

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 108
5440837

BETWEEN ROSINA HAUITI
 Applicant

A N D TE REO IRIRANGI O NGA
 RAUKAWA TRUST t/a
 RAUKAWA FM
 Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
 A Bennett, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions: 30 January 2015 from the Applicant
 12 February 2015 from the Respondent

Date of Determination: 13 April 2015

COSTS DETERMINATION OF THE AUTHORITY

- A. The effect of the *Calderbank* offers is the reversal of the costs position. Therefore I decline to make any award of costs to the applicant. Only the respondent's costs application shall be considered as a consequence.**
- B. Rosina Hauiti is ordered to pay the respondent \$7,000 towards its actual legal costs.**

The substantive determination

[1] The Authority in its substantive determination dated 14 January 2015¹ held that Ms Hauiti was unjustifiably disadvantaged by the respondent's decision to suspend her without pay from 24 October 2013 until 4 December 2013 and was unjustifiably dismissed. The respondent was ordered to pay wage arrears of

¹ *Hauiti v. Te Reo Irirangi o Nga Raukawa Trust t/a Raukawa FM* [2015] NZERA Auckland 10

\$8,076.92 less PAYE pursuant to s.131 of the Employment Relations Act 2000 (the Act) and compensation of \$1,250 including a reduction of 75% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Act.

[2] Both parties apply for costs. Ms Hauti incurred legal costs and disbursements of \$3,875.65. The respondent seeks a reversal of the usual costs position and a contribution of \$28,000 towards its total legal costs of \$72,224.10 excluding GST and disbursements. It refers to two without prejudice settlement offers dated 9 May and 23 June 2014 for \$8,000 in full and final settlement (the *Calderbank* offers).

Issues

[3] The following issues are to be determined:

- a. What effect do the *Calderbank* offers have on costs (if any)?
- b. What is the starting point for assessing costs?
- c. Are there any factors that warrant adjusting the notional daily tariff?

What effect do the *Calderbank* offers have on costs (if any)?

[4] The respondent seeks a reversal of the usual position on costs being paid to a successful party and an award of costs against Ms Hauti. It refers to its partial success, Ms Hauti's contributory conduct and her rejection of two *Calderbank* offers of \$8,000. Although Ms Hauti did not address the *Calderbank* offers I understand she rejected them because she sought vindication. This is inferred from her reply dated 9 May 2014 rejecting the offer because "... *it would be just another slap in the face from the trustees who sought to punish me for broadcasting the truth of their actions in covering the financial misappropriation by the former [employee]*".

[5] Costs are discretionary and usually follow the event.² *Calderbank* offers are discretionary factors for the Authority in determining an appropriate costs award. The making of such an offer does not automatically result in a more favourable award of costs. The offeror has the burden of persuading the Authority to exercise its costs discretion in their favour³.

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808, 819 at [44]

³ *Aoraki Corp Ltd v McGavin* [1998] 3 NZLR 276, [1998] 1 ERNZ 601 (CA)

[6] The Court has expressly sanctioned the use of *Calderbank* offers whereby one party conveys to another an offer “*without prejudice except as to costs*”. In order to be effective, a *Calderbank* offer ought to be clear as to its terms, and the recipient should be allowed a reasonable time to consider the offer⁴. Greater weight will be given to the making of such an offer if the party has, in the Authority’s view, unreasonably proceeded with a claim that could have been readily settled and has then recovered less or not significantly more⁵.

[7] In determining costs, it is necessary to measure the degree of success the respondent has achieved. It is then necessary to take into account the *Calderbank* offer and if it was more than what the applicant achieved, the normal effect of a *Calderbank* offer is that the costs position is reversed⁶.

[8] A “*steely*” approach to *Calderbank* offers is required. The scarce resources of the Authority should not be burdened by litigants who choose to reject a reasonable settlement offer, proceed with litigation and then fail to achieve any more than was previously offered. Where respondents have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the applicant in the absence of compelling countervailing factors⁷.

[9] There may be cases where vindication through seeking a statement of principle in the employment context may be relevant to the exercise of the Authority’s discretion towards costs. Thus the relevance of reputational factors means that costs assessments are not confined solely to economic consideration. But equally, an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the applicant⁸.

[10] The *Calderbank* offers dated 9 May and 23 June 2014 were made in a timely manner in the months prior to the investigation meetings. Both offers are clear as to their terms. A payment of \$8,000 in full and final settlement of her personal grievance claims was made. At the time the offers made on 9 May and 23 June 2014, Ms Hauiti was self-represented. There was no indication she had incurred legal costs which would need to be addressed separately.

⁴ *Ogilvy & Mather (NZ) Ltd v Darroch* [1993] 2 ERNZ 943 (EmpC)

⁵ See above

⁶ *Blue Star Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [24]

⁷ See above at [20]

⁸ See above at [19]

[11] Both *Calderbank* offers exceeded the monetary amounts awarded to Ms Hauti. Taking into account PAYE, she would have been received approximately \$6,342.18 in wage arrears and \$1,250 compensation totalling \$7,592.18.

[12] Although Ms Hauti was successful in her unjustified disadvantage and dismissal claims, the determination did not provide vindication about her views regarding the trustees and alleged staff misappropriation. Her original broadcast provided that vindication by publicising her concerns to the respondent beneficiaries and general public. No further (or better) vindication was given by the Authority hearing and determination.

[13] The fact a *Calderbank* offer omits reference to an acceptance of wrongdoing does not necessarily lead to the conclusion that it ought not to be taken into account in assessing costs.⁹

[14] In my view Ms Hauti's success did not exceed the *Calderbank* offers. The offer of compensation was at a reasonable level which would have conveyed vindication post broadcast. There was no better vindication achieved by Ms Hauti through hearing.

[15] There are no other countervailing factors which would justify the setting aside of the settlement offers in my assessment of costs.

[16] The effect of the *Calderbank* offers is the reversal of the costs position. Therefore I decline to make any award of costs to the applicant. Only the respondent's costs application shall be considered as a consequence.

What is the starting point for assessing costs?

[17] The correct approach to assessing costs in this matter is for the Authority to adopt its usual notional daily tariff based approach to costs¹⁰. The current notional daily tariff is \$3,500. This matter involved a four day investigation meeting. The starting point for assessing costs is therefore \$14,000.

⁹ *New Zealand School of Education Ltd v Nafissi* [2012] NZEmpC 35 at [26]

¹⁰ *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [16]

Are there any factors that warrant adjusting the notional daily tariff?

Factors which warrant a reduction in the notional daily tariff

[18] Ms Hauti achieved partial success which should be reflected in a 50% reduction in the starting point for assessing costs to \$7,000. She was unsuccessful in her claim of unjustified disadvantage regarding the paid suspension but succeeded in her claim regarding the unpaid suspension. Similarly she was unsuccessful in her claim her conduct did not justify dismissal but was successful in her claim about the process leading to an unjustified dismissal.

Factors which warrant an increase to the notional daily tariff

[19] The respondent alleges the notional daily tariff ought to be increased because Ms Hauti's conduct unnecessarily increased costs by requiring an additional days hearing time, making un-sustained and/or irrelevant allegations about pre-determination and malicious and unlawful behaviour by respondent trustees.

[20] An additional days hearing was required but ultimately proved useful given the additional evidence produced of the respondent's financial position and the necessity to cross-examine Mr Heke about this. It also gave the opportunity for both parties to provide their closing submissions.

[21] Although there were substantial allegations about the trustee's behaviour, the extra time taken to deal with these is covered in the notional daily tariff. Any unmeritorious conduct by the applicant towards the trustees was taken into account in the reduction of remedies for contributory behaviour.

[22] I decline to make any increase in the notional daily tariff in the circumstances.

Outcome

[23] Rosina Hauti is ordered to pay the respondent \$7,000 towards its actual legal costs.

TG Tetitaha
Member of the Employment Relations Authority