IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 117
5517981

	BETWEEN	CHRISTINE JONES Applicant
	AND	BOARD OF TRUSTEES FOR KIMI ORA SCHOOL Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Peter Barrett, Counsel for Applicant Carolyn Heaton, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	18 September 2015 from the Applicant 28 August and 24 September 2015 from the Respondent
Determination:	30 November 2015

COSTS DETERMINATION OF THE AUTHORITY

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[1] In my determination of 22 July 2015 I found that Christine Jones' claim of constructive dismissal against her former employer failed.[1] I reserved the issue of costs and have now received submissions from both parties on that matter.

[2] The respondent, the Board of Trustees for Kimi Ora School (the Board), seeks to recover a contribution to its costs. The Board submits that the Authority's nominal daily tariff, which it incorrectly cites as $3,000 per day, should be increased in this instance to reflect two factors. Firstly, the costs of $39,735.14 (inclusive of disbursements and GST) incurred in defending Ms Jones' claim and, secondly, the Calderbank offers the Board made to her.

[1] [2015] NZERA 69.

[3] Invoices and copies of the Calderbank offers were provided to the Authority by counsel for the Board. These reveal that the Board, through Ms Heaton, made a final offer to Ms Jones on 16 December 2014. The offer, headed "*Without Prejudice Save as to Costs*", offered $10,000 under s. 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and a contribution of $3,500 to Ms Jones' costs. An additional non-financial component of the offer was a positive reference acknowledging the contribution made to Kimi Ora by Ms Jones.

[4] Ms Jones, through her counsel, Mr Barrett, rejected the offer and referred to Ms Jones' own offer made on 10 December 2014. That offer entailed financial remedies under four separate heads (sick/discretionary leave; lost wages; compensation; and costs) which, when quantified, equated to $42,180 gross or approximately $34,000 nett.

[5] Mr Barrett submits that, if any award of costs is made, it should be limited to the Authority's daily tariff, which he too cites incorrectly as $3,000. Mr Barrett invites me to let costs lie where they fall. One reason for this is that Ms Jones had, in counsel's submission, a claim that "*did not lack merit and was seriously arguable*."

[6] A second reason cited by Mr Barrett is that the substantive determination found the Board had breached its contractual *good employer* obligation to Ms Jones. This related to the disparate manner in which the Board proposed treating Ms Jones' accessing of emails between two of her colleagues, and the treatment it accorded those two individuals over the unprofessional and non-collegial tenor of their communications about Ms Jones.

[7] Counsel for both parties cite the principles applicable to the award of costs in the Authority as expounded in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.[2] These have recently been reconfirmed by the Full Court of the Employment Court in *Fagotti v Acme & Co Limited*.[3]

[8] The *Da Cruz* principles include the discretionary nature of costs awards, a discretion which is to be exercised in accordance with principle rather than arbitrarily. Costs generally follow the event, which normally results in the successful party being entitled to a reasonable contribution to its actual costs from the unsuccessful party.

[2] [2005] ERNZ 808 (EmpC).
[3] [2015] EmpC 135.

Costs are considered in the light of the particular circumstances of each case. They are frequently judged against a notional daily tariff. Where a party's conduct has increased costs unnecessarily that may be taken into account in the award made.

[9] I am not persuaded by Mr Barrett's submissions that the "*merit*" or "*seriously arguable*" nature of Ms Jones' claim warrants an exercise of my discretion against the application of the principle that costs normally follow the award. A more pertinent consideration is that Ms Jones wholly failed in respect of her claim to have been constructively dismissed.

[10] Nor do I consider the breach by the Board of its contractual good employer obligation to Ms Jones to be a relevant factor in considering whether an award of costs should be made. That breach occurred after the event that triggered Ms Jones' decision to leave her employment at Kimi Ora School and it would not be appropriate to take it into account in determining costs in relation to her unsuccessful constructive dismissal claim.

[11] I consider there to be no good reason in this instance to deviate from the usual principle of awarding costs to the successful party. The normal approach of the Authority is to take the daily tariff as the starting point for the number of days of the investigation meeting and consider adjusting the total by increasing or reducing it according to whatever factors are relevant to the circumstances. In this instance the investigation occupied one day, making the starting point the Authority's current daily tariff of $3,500.

[12] The next issue is whether the Calderbank offers made by the Board should be taken into account in considering the level of costs to be awarded. Mr Barrett submits they should not be considered. He argues it was reasonable for the applicant to reject the offers, in view of the situation and timing of them.

[13] At the time the first Calderbank offer was made on 10 November 2014 the Authority's investigation was scheduled to take place on 19 February 2015, a little over three months later.[4] By the time of the second Calderbank offer the date had been moved to 14 April 2015. There was no time limit for acceptance of either offer, and Ms Jones had ample time (four months) to consider the second offer before the

[4] The investigation was subsequently moved to April 2015 at the request of the respondent due to the timing issues with briefing witnesses.

Authority's investigation. Mr Barrett refers to the date of the Board's first offer as the day Ms Jones' employment terminated. It was three months after the Board had received evidence which, in Mr Barrett's submission, corroborated Ms Jones' employment problem. He asserts the Board did nothing within that three month period to investigate and remedy that problem.

[14] I am not persuaded by that submission and do not find the date to have the significance Mr Barrett attributes to it. While it may have been the last day of Ms Jones' notice period, the reality is that she had not been at Kimi Ora school since 17 June 2014. As noted in my determination of her application, Ms Jones had acknowledged making the decision not to return to her employment on, or certainly by, 17 June. The focus of her dealings with the Board from the date of Mr Barrett's letter of 10 July to the Board was on negotiating suitable exit arrangements, not on remedying her employment problem.

[15] In any event a second Calderbank offer was made by the Board on 16 December 2014. Mr Barrett submits it was a tactical offer made at a time when it was evident the offer would not be open for negotiation, at least during the school holidays when it was known that key personnel from the Board would be unavailable.

[16] I am not persuaded by that submission either. I note the timing of that offer is more likely to have been influenced by the length of time Ms Jones took to respond to the first Calderbank offer than by the motive ascribed to it by Mr Barrett. He responded in writing to that offer on 10 December 2014, one month after the offer had been made. The Board made its second Calderbank offer six days later, which seems a reasonable timeframe, allowing the possibility of having the matter settled before the summer school holidays.

[17] I find no basis for Mr Barrett's assumption that negotiations would not be possible during the school holidays. I accept Ms Heaton's submission that she could have obtained instructions and attended to any negotiations that may have been sought by Ms Jones during this period.

[18] The Court of Appeal has said that a "*steely*" approach to Calderbank offers is required in the employment jurisdiction[5]. The Full Court has confirmed that this

[5] Health Waikato Ltd v Elmsly [2004] 1 ERNZ 172 (CA) & Bluestar Print Group (NZ) Ltd v Mitchell [2010] ERNZ 446 (CA).

applies to the Authority as well as the Court.[6] I consider the Board's Calderbank offer of 16 December to be a credible and reasonable one which, if accepted, would have saved both parties considerable cost. It was made in a timely manner before the Board incurred the majority of its costs in successfully defending Ms Jones' claim. I find it is appropriate to take that Calderbank offer into account when considering an award of costs.

[19] Itemised invoices provided by Ms Heaton reveal that the bulk of the cost of the Board's preparation for the Authority's investigation occurred in the three months before the scheduled date for that meeting. This was one month after the second Calderbank offer had been made. Fees, including disbursements and GST, amounted to $26, 460.12 in that period.

[20] The reasonableness of that level of fees for a one day Authority investigation is questionable, particularly in light of statements made by the Court in *Stevens v Hapag-Lloyd (NZ) Ltd*[7] and endorsed by the Full Court in *Fagotti*[8]. Those statements referred to proceedings in the Authority as being intended to be low level, cost effective, readily accessible and non-technical. Judge Inglis further noted that, while it was the right of each party "*to instruct counsel and (if they do) to instruct counsel of their choosing, and to apply significant legal resources to the pursuit or the defence of a claim in the Authority at first instance, that is a choice they make including having regard to the generally applied daily rate*"[9].

[21] However, I do not find it necessary to take that matter further as the Board does not seek to recover the full costs incurred. Ms Heaton's submissions include an acceptance that awards of costs in the Authority must be proportionate and modest. I note that the Board's fees were covered by insurance, except for a $3,000 excess. That does not affect a determination of this award as the insurer has subrogation rights to recover costs[10] and Ms Heaton is exercising those rights.

[22] Mr Barrett provided no information regarding Ms Jones' financial circumstances, from which I can assume that is not a factor I need to consider.

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[6] n3 at [110].
[7] [2015] NZEmpC 28 at [94].
[8] n3 at [107].
[9] n7 at [34].
[10] McCammon v Wellington Free Ambulance (Inc) WC 8A/03 (EmpC).

Taking all the above factors into account, I consider an upwards adjustment of $3,000 to the daily tariff to be appropriate.

Determination

[23] Ms Jones is ordered to pay costs to the respondent in the sum of $6,500.

Trish MacKinnon
Member of the Employment Relations Authority