

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 62  
5613302

BETWEEN ROXANE MILLER  
Applicant

AND THE FREE RANGE EGG &  
POULTRY CO. LIMITED  
Respondent

5634207

BETWEEN THE FREE RANGE EGG &  
POULTRY CO. LIMITED  
Applicant

AND ROXANE MILLER  
Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Scott for Ms Miller  
Dave Jaques for The Free Range Egg & Poultry Co.  
Limited

Submissions Received: 20 February 2017 from Applicant/Respondent  
27 February 2017 from Respondent/Applicant

Determination: 10 March 2017

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. The Free Range Egg & Poultry Co. Limited is ordered to pay to Ms Miller the sum of \$3,500 plus disbursements of \$277.56 as a contribution to her costs within 14 days of the date of this determination.**

[1] In a determination dated 23 January 2017<sup>1</sup> I held Ms Miller had been unjustifiably dismissed from her employment at The Free Range Egg & Poultry Co. Limited (FRENZ) and awarded remedies totalling \$25,312.50.

[2] In respect to the claims by FRENZ against Ms Miller I held that Ms Miller had not breached any fiduciary or confidentiality obligations owed to FRENZ, but that she had caused invoices to be wrongly paid, had used the company fuel card without authorisation and had been incorrectly reimbursed accommodation costs. Ms Miller was ordered to reimburse FRENZ the sum of \$2,832.26.

[3] I reserved costs, indicating that if the parties were unable to resolve that issue, both parties would have the opportunity to file costs memoranda and evidence. These have now been received by the Authority for consideration.

[4] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event.

### **Determination of costs**

[5] Under normal circumstances the Authority would apply a starting point of a notional daily tariff for quantifying costs. On 1 August 2016 the daily tariff was increased to apply to matters lodged on or after 1 August 2016. Both applications involved in this matter were lodged in the Authority before 1 August 2016 and therefore the applicable daily tariff rate is \$3,500.

[6] As held by the Employment Court, the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.<sup>2</sup> As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup> awards in the Authority will be modest taking into account conduct which increases costs unnecessarily.

[7] The Authority will take into account, when dealing with the issue of costs, any offers made by the parties to settle matters. As stated by the Court of Appeal:<sup>4</sup>

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<sup>1</sup> [2017] NZERA Auckland 21.

<sup>2</sup> *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

<sup>3</sup> (2006) 7 NZELC 98,128; [2005] ERNZ 808; (2005) 3 NZELR 1 (EMC).

<sup>4</sup> As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385.

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.<sup>5</sup>

[8] The Employment Court in *Mattingly v Strata Title Management Limited* held:<sup>6</sup>

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a “steely approach” ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court's observation in *Da Cruz* that Authority awards will be “modest”. What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a *de novo* challenge, having regard to the circumstances of the particular case.

[9] Ms Miller made a written Calderbank offer to settle all matters between the parties on 15 November 2016, three days prior to the investigation meeting which commenced on 18 November 2016. The offer was stated to be open for acceptance until 10.00am on Thursday 17 November 2016.

[10] The offer was for a total of \$58,250 in favour of Ms Miller made up as follows:

- a) A sum equivalent to three months lost remuneration (\$26,250);
- b) \$10,000 for compensation under section 123(1)(c)(i); and
- c) \$22,000 plus GST in costs.

[11] The Calderbank offer was rejected by FRENZ on the basis that the costs sought in the letter were unusually high. The invoices provided by Ms Miller in support of her costs application show that FRENZ was right to consider that the costs claimed in the Calderbank were inflated. It is difficult to see how Ms Miller could have incurred costs of \$22,000 plus GST as at 15 November 2016 given that the investigation meeting took place after that date and her total bill for costs was \$21,378.90 which included disbursements of \$1,023.90. A portion of Ms Miller's total costs would have included the costs associated with the one day hearing.

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<sup>5</sup> Ibid at [18].

<sup>6</sup> [2014] NZEmpC 15; [2014] ERNZ 1 at [27]

[12] Further, the Calderbank offer does not address the counter-claim by FRENZ for the reimbursement of invoices wrongly paid, the unauthorised use of the company fuel card and the incorrectly reimbursed accommodation costs.

[13] Taking into account Ms Miller's success, the short time frame in which to consider the offer, the proximity to the hearing day (all preparations had by then been completed), the inflated costs claim and the lack of addressing FRENZ's counter-claim, I find the rejection of the Calderbank offer by FRENZ was reasonable.

[14] Ms Miller has submitted that there were further attempts to negotiate a settlement during the day of the investigation meeting. No details of the content of any offers have been provided to the Authority and I am therefore unable to assess whether those further negotiations offered by Ms Miller were reasonable.

[15] There will be no uplift in costs as a result of the Calderbank offer or failure to further negotiate a settlement.

[16] The investigation meeting took one day. Applying the daily tariff would see the award of a contribution in the order of \$3,500. Ms Miller seeks uplift to full indemnity costs to reflect her claim that FRENZ unreasonably rejected the Calderbank offer and that the conduct of FRENZ's counsel contributed to the investigation meeting being lengthened.

[17] Indemnity costs may be justified in relatively rare cases where a party's conduct is particularly egregious.<sup>7</sup> I am not satisfied the conduct of this case falls into that category.

[18] Taking into account FRENZ's partial success in its counter-claims, in all the circumstances of this matter I consider it appropriate that FRENZ contribute to Ms Miller's costs at the applicable daily tariff rate and order The Free Range Egg & Poultry Co. Ltd to contribute to Ms Miller's costs by paying \$3,500 within 14 days of the date of this determination.

[19] Ms Miller also seeks reimbursement of the disbursements. Ms Miller is clearly entitled to a refund of the \$71.56 lodgment fee, the costs associated with

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<sup>7</sup> *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2 at [9].

photocopying and office expenses and the disbursements attributable to research undertaken by Mr Scott.

[20] Turning to the travel costs and accommodation claimed by Ms Miller for Mr Scott's travel from Hamilton to Auckland, I do not accept that FRENZ should pay these costs. Ms Miller chose to engage out of town counsel when she could equally have engaged Auckland counsel.

[21] The Employment Court has adopted the approach of refusing to pay for the cost of travel and accommodation incurred by out of town counsel and I have followed that approach in this determination.<sup>8</sup>

[22] The Free Range Egg & Poultry Co. Ltd is ordered to contribute to Ms Miller's costs by reimbursing disbursements of \$277.56 within 14 days of the date of this determination.

Vicki Campbell  
Member of the Employment Relations Authority

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<sup>8</sup> *Commissioner of Salford School v Campbell* [2015] NZEmpC 186 at [70]; *O'Connor v Auckland University Students' Association Inc* [2014] NZEmpC 185.