

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 48
5549765

BETWEEN	RADOMIR MIHAJLOVIC First Applicant
A N D	JELENA MIHAJLOVIC Second Applicant
A N D	PARAMOUNT SERVICES LIMITED First Respondent
A N D	AN14 SERVICES LIMITED Second Respondent

Member of Authority: T G Tetitaha

Representatives: A Espie, Counsel for the Applicants
D Mitchell, Advocate for the First Respondent
No appearance by Second Respondent

Investigation Meeting: On the papers

Submissions: 4 March 2016 from the Applicants
17 March 2016 from the First Respondent

Date of Determination: 7 April 2016

COSTS DETERMINATION OF THE AUTHORITY

A. Paramount Services Limited is ordered to pay \$10,000 contribution towards the applicants' legal costs.

Employment relationship problem

[1] The Authority in its substantive determination dated 22 February 2016¹ found the applicants were unjustifiably dismissed. Radomir Mihajlovic was awarded lost remuneration of \$5,000.32 less PAYE and \$5,000 pursuant to s.123(1)(c)(i) of the

¹ *Radomir Mihajlovic & Anor v. Paramount Services Ltd & Anor* [2015] NZERA Wellington 25.

Employment Relations Act 2000 (the Act). Jelena Mihajlovic was awarded three months' wages less PAYE and \$5,000 pursuant to s.123(1)(c)(i) of the Act.

[2] The applicants now apply for costs. Their actual costs were \$15,176.35 including GST.

Issues

[3] The following issues are to be determined:

- a. Should the applicants be awarded indemnity costs?
- b. If not, what is the starting point for assessing costs?
- c. Are there any factors that warrant adjusting the notional daily tariff?

Should the applicants be awarded indemnity costs?

[4] The applicants seek an award of indemnity costs. Indemnity costs are exceptional so require “*exceptionally bad behaviour*” where a party has behaved either badly or very unreasonably².

[5] This matter does not meet the very high threshold required before indemnity costs may be imposed. *Calderbank* offers do not on their own warrant indemnity costs being awarded in this jurisdiction. It is inconsistent with the statutory imperatives underlying the Act for significant costs awards to be imposed on unsuccessful litigants in the Authority even where reasonable *Calderbank* offers have been exchanged.³ *Calderbank* offers are a factor to be taken into account in assessing costs.

What is the starting point for assessing costs?

[6] The correct approach to assessing costs in this matter is for the Authority to adopt its usual notional daily tariff based approach to costs⁴. The current notional daily tariff is \$3,500. This matter involved a two day investigation meeting. The starting point for assessing costs is therefore \$7,000.

² *Bradbury & Ors v. Westpac Banking Corporation* [2009] NZCA 234.

³ *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [94].

⁴ *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [16].

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

[7] Several *Calderbank* offers were exchanged between the parties. On 24 February 2015 the applicants sought payment of a combined sum of \$12,000 and \$3,500 plus GST contribution towards their legal costs. The first respondents counteroffered with a combined sum of \$6,000 and \$2,250 plus GST contribution towards their legal costs.

[8] On 21 July 2015 the applicants sought \$15,000 and \$6,000 plus GST contribution to their combined legal costs. No response or acknowledgment was received to this offer.

[9] On 10 December 2015 the first respondent offered payment of a combined sum of \$13,000 and \$7,000 plus GST contribution towards their legal costs. This offer was made after the first day of the investigation meeting but prior to the second hearing day. However all of the first respondent's *Calderbank* offers fell below what the applicants were awarded. Therefore they cannot be taken into account in reducing or reversing costs.

[10] The applicant's settlement offers were clear as to their terms and made in a reasonable amount of time in advance of hearing. An uplift to the daily notional rate of \$5,000 is appropriate to reflect the applicant's *Calderbank* offers exchanged making a total of \$10,000.

[11] There are no factors requiring reduction. Although the applicant was unsuccessful in its penalty claims, this did not occupy much (if any) of the hearing time. The remaining causes of action struck out were peculiar to the second respondent who took no active part in the hearing.

[12] Paramount Services Limited is ordered to pay \$10,000 contribution towards the applicants' legal costs.

TG Tetitaha
Member of the Employment Relations Authority