

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 93  
3023304

BETWEEN JULIE BRISTOWE  
Applicant

AND RAKEIWHENUA TRUST T/A  
TUHOE HAUORA  
Respondent

Member of Authority: Robin Arthur

Representatives: Stan Austin, advocate for the Applicant  
Peter Marshall, counsel for the Respondent

Submissions received: 29 January 2019 from Applicant and  
12 February 2019 from Respondent

Determination: 20 February 2019

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] By determination issued on 21 December 2018 the Authority found Rakeiwhenua Trust had unjustifiably disadvantaged Julie Bristowe by not fairly investigating a complaint. She was awarded compensation of \$5000.<sup>1</sup> The determination declined Ms Bristowe's claims that her resignation was really a constructive dismissal and that she had suffered two other instances of unjustified disadvantage. The Authority also rejected a counterclaim from the Trust seeking an order requiring Ms Bristowe to repay wages for some approved study leave she had taken during her employment.

[2] The parties were encouraged to resolve any costs issue themselves. They were advised that, if asked to do so, the Authority could be expected to determine costs by applying its usual tariff unless particular circumstances or factors required an upward

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<sup>1</sup> *Bristowe v Rakeiwhenua Trust* [2018] NZERA Auckland 411.

or downward adjustment of that rate.<sup>2</sup> For a one-day meeting, as was needed in this case, the current tariff is \$4,500.

[3] The parties were unable to resolve costs and lodged memoranda for consideration in an Authority determination of costs.

### **The parties' submissions**

[4] Ms Bristowe sought an award for what were described as her full costs of \$8,332.50 and reimbursement of the \$71.56 fee paid to lodge her application in the Authority. She submitted an award of costs at that level was appropriate for two reasons. Firstly, there was said to be an operative *Calderbank* offer, that is an offer made on a without prejudice basis prior to the Authority investigation to settle the matter for an amount less than was eventually awarded. Secondly, she said the costs incurred were reasonable and modest. Alternatively, she sought an upward adjustment of the daily tariff to mark her success in opposing the Trust's counterclaim for repayment of wages paid for study leave.

[5] The Trust proposed any order of costs to Ms Bristowe should be no more than \$2,500. It said this outcome should result from an analysis applying the relevant principles and an assessment of the relative success of the parties in respect of the claims made.

### **An operative *Calderbank* offer?**

[6] On 27 August 2018 Ms Bristowe, through her representative, had offered to settle her claim against the Trust on the basis of a compensation payment of \$6,000 and a contribution of \$2,500 to her costs to that date. The offer was made about six weeks before the Authority's investigation meeting. This was around the time Ms Bristowe and her husband lodged their witness statements and before the Trust witnesses were due to lodge their statements. The offer was not accepted.

[7] Ms Bristowe submitted this settlement offer should be an operative factor in assessing any costs award to her because it was for a value less than she eventually achieved from the Authority determination. The comparative value was based on the

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<sup>2</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

notion that the substantive determination had indicated a costs award to her would likely be made at the daily tariff rate of \$4,500. Taking that amount plus the \$5,000 compensation awarded gave a notional total of \$9,000. This was more than the total value of her August 2018 settlement offer of \$8,500.

[8] While Ms Bristowe correctly submitted the Authority should take a “steely approach” to settlement offers,<sup>3</sup> the assessment of the comparative value cannot realistically be made on the basis of a notional costs award yet to be made. What was to be compared, in the facts of this case, was her offer to settle earlier for \$6,000 with the eventual award of \$5,000. In those circumstances the settlement offer was not operative in a manner that should result in an uplift of the daily tariff.

### **Relative success – what effect if any?**

[9] The Trust’s submissions, in effect, sought a downward adjustment of the daily tariff because its analysis of the issues investigated by the Authority suggested more, or the more important ones, were determined in the Trust’s favour rather than in favour of Ms Bristowe.

[10] So, for example, Ms Bristowe was found to be unjustifiably disadvantaged but not subject to breaches of duties owed to her so serious that her resignation was really a constructive dismissal. While I have considered the careful analysis made in the Trust’s submissions, ultimately its approach did not accord with all the broad principles applying to the assessment of costs. Rather, the evidence about what were said to be unjustified actions of the Trust were overlapping and (comparing disadvantage with dismissal) of varying degrees of seriousness. While Ms Bristowe did not succeed in all of her claim, she did establish the Trust had acted unjustifiably towards her on an important matter. She was also entirely successful in resisting the Trust’s counterclaim, which the Trust had been cautioned from an early stage was an ‘uphill’ argument but it had elected to pursue nevertheless. Costs follow the event of those successes in her claim.

[11] What the analysis in the Trust’s submissions did assist with was establishing that Ms Bristowe’s limited degree of success did not warrant any uplift on the tariff.

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<sup>3</sup> *Fagotti*, above n 2, at [109].

## **Order**

[12] The Trust must pay to Ms Bristowe the sum of \$4,500 as a contribution to her costs of representation in her application to the Authority. It must also reimburse her for the expense of the fee of \$71.56 paid to lodge her application. These sums must be paid to her within 28 days of the date of this determination.

Robin Arthur  
Member of the Employment Relations Authority