

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 357
3112322

BETWEEN SEBASTIEN BERNARD
Applicant

AND REGUS NEW ZEALAND
MANAGEMENT LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Sebastien Bernard, the Applicant
Alastair Espie & Tariqa Satherley, counsel for the Respondent

Submissions received: 1 July 2021 from Respondent

Determination: 11 August 2021

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Sebastien Bernard is to pay Regus New Zealand Management Limited costs of \$5,000.00.

[1] In a determination on 4 June 2021, Sebastien Bernard's personal grievance claim against Regus New Zealand Management Limited (Regus) was dismissed. Costs were reserved, with the parties to lodge submissions in accordance with a timetable. Counsel lodged submissions. Mr Bernard was no longer represented so the submissions were served on him personally. Mr Bernard has not lodged any submissions in reply, despite a reminder. This determination resolves the issue of costs.

[2] Costs normally follow the event. There is no reason to depart from that principle here. Regus New Zealand succeeded so is entitled to an award of costs.

[3] Costs in the Authority are often determined by reference to a well-publicised daily tariff. Applying that approach here, there would be an order of costs of \$4,500.00. However, Regus New Zealand seeks an uplift to \$6,500.00 on the basis that it made *Calderbank* offers on 22 September 2020 and on 22 February 2021 which were not accepted. The first offer was open for acceptance for a week. The second offer was made on 22 February 2021 prior to the investigation meeting scheduled for 26 February. It was open for acceptance until 3.00pm on 25 February 2021. The second offer comprised an increased compensation amount plus a contribution to legal costs.

[4] The Court of Appeal has emphasised that scarce Court resources should not be burdened by litigants who reject reasonable settlement offers, proceed with litigation but fail to achieve more than was previously offered. The normal effect of a *Calderbank* offer is that the costs position is reversed.¹ However, a *Calderbank* offer sometimes leads to an uplift in costs, for the party entitled to costs on ordinary principles as the successful party. As the Employment Court observed:²

There is both a public and a private interest in encouraging early offers of compromise in legal proceedings ... There is also an interest in encouraging employers and employees to resolve matters at an early stage, and to give careful consideration at the outset to their prospects of success if they proceed down the litigation pathway. The statutory focus on alternative dispute resolution reflect this policy.

[5] On their face, neither *Calderbank* offer could be regarded as insubstantial, given what might have been recovered if Mr Bernard had made out a personal grievance. I am mindful that the unchallenged documentary evidence pointed to a reasonable prospect that Regus New Zealand would be able to establish justification, or at least a measure of contribution. Mr Bernard was legally represented, so had the opportunity to understand the risk of rejecting the offers. There is no information from Mr Bernard to explain the circumstances in which the offers were rejected. I am left to conclude that the rejection of the *Calderbank* offers was not reasonable.

¹ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385.

² *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137 at [24].

[6] The legislative intent in respect of Authority proceedings is that they should be low level, cost effective, readily accessible and non-technical, without the trappings of the Court. I need to balance that intent, alongside recognising that Mr Bernard unreasonably rejected *Calderbank* offers. I also have regard to the evidence produced earlier about Mr Bernard's modest circumstances. These factors lead me to conclude that an uplift of \$500.00 would be appropriate.

Philip Cheyne
Member of the Employment Relations Authority