

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 428
5372780

BETWEEN MARAMA TARAU
Applicant

AND NGATI RANGINUI HOME
AND COMMUNITY
SUPPORT SERVICES
COMPANY LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: W Hika, Counsel for Applicant
R Harrison, Counsel for Respondent

Submissions received: 6 September 2013 from Applicant
13 September 2013 from Respondent

Determination: 20 September 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 2 September 2013¹ the Authority found that the applicant was entitled to be paid the gross sum of \$1,670.95 but she was unsuccessful with her claim that she was unjustifiably dismissed. The parties were invited to resolve the issue of costs but have not been able to do so. Submissions on costs have been provided by the parties in anticipation of the Authority determining this matter.

[2] The applicant submits that she has incurred total costs of \$6,013.47 (including GST) as revealed by content of a copy of the invoice provided by Mr Hika. However, I note that the invoice is addressed to *Ngati Ranginui Iwi* rather than Ms Tarau. But the matter of whether Ms Tarau has actually incurred any costs at all remains inconclusive. And while the submissions for Ms Tarau as to the costs being sought are rather unclear, it seems that Ms Tarau seeks that the above sum be awarded.

¹ [2013] NZERA Auckland 391

[3] The submissions for the respondent point to a *Calderbank* offer (\$5,000) that was made to the applicant on 27 June 2013. Attention is also drawn to the “unrealistic” position adopted by the applicant during the “without prejudice” negotiations. It is submitted for the respondent that given the “realistic” *Calderbank* offer made, relative to the eventual outcome, whereby Ms Tarau was only moderately successful in that she was awarded the wages claimed, costs should lie where they fall.

Determination

[4] Firstly, I have to say that the fees involved relating to the applicant’s case appear to be quite high. This is particularly so given that this matter was determined on the papers and the preparation required was not particularly onerous in regard to time commitments and/or the general provision of professional services.

[5] But more relevant is the existence of a valid, and in my view, realistic *Calderbank* offer. Given the factual circumstances and the material evidence pertaining to this case, this offer should have been accepted by Ms Taura, or at the least, should have been the basis for further negotiations i.e. a counter-offer to have been by the applicant; as her claim of unjustifiable dismissal was always going to be an uphill struggle.

[6] The fundamental principles concerning *Calderbank* offers are well established and have been considered by the Court of Appeal in a number of cases. For example, in *Health Waikato v Elmsly*² the Court stated:³

... we think that a more sensible approach by the defendants [respondents] to the making of *Calderbank* offers and steely responses by the Courts [Authority] where plaintiffs [applicants] do not beat *Calderbank* offers would be in the broader public interest.

[7] I note from the submissions of the respondent that the basis of the *Calderbank* offer made to Ms Taura included a realistic assessment that she could be successful with her wages claim and hence a net amount of \$1,300 was a component of the offer. The respondent also assessed that a reasonable contribution to the costs incurred by Ms Tarua, at the point that the offer was made, would be \$3,500, the current daily

² [2004] 1 ERNZ 172

³ At [53]

tariff used by the Authority for a one day investigation meeting. I conclude that the combination of these two particular factors constituted a “sensible approach” by the respondent and should have been the basis for close consideration by the applicant and for a reasonable settlement to have arisen.

[8] I find that the applicant unreasonably failed to give appropriate consideration to the *Calderbank* offer made by the respondent. Of course the applicant is entitled to make the decision that she did, but by doing so, she cannot then expect the respondent to make a contribution to the costs incurred while continuing with proceedings, given the final outcome. I find that in all the circumstances of this case it is appropriate that costs should lie where they fall. It is so ordered.

K J Anderson
Member of the Employment Relations Authority