

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

**[2019] NZERA 3
3028751**

BETWEEN	DAVID HORAN Applicant
AND	GOLDEN FORK LIMITED First Respondent
	RAVNEET BRAR Second Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Danny Gelb, Advocate for Applicant Shelley Eden, Counsel for Respondent
Costs Submissions	11 December 2018 from Applicant 21 December 2018 from Respondent
Determination:	4 January 2019

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 26 November 2018 ([2018] NZERA Auckland 370), I found that the Applicant, Mr David Horan, had been unjustifiably dismissed from his employment by the Respondent, Golden Fork Limited (GFL).

[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 half day meeting.

[4] Mr Gelb, citing actual costs (post-mediation) of \$10,584.61 is seeking a contribution to costs in the sum \$7,500.00.

[5] Ms Eden, on behalf of GFL, submits that an award of \$2,999.99 is appropriate.

Submissions for the Applicant

[6] Mr Gelb submits that the determination of the Authority found that Mr Horan had a personal grievance as a result of his dismissal. Mr Horan was awarded lost wages, holiday pay and compensation for humiliation, upset and injury to feelings. In addition a penalty was awarded against GFL for non-payment to Mr Horan of the full amount of his holiday pay.

[7] The investigation only occupied slightly in excess of half a day, and I consider that a starting point in light of the normal daily tariff for a one day hearing of \$4,500.00 should be \$2,250.00.

[8] Mr Gelb submits that Mr Horan made two Calderbank Offers to GFL to resolve the matter prior to the substantive matter being heard.¹ A Calderbank Offer is an offer 'without prejudice save as to costs' offer.

[9] A Calderbank Offer was made in a letter headed 'Without prejudice save as to costs' dated 1 March 2018 (the First Calderbank Letter). This offered that Mr Horan would settle the matter on a full and final basis provided that GFL paid him a total sum of \$10,000.00 being comprised of \$6,500.00 as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), and a contribution to Mr Horan's costs of \$3,500.00, plus GST. Attached was a draft record of settlement document.

[10] GFL responded on 10 September 2018 that enclosed a Calderbank Offer in response (the Counter-Offer). GFL rejected the First Calderbank Offer and, in an attached letter headed "Without prejudice save as to costs", counter-offered to settle the matter in a total sum of \$3,500.00 pursuant to s 123(1)(c)(i) of the Act.

[11] Mr Horan responded to the Counter-Offer by making a further Calderbank Offer by way of an email dated 16 October 2018 (the Second Calderbank Offer). Mr Horan offered to settle in a reduced sum of \$4,000.00 pursuant to s 123(1)(c)(i) of the Act, and costs of \$4,000.00 plus GST. This Second Calderbank Offer advised that it would expire if not accepted in full by 9.00 p.m. on 24 October 2018. It was not accepted by GFL and expired.

Submissions for the Respondent

[12] Ms Eden submits that the invoices being relied upon by the Applicant are excessive or an otherwise unreasonable approach to hourly rates and resources.

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA)

[13] In particular Ms Eden submits that Mr Gelb's standard hourly rate is \$295.00 and that the invoices indicate that Mr Gelb took on the majority of the work in the case including time attendance on tasks that are administrative in nature. This is despite Mr Gelb's website stating that his business is a two person team with one administrative employee who could have been expected to undertake the administrative work .

[14] Ms Eden further submits that the travel time claimed by Mr Gelb appears to be excessive.

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 former Chief Judge Colgan in *NZ Automobile Association Inc v McKay*².

[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)*³.

Determination

[18] It is a principle set out in *Da Cruz*⁴ 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*⁵ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁶ at para [48] "As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred."

² [1996] 2 ERNZ 622

³ [2005] 1 ERNZ 808

⁴ [2005] 1 ERNZ 808

⁵ [2005] 1 ERNZ 808

⁶ [2001] ERNZ 305

[20] I consider that the Calderbank Offers should be taken into consideration in determining the appropriate level of costs.

[21] 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*⁷ 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 impacted⁸.

[22] Mr Horan was awarded a total sum of \$4,605.00 by the Authority (in respect of unpaid holiday pay entitlement, lost wages and compensation plus a proportion of a penalty award).

[23] The Calderbank Offers were both made in advance of the Investigation Meeting and included an amount in respect of costs. There was therefore due time for GFL to consider them fully prior to taking any part in that proceeding.

[24] In terms of the amount suggested by Mr Horan by way of compensation the Second Calderbank Offer offered to settle in an amount which was slightly less than Mr Horan was subsequently awarded by the Authority.

[25] The Counter-Offer was in a sum less than Mr Horan was subsequently awarded in the Authority and did not include a sum in respect of costs.

[26] 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 GFL to pay Mr Horan a contribution to costs in the sum of \$3,500.00, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority

⁷ [2015] NZEmpC 137 at para [95]

⁸ *Aoraki Corporation Ltd v McGavin*⁸ [2004] 1 ERNZ 172 (CA) at [53]