

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 44
3030670

BETWEEN

BARBARA HENDERSON
First Applicant

ALAN THORN
Second Applicant

SUSAN STOWELL
Third Applicant

AND

EUROFINS BAY OF PLENTY
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Kerry Single for Applicant
Mark Beech for Respondent

Submissions received: 29 November 2018 from Applicant
18 December from Respondent

Determination: 30 January 2019

COSTS DETERMINATION OF THE AUTHORITY

- A. Eurofins Bay of Plenty Limited is ordered to pay to the applicants the sum of \$4,636.36 as a contribution to their costs within 14 days of the date of this determination.**

[1] In a determination dated 9 November 2018 I found the three applicants were unjustifiably dismissed and awarded remedies accordingly.¹

[2] I reserved costs, indicating that if the parties were unable to resolve costs, both parties would have the opportunity to file cost memoranda and evidence. The parties have been unable to resolve the matter.

[3] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. Under normal circumstances the Authority would apply a starting point of a notional daily tariff for quantifying costs.

[4] The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks' reasonable.² The principles applying to costs are well settled and do not require repeating.³

[5] An assessment of costs will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.⁴

[6] The investigation meeting took just less than one day. The starting point is therefore \$4,500. The applicants incurred costs of \$10,638.11 and expenses of \$236.36. The expenses include photocopying, the filing fee and travel.

[7] The claims for each of the applicants were lodged as one single application and were heard and determined together. This would have had savings for both parties. The applicants did not incur separate costs for three separate investigation meetings and Eurofins had the one investigation meeting to prepare for rather than three separate investigation meetings.

[8] The applicants have applied for indemnity costs. Indemnity costs are only available when there has been exceptionally bad behaviour. The applicants point to

¹ [2018] NZERA Auckland 346.

² Employment Relations Act 2000, Schedule 2, clause 15.

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].

⁴ Practice Note 2, Costs in the Employment Relations Authority.

delays and refusal on the part of Eurofins to provide information and failing to agree to mediation in the first instance to support their application for indemnity costs.

[9] I do not agree that indemnity costs is appropriate in the circumstances of this case.

Settlement offer

[10] At the end of the investigation meeting I encouraged the parties to enter into discussions with a view to resolving matters between them. They entered into discussions on a without prejudice except as to costs basis.

[11] The Authority will take into account any offers made by the parties to settle matters:⁵

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.

[12] The Employment Court has stated:⁶

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.

[13] The applicants offered to settle matters with a payment of not less than \$10,000 each and a contribution of over \$7,000 to costs. This offer was rejected by Eurofins. Ms Henderson achieved a result in excess of the offer rejected by Eurofins. Mr Thorn and Ms Stowell both achieved a result of less than the amount offered.

[14] I am satisfied Eurofin’s rejection of the offer by the applicants was reasonable. The offer did not distinguish between the three applicants and the offer to resolve costs was in excess of the daily tariff approach used by the Authority. It was the

⁵ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

⁶ *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15; [2014] ERNZ 1 at [27].

applicant's decision to lodge their claims as a single application resulting in a reduced exposure to costs for each of them.

[15] I am not persuaded that an uplift to the daily tariff is warranted. In all the circumstances I consider an appropriate contribution to the applicant's costs to be one amount of \$4,500. The applicants are entitled to recover expenses incurred for printing and the filing fee of \$136.36.

[16] Eurofins Bay of Plenty Limited is ordered to pay to the applicants the sum of \$4,636.36 as a contribution to the applicants' costs within 14 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority