of the direction to mediation.

[8] PCMWL filed its witness statements on 31 March 2022.

[9] On 13 April 2022 Ms Jamison withdrew her claim. PCMWL sought a determination as to costs that afternoon and a timetable was set for the filing of memoranda. The parties were invited to attempt to resolve costs themselves.

### **Costs principles**

[10] Whether a costs award should be made or not is a matter of discretion and governed by well-established principles.<sup>1</sup>

[11] In this matter the main principle to be applied is that costs should normally follow the event. PCMWL says it has been successful in this matter because it has been withdrawn and as it has incurred costs in responding to the matter, so it is entitled to an award of costs.

---

<sup>1</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

[12] Ms Jamison’s decision to withdraw her matter does not exclude a costs award being made because the Authority is able to make an award of costs in circumstances where a party has withdrawn a statement of problem prior to an investigation meeting.<sup>2</sup>

### **Costs analysis**

#### *(i) Actual costs incurred*

[13] It is accepted PCMWL has incurred actual costs totalling \$41,454.42, \$25,686.77 of which were incurred between 1 and 31 March 2022. It is not clear on the face of the time records provided in support how much of the costs incurred are attributable or consequent to changes in representation. It is reasonable to infer this is a factor in the high level of costs incurred particularly given the relatively modest nature of Ms Jamison’s claim.<sup>3</sup> There is no suggestion Ms Jamison has contributed to factors which required PCMWL to change representatives.

#### *(ii) Without prejudice save as to costs offers (WPO)*

[14] A series of WPOs were exchanged between the parties. The first was made by PCMWL on 31 May 2021. It was not accepted by Ms Jamison. On 25 February 2022 Ms Jamison proposed a WPO which PCMWL responded to by way of a counter WPO dated 7 March. This was not accepted and Ms Jamison proposed a further WPO offer on 6 April which PCMWL did not accept.

[15] PCMWL submits its two WPOs are relevant to the Authority’s consideration of costs because if its first offer had been accepted significant costs would have been avoided and with respect to the 7 March offer, the costs of drafting and filing the witness statements would have been avoided.

[16] Given its age the first offer is stale and I put no weight on it.

[17] The second WPO is valid and is a relevant factor in any assessment of costs. The offer makes clear indemnity costs would be sought “...from the date of expiry of

---

<sup>2</sup> *Eden v Rutherford & Bond Toyota Ltd* [2010] NZEmpC 43.

<sup>3</sup> As demonstrated by Ms Jamison’s 25 January 2022 offer to settle her claim of just over \$9,000 approximately \$2000 of which was wage arrears.

this offer” being 9 March. The time records show those costs total \$22,064.77, \$18,356.25 of which relate to the drafting of three witness statements.

(iii) *Conduct*

[18] PCMWL submits Ms Jamison has ‘continually acted in bad faith during the proceedings’ including:

- requesting a second mediation;
- introducing new witnesses at a late stage;
- being unwilling to engage with PCMWL ; and
- unreasonably declining its WPOs.

[19] These claims are serious and have been given careful consideration. It is difficult to accept that the request that the parties resume mediation is ‘bad faith’ given mediation is the primary dispute resolution mechanism under the Act and the particular circumstances of this matter including the parties’ active engagement in settlement discussions and Ms Jamison’s personal circumstances. PCMWL’s concerns about the additional witness were heard, considered and to a degree accommodated. The correspondence does not support a finding Ms Jamison was unwilling to engage with PCMWL. Indeed, the correspondence suggests active engagement with a view to reaching settlement. Ms Jamison’s decline of the 7 March WPO is nested within the parties active engagement regarding settlement. While it is unfortunate the WPO was not accepted the documentation does not support a finding it was declined in ‘bad faith’.

[20] There is no reasonable basis to find Ms Jamison’s conduct in respect of her claim demonstrates continual acts of bad faith or that she was improperly motivated in bringing, pursuing or withdrawing her claim.

(iv) *Is this a case which warrants indemnity costs?*

[21] This is not a case where Ms Jamison as the withdrawing party has engaged in conduct which would warrant indemnity costs such as delaying tactics, timetabling breaches or conduct that resulted in the other side’s preparation being unnecessarily duplicated.<sup>4</sup>

---

<sup>4</sup> *Pars Transport Ltd v Lardelli* EmpC Wellington WC25/06.

[22] An award of indemnity costs is not warranted.

*Should Ms Jamison be required to make a fair contribution to PCMWL's costs?*

[23] In *Data Group Limited v Gillespie* the court determined costs where a party withdrew proceedings prior to hearing.<sup>5</sup> Factors the court took into account were the length of time between date of withdrawal and the intended hearing date and steps taken by the parties in preparation for the hearing. In this matter Ms Jamison withdrew her case over two months before the intended investigation meeting date (28 and 29 June 2022). However, most of the timetabling requirements had been fulfilled prior to her withdrawal of proceedings including PCMWL filing its witness statements. It is accepted by that date PCMWL's preparations for the investigation meeting, at least in respect of the timetabled directions were advanced. This weighs in favour of an award of contribution to costs. Further, that Ms Jamison declined a WPO offer which highlighted it was made prior to the costs of drafting witness statements being incurred is a factor which also weighs in favour of an award of costs.

[24] An award of costs is appropriate.

*What is a fair costs contribution?*

[25] Though there was no investigation meeting given the circumstances of this matter including the 7 March WPO, the amount of preparation undertaken by PCMWL and the costs incurred after the expiry of the WPO a fair starting point for a consideration of costs is the first day notional daily tariff of \$4,500.

[26] Ms Jamison's personal circumstances for her decision to withdraw her proceedings are relevant to a reduction in the starting point. Though these circumstances have not been supported by affidavit evidence I am satisfied they were live issues between the parties including featuring in their correspondence regarding possible settlement. Further factors weighing in favour of a reduction in the starting point is the reasonableness of the costs incurred including the change in representative which has concentrated the period in which the costs were incurred and time to the

---

<sup>5</sup> *Data Group Limited v Gillespie* EmpC Auckland AC 16/04, 22 March 2004.

investigation meeting which was scheduled some eight weeks after the date of withdrawal.

[27] Having considered the submissions and information received and guided by the principals applicable to a consideration of costs Pets in the City Mt Wellington Limited is entitled to a costs award of \$2,000.

### **Outcome**

[28] Ms Jamison is ordered to pay Pets in the City Mt Wellington Limited \$2,000.00 as a contribution to legal costs reasonably incurred in responding to her claim within 21 days of the date of this determination.

Marija Urlich  
Member of the Employment Relations Authority