

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 28  
3020179

BETWEEN                      RUI LEITAO  
   Applicant  
  
AND                                OPOTIKI RETURNED  
   SERVICES ASSOCIATION  
   INC  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Stan Austin, Advocate for Applicant  
   Leonard Hemi, Counsel for Respondent  
  
Submissions received:        17 December 2018 from Applicant  
   18 January 2019 from Respondent  
  
Determination:                22 January 2019

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In a determination dated 22 November 2018 ([2018] NZERA Auckland 365), I found that the Applicant, Mr Rui Leitao, had been unjustifiably dismissed from his employment by the Respondent, Opotiki Returned Services Association Inc (Opotiki RSA).

[2]     Costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and both parties have filed submissions in respect of costs.

[3]     The matter involved a one day investigation meeting.

[4]     Mr Austin, citing actual costs of \$11,623.00 is seeking a full reimbursement of costs.

[5]     Mr Hemi, on behalf of Opotiki RSA, submits that an award of \$6,960.00 is appropriate.

Submissions for the Applicant

[6] Mr Austin submits that a full reimbursement of the Applicant's costs is appropriate on the basis that Opotiki RSA had previously declined a Calderbank Offer.<sup>1</sup> A Calderbank Offer is an offer 'without prejudice save as to costs' offer.

[7] The determination of the Authority found that Mr Leitao had a personal grievance as a result of his dismissal. Mr Leitao was awarded lost wages and compensation for humiliation, upset and injury to feelings.

[8] Mr Austin submits that the Applicant made a Calderbank Offer to Opotiki RSA to resolve the matter prior to the substantive matter being heard in a letter headed 'Without prejudice save as to costs' dated 10 September 2018 (the Calderbank Letter).

[9] This offered that Mr Leitao would settle the matter on a full and final basis provided that Opotiki RSA paid him a total sum of \$8,000.00 as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), and a contribution to Mr Austin's costs of \$3,200.00.

[10] Opotiki RSA did not respond to the Calderbank Offer.

[11] This rejection of the Calderbank Offer should therefore be given full recognition in any costs award.

Submissions for the Respondent

[12] Mr Hemi submits that Mr Austin is an employment advocate with lower practising costs than those incurred by an employment lawyer. Accordingly it is not appropriate that costs be set at the same rate as for qualified and admitted barristers and solicitors who have higher operating rates.

[13] In addition the Respondent submits that the costs claimed in respect of the matter by the Applicant's advocate are more than what could reasonably be expected in terms of the hours claimed to complete various associated tasks.

[14] Whilst it is submitted that there should be some recognition of the rejection of the Calderbank Offer by an uplift in the daily rate, it is submitted that this should not automatically result in an uplift which equates to a reimbursement of full legal costs.

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<sup>1</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA).

## *Principles*

[15] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

### **15 Power to award costs**

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[16] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*<sup>2</sup>.

[17] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*<sup>3</sup>.

## **Determination**

[18] It is a principle set out in *Da Cruz*<sup>4</sup> that costs are not to be used as a punishment.

[19] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>5</sup> that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*<sup>6</sup> at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[20] I note the argument made by Mr Hemi in respect of employment advocates and practitioners. Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing. This amount can then be adjusted upwards or downwards by the Authority at its discretion having regard to the factors as set out in *Da Cruz*.

[21] I consider that the Calderbank Offer is a factor that should be taken into consideration in determining the appropriate level of costs.

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<sup>2</sup> [1996] 2 ERNZ 622.

<sup>3</sup> [2005] 1 ERNZ 808.

<sup>4</sup> [2005] 1 ERNZ 808.

<sup>5</sup> [2005] 1 ERNZ 808.

<sup>6</sup> [2001] ERNZ 305.

[22] Whilst taking note of the comments made by Judge Inglis as regards the ameliorating of the ‘*steely*’ approach noted in the judgment in *Stevens v Hapag-Lloyd (NZ) Ltd*<sup>7</sup> which referred to ‘*significant costs awards*’, I consider that Calderbank Offers may still be taken into consideration in the matter of costs in the Authority on the basis that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted<sup>8</sup>.

[23] Mr Leitao was awarded four months lost remuneration and the sum of \$12,000.00 in compensation pursuant to s 123(1)(c)(i) of the Act by the Authority, which is less than he offered to accept by way of settlement in the Calderbank letter dated 10 September 2018. Mr Leitao was awarded a total sum of \$16,128.00 by the Authority (in respect of lost wages and compensation).

[24] The Calderbank Offer was made well in advance of the Investigation Meeting, and included an amount in respect of costs, and there was therefore due time for Opotiki RSA to consider it fully prior to taking any part in that proceeding.

[25] In terms of the amount suggested by Mr Leitao by way of compensation the Calderbank Offer offered to settle in an amount which was less than what Mr Leitao was subsequently awarded by the Authority.

[26] The investigation occupied one day, and I consider that an appropriate starting point is that of the normal daily tariff for a one day hearing of \$4,500.00. The matters before the Authority were not complex which was reflected in the duration of the Investigation Meeting.

[27] Taking all these considerations into account, I order Opotiki RSA to pay Mr Leitao a contribution to costs in the sum of \$7,000.00, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>7</sup> [2015] NZEmpC 137 at para [95].

<sup>8</sup> *Aoraki Corporation Ltd v McGavin*.