

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 330
3030512

BETWEEN	SIMONA STEFANOVIKJ First Applicant
AND	CHRYSOLYTE APE-ESERA Second Applicant
AND	DANIEL NEHO Third Applicant
AND	AKINA TRADING LIMITED Respondent

Member of Authority: T G Tetitaha

Representatives: R Walters, counsel for the Applicants
D Green, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 24 May 2019 and 27 May 2019 from the Applicant
24 May 2019 from the Respondent

Date of Determination: 5 June 2019

COST DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A substantive determination was issued on 10 May 2019. There were proven breaches of s 81(2)(c), (d), (g), (h) and (i) of the Holidays Act 2003 and s 130(i)(g) of the Employment relations Act 2000. The respondent was ordered to pay a penalty of \$10,000 into the Authority's bank account within seven days. \$5,000 of the penalty was to be paid to the applicants. The respondent was also ordered to pay various amounts of holiday pay to

each of the applicants within seven days of the determination. The applicants' personal grievance application was dismissed. Costs were reserved¹.

[2] Both parties seek payment of their respective legal costs. The applicants seek payment of \$8,518.78 to each of the applicants for their costs for litigating the records in arrears issue (\$25,556.34). They seek costs relating to that redundancy issue to lie where they fall. The applicants submitted actual costs were \$25,556.35.

[3] The respondent relies upon a Calderbank offer it made to settle matters for approximately \$18,000 and seeks payment of its costs by the applicants. It seeks an order the applicants pay a reasonable contribution to its legal costs. Its actual costs were \$13,012.50 excluding GST. The company was represented by the Respondent Director at hearing.

Indemnity costs

[4] The applicants seek indemnity costs. This is not a suitable case for the award of indemnity costs.

Starting Point for Assessing Costs

[5] The Authority has adopted a notional daily tariff based approach to cost awards. Matters lodged in the Authority from 1 August 2016 are subject to the increased daily tariff of \$4,500 for the first hearing day and \$3,500 thereafter². This matter involved a two day investigation meeting, therefore the starting point for assessing costs is \$8,000.

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

Factors which warrant a reduction of the daily notional tariff

[6] A *Calderbank* offer to settle a matter may reduce and/or reverse costs if it exceeds the amount actually achieved by the applicants at hearing. The question is whether the party to whom the offer was made had acted unreasonably in rejecting the offer, at the time that it did so.³

¹ *Stefanovikj and Ors v Akina Trading Limited* [2019]NZERA 280

² Practice note 2. Costs in the Employment Relations Authority para 4.

³ *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10 at [28].

[7] The *Calderbank* was made prior to hearing on 2 October 2018. This offer was for payment of \$4,500 to each applicant (\$13,500 total) and \$4,500 GST inclusive towards their fees.

[8] At hearing the applicants were successful in recovering \$14,780.53. This included a \$10,000 penalty, half of which was paid to the applicants. The total amount ordered exceeds the *Calderbank* offer. The fact the applicants only received half of the penalty does not necessarily mean any reduction or reversal of costs.

[9] The *Calderbank* did not address the applicants' primary concerns about Akina's record keeping. This was a minimum standards matter that affected not only these applicants but all of the employees of this respondent. Given the state of the record and the amount of disagreement between the parties, I do not consider it unreasonable for the applicant's to refuse the offer and seek clarification and vindication by way of hearing. Accordingly I set the *Calderbank* to one side.

[10] Given the applicants were partially unsuccessful, a reduction in costs by one third is justified. I see no basis to require payment of a separate amount of costs to each applicant given they have all used the same lawyer.

[11] Accordingly I order Akina Trading to pay \$5,333.33 as a contribution towards the applicants' costs.

T G Tetitaha
Member of the Employment Relations Authority