



*Submissions for the Applicant*

[6] Ms Pollak submits that an uplift in the Authority's daily tariff in regard to costs is appropriate on the basis that the Applicant 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 the Applicant had failed to raise a personal grievance within the statutory 90 time period and that it was not just to allow her to raise it outside the expiry of the 90 day statutory period.

[8] Ms Pollak submits that the Respondent made a Calderbank Offer to the Applicant to resolve the matter prior to the substantive matter being heard in a letter headed 'Without prejudice save as to costs' dated 28 November 2018 (the Calderbank Offer).

[9] This offered that the Respondent would settle the matter on a full and final basis upon payment of the sum of \$15,000.00 as compensation pursuant to s 123(1)(c )(i) of the Employment Relations Act 2000 (the Act).

[10] The Applicant rejected the Calderbank Offer made by the Respondent, and counter-claimed in the sum of \$45,000.00. This counter offer was regarded as unrealistic by the Respondent and rejected.

[11] Following rejection of the Calderbank Offer the Respondent submits that it was put to unnecessary costs which lead to it incurring at least half of the total costs of \$42,072.38 after the date of the Calderbank Offer.

[12] It is submitted by the Respondent that the rejection of the Calderbank Offer should therefore be given full recognition in any costs award.

*Submissions for the Respondent*

[13] Ms Royal, on behalf of the Applicant, submits that the issues raised in the Calderbank Offer were not relevant to the preliminary issue that needed to be determined by the Authority.

[14] Further that the Applicant's application in regard to the preliminary issue was not unreasonable and does not amount to any exceptionally bad behaviour to support an uplift of any costs in the event that costs are awarded.

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

[15] In this case the Applicant submits that costs should lie where they fall.

### *Principles*

[16] 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.

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

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

### **Determination**

[19] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>4</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>5</sup> at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[20] 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.

[22] Whilst taking note of the comments made by Chief Judge Inglis as regards the ameliorating of the ‘steely’ approach noted in the judgment in *Stevens v Hapag-Lloyd (NZ)*

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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> [2001] ERNZ 305

*Ltd*<sup>6</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>7</sup>.

[23] The Applicant was unsuccessful in the preliminary matter. The Calderbank Offer was made well in advance of the Investigation Meeting, and there was therefore due time for the Applicant consider it fully prior to taking any part in that proceeding. The Applicant did so, responding by making a counterclaim which was rejected by the Respondent given its view that it was unrealistic.

[24] The matter was determined ‘on the papers’. Costs normally follow the event and the Respondent is entitled to a contribution towards its costs.

[25] I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a half day investigation meeting as the starting point.

[26] This starting point should be uplifted to take into account the rejection of the Calderbank Offer.

[27] Accordingly Ms Wang is ordered to pay W&H Developments Limited the sum of \$3,800.00 towards its legal costs.

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

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<sup>6</sup> [2015] NZEmpC 137 at para [95]

<sup>7</sup> *Aoraki Corporation Ltd v McGavin*<sup>7</sup> [2004] 1 ERNZ 172 (CA) at [53]