

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 82
3042631

BETWEEN	ANTONY SMITH Applicant
A N D	THE VET CENTRE MARLBOROUGH LIMITED Respondent

Member of Authority: Peter van Keulen

Representatives: Mike Hardy-Jones, counsel for the Applicant
Miriam Radich and Sarah Wadworth, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 27 January 2020 from the Respondent
4 February 2020 from the Applicant

Date of Determination: 24 February 2020

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 14 January 2020¹, I dismissed Antony Smith's claims of unjustified action causing disadvantage and unjustified dismissal, against the Vet Centre

¹ [2020] NZERA 12.

Marlborough Limited. I also reserved costs so that the parties could try to agree costs. The parties were unable to agree and now the Vet Centre seeks costs.

Application for costs

[2] Counsel for the Vet Centre seeks an award of costs, being indemnity costs from the date of a Calderbank offer that the Vet Centre made which Mr Smith did not accept and, as he was not successful with his claims, did not beat. Alternatively, counsel submits that I should make an award of costs based on the daily tariff with that tariff uplifted to reflect additional cost incurred because of the Calderbank offer.²

[3] Counsel for Mr Smith accepts that costs should follow the event i.e. the Vet Centre is entitled to costs but he says that indemnity costs are not appropriate and I should award costs in the normal way, based on the application of the daily tariff. He also says there is no basis for increasing the award of costs beyond the daily tariff rate as the Vet Centre's Calderbank offer was reasonably rejected by Mr Smith, and in any event the Calderbank offer was flawed as it failed to contain any amount for holiday pay which Mr Smith was seeking as part of his claim; and the Vet Centre subsequently paid Mr Smith 22.5 days holiday, prior to the commencement of the investigation meeting.

[4] Alternatively counsel for Mr Smith says if I find the Calderbank offer is relevant that only warrants a small increase in the daily tariff amount.

² A Calderbank offer is an offer made by one party, normally a respondent, to settle the claim on terms. The offer is marked "without prejudice save as to costs". The purpose of a Calderbank offer is to not only to attempt to settle a claim but by using the stated words the offering party is reserving the right to bring the offer to the Court's (or in this case the Authority's) attention if the claim is not settled. This is so that the offer can be used for assessing costs once the claim has been determined.

Analysis

Costs in the Authority

[5] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*³ and other relevant Employment Court and Court of Appeal decisions.⁴ I have applied these principles when determining this costs application.

Costs for the Vet Centre

[6] The starting point is that costs should follow the event. As the Vet Centre was successful in defending Mr Smith's claims it is entitled to an award of costs.

Applying the daily tariff

[7] The next question is whether I should apply the daily tariff, which is the normal approach to setting the quantum of any costs award in the Authority. The alternative is to quantify costs on some other basis if the circumstances warrant this – in this case counsel for the Vet Centre says it should be on an indemnity basis from the non-acceptance of the Calderbank offer.

[8] The Vet Centre made its Calderbank offer to Mr Smith on 18 April 2019. The offer was to pay Mr Smith \$10,000.00 as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 plus \$3,500.00 as a contribution to Mr Smith's costs. The Calderbank offer did not include any amount for holiday pay on the basis that the Vet Centre stated in its offer that Mr Smith's holiday pay entitlement had been used by him (through the

³ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

⁴ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135, *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127.

disciplinary process when he was away from work) and there was no holiday pay owing to him.

[9] I am satisfied that the offer of 18 April 2019 met the requirements to be a valid Calderbank offer.⁵ I do not accept that the Vet Centre's stated position on holiday pay – that nothing was owed – invalidates the offer. It was open for Mr Smith to accept that statement and accept the offer of \$13,500.00 or reject it on the basis that he believed he was entitled to holiday pay and therefore wanted more by way of settlement.

[10] If a party reasonably rejects a Calderbank offer then that offer has no relevance to the question of costs. In this case Mr Smith rejected the Calderbank offer on 24 April 2019, and it appears that this was done without any explanation rather Mr Smith made his own Calderbank offer to the Vet Centre.

[11] Without any further explanation for why Mr Smith rejected the Vet Centre's Calderbank offer with his own offer, I cannot say that Mr Smith reasonably rejected the Calderbank offer.

[12] So, the Calderbank offer is relevant to the question of quantum, starting with the issue of indemnity costs. However, there is no presumption that indemnity costs will be imposed following the rejection of a Calderbank offer.⁶ In fact, in most cases where there is an applicable Calderbank offer, it is only relevant to the question of whether the daily tariff should be applied on an increased basis.

[13] Indemnity costs normally only follow a Calderbank offer where there is some additional factor making that appropriate, such as the conduct of the case by the one party.⁷

⁵ *Ogilvie & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943.

⁶ *Diver v Geo Boyes and Co Ltd* HC Hamilton CP58/93.

⁷ See for example, *Prins v Tirohanga Group Limited (formally Tirohanga Rural Estates Ltd)* EmpC Auckland AC 27/07.

This means, that in order to award indemnity costs I must be satisfied that there was exceptionally bad behaviour by Mr Smith in his conduct of the case.⁸

[14] I am not satisfied that there was exceptionally bad behaviour by Mr Smith in his conduct of this claim and I will not award indemnity costs. I am satisfied that it is appropriate to award costs to the Vet Centre on the basis of the daily tariff.

Length of the investigation meeting

[15] The investigation meeting in this matter took one and a half days⁹. Therefore, my starting point, applying the daily tariff is that the award of costs should be \$6,250.00.

Increasing the daily tariff

[16] The Calderbank offer is relevant to the question of uplifting the daily tariff, but this will not be a significant uplift. Whilst the Court of Appeal¹⁰ and the Employment Court¹¹ advocate adopting a “steely approach” to Calderbank offers, this does not necessarily apply to quantum. A number of factors must be considered in terms of adjusting the daily tariff and Judge Inglis (as she was then) observed in *Stevens v. Hapag-Lloyd (NZ) Ltd*¹² that it would be inconsistent with the statutory imperatives for significant costs awards to be imposed on unsuccessful litigants in the Authority.

[17] In *Davide Fagotti v. Acme & Co Ltd*¹³ the Full Bench of the Employment Court’s analysis was that a \$1,000.00 uplift in respect of the daily tariff against a party who unreasonably rejected a Calderbank offer was appropriate. I find this to be instructive and therefore, in this case, I think the Calderbank offer justifies uplifting the daily tariff by \$1,000.00 per day, so \$1,500.00 in total.

⁸ *Bradbury v Westpac Banking Corporation* [2009] NZCA 234.

⁹ Noting that counsel appear to believe two days is the appropriate length of the meeting, however I have checked the start and finish times and am satisfied that the investigation meeting was only one and a half days.

¹⁰ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385.

¹¹ *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135.

¹² *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28.

¹³ *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135.

Conclusion

[18] I award costs to the Vet Centre based on the daily tariff for a one and a half day investigation meeting being \$6,250.00. This rate is then adjusted upward for the Calderbank offer to \$7,750.00.

Order

[19] Mr Smith is to pay The Vet Centre Marlborough Limited \$7,750.00 as a contribution to its costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority