

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 491
3071393

BETWEEN

LANCE CRUICKSHANK
Applicant

AND

MIYAMOTO INTERNATIONAL
NEW ZEALAND LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: J R Pullar and M P Davis, counsel for the Applicant
D J Kilpatrick, advocate for the Respondent

Submissions Received: 12 November 2020 from the Respondent
26 November 2020 from the Applicant

Date of Determination: 30 November 2020

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Lance Cruickshank is to pay Miyamoto International New Zealand Limited costs of \$4,500.00.

Employment relationship problem

[1] In my determination dated 3 November 2020 I dismissed Mr Cruickshank's personal grievance claims and reserved costs. I now have submissions from each party. This determination resolves the issue of costs.

[2] The Authority has discretion to order a party to pay costs. The discretion must be exercised in accordance with principle. The Authority has adopted and publicised a daily tariff approach as the starting point for considering costs.

[3] The respondent succeeded in its defence of the claims. As a matter of principle, costs in the respondent's favour would normally follow.

[4] The applicant submits that his circumstances and limited ability to pay mean that the Authority should reduce the daily tariff and limit the costs order to \$2,000.00. Some details of the applicant's circumstances are set out in an affidavit. However, the applicant would have understood the likely consequences in costs should he not succeed with his claims. He elected to pursue his claims to an investigation which necessitated the respondent incurring costs to defend the claims. I do not accept that the circumstances described in the affidavit should reduce the amount of costs to which the respondent would ordinarily be entitled.

[5] The respondent seeks an uplift of costs from the daily tariff which would otherwise apply. It made two *Calderbank* offers. The first offer was for a little over \$8,000.00 in compensation and costs. It was made on 18 February for acceptance by 25 February 2020. That followed a case management conference on 17 February setting a timetable for an investigation meeting which required steps to be taken from early March.

[6] On 17 February, I directed the respondent to disclose any notes made of a meeting which had been held on 24 January 2018. The applicant says the notes were disclosed after the time for acceptance of the *Calderbank* offer expired. I proceed on that basis. The notes assisted me to resolve significant eventual disputes in the respondent's favour. I accept the submission for the applicant that he did not unreasonably refuse the *Calderbank* offer. He did not have an opportunity, before the offer expired, to consider the content of the notes and the extent to which they strengthened the respondent's defence and undermined his position.

[7] The investigation meeting scheduled as part of the February case management conference was adjourned because of the Covid-19 alert level response. In May the meeting was set for 4 August. The second *Calderbank* offer (\$12,500.00 with GST on costs to be paid on confirmation of the amount) was made on Friday 3 July at 4.52pm by email to counsel for response by 3pm on Wednesday 8 July. The respondent faced a requirement to lodge statements of evidence by 17 July. The time was abridged, compared to the first *Calderbank*

offer. Presumably that was to allow the respondent to avoid costs associated with preparing statements of evidence in accordance with the timetable.

[8] The applicant says that the time allowed for him to consider whether to accept the offer was not reasonable. He says that he cannot be regarded as unreasonably declining the *Calderbank* offer, so that the second *Calderbank* offer does not justify a departure from the Authority's daily tariff approach.

[9] I am mindful that the Employment Court has recently reinforced the importance that costs awards in the Authority be reasonably predictable.¹ That supports maintaining the application of the daily tariff approach. The applicant refers me to *Elisara v Allianz New Zealand Limited*² to support a submission that an increase in costs above the daily tariff would be unduly burdensome to the applicant in light of his circumstances. There is merit in this point.

[10] In summary, I am persuaded to disregard the first *Calderbank* offer. I am not persuaded to disregard the second offer. However, the interests of justice in this case, given the applicant's limited means, are better served by maintaining the application of the daily tariff approach to assessing costs. There will be an order for the applicant to pay costs of \$4,500.00.

Philip Cheyne
Member of the Employment Relations Authority

¹ *Canterbury Westland Kindergarten Association Incorporated v Barnes* [2020] NZEmpC 199 at [29].

² [2015] NZEmpC 135.