

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 233
3132135

BETWEEN	JACQUELINE FURNISS Applicant
AND	WAIKANAE BEACH MOTEL LIMITED First Respondent
AND	NICOLA EVANS AND RICK CIROLLI Second and Third Respondents

Member of Authority: Sarah Kennedy-Martin

Representatives: Matt Belesky, counsel for the Applicant
Anthony Drake and Rosie Judd, counsel for the Respondents

Submissions received: 20 January 2023 from Applicant
3 February 2023 from Respondent

Determination: 8 May 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] In its substantive determination of 9 December 2022, the Authority found that the applicant's dismissal was unjustified.¹ The Authority reserved the issue of costs and set a timetable for exchange of submissions.

[2] The Authority received submissions on behalf of both parties.

¹ *Jacqueline Furniss v Waikanae Beach Motel Ltd* [2022] NZERA 653

The applicant's submissions

[3] The applicant submits an award of costs for a total of two days hearing time in the sum of \$10,088.16 would be appropriate as follows:

- \$8,000.00 for daily tariff
- \$1,200.00 uplift for GST
- \$71.75 ERA filing fee
- \$516.60 flights and \$300.00 accommodation for the representative.

[4] The applicant submits neither party has an effective Calderbank offer because neither would have been in a better financial position had they accepted the other party's offer.

The respondents' submissions

[5] The respondents submit the starting point of \$8,000.00 being the daily tariff for a two-day hearing should be reduced to \$5,246.00 because the applicant unreasonably declined an operative Calderbank offer made to her by the respondent on 18 June 2021 and she was only partly successful in her claims.

[6] Regarding the Calderbank offer, the respondents submit this offer was made in good faith before either party incurred costs associated with having the Authority determine the matter and because the applicant failed to achieve any more than what was offered to her in the Calderbank offer, they are entitled to have this considered for the purposes of determining an award of costs.

[7] The respondents accept there should be an uplift to account for GST payable on the final amount but says that disbursements for flights and accommodation associated with the investigation meeting is not appropriate in this case. On that basis, they submit \$5246.56 would be an appropriate costs award in this case comprising of:

- \$4500.00 reduction from daily tariff (reflecting the applicant's mixed success and her unreasonable refusal of the Calderbank offer);
- \$675.00 for GST on \$4500.00;

- \$71.75 for the ERA filing fee.

Discussion and conclusion

[8] Costs are a matter of discretion. The discretion is to be exercised in accordance with principle and not arbitrarily. The main principle in the exercise of the discretion is that costs follow the event. If a party is successful, they will be entitled to an award of costs. The applicant was successful. Despite not every problem set out in the statement of problem being found to be made out, most of the problems were found to form the factual background to the unjustified dismissal claim and remedies were calculated accordingly.

[9] The Authority's investigation meeting time amounted to two full days. The starting point for costs based on the Authority's daily tariff is \$4,500.00 for the first day and \$3,500.00 for the second day. The Authority can from that starting point of \$8,000.00 consider whether there are factors justifying an increase or decrease in costs. This can include whether an effective Calderbank offer was unreasonably refused.²

Calderbank offer

[10] When a Calderbank offer is sent by a respondent, the consequences of unreasonably rejecting a Calderbank offer for the applicant if, as in this case, they win but recover less than was offered, is that costs awarded may be reduced so that some or all of the respondent's costs are recoverable.

[11] Any costs that may be awarded as a result of a successful Calderbank offer would run from the date that the offer expired or was rejected, not when the offer was first made. The Authority is reminded that it is to adopt a "steely" approach in considering Calderbank offers.³

² For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.

³ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385.

[12] There is a small difference of \$184.00 between the Calderbank offer of \$26,700.00 made by the respondent to the applicant on the 18 June 2021 and the Authority's award of \$26,864.00. Given the Calderbank offer was made before either party had incurred costs in preparation for the investigation meeting, I consider that had the applicant accepted that offer, she would indeed have been in a better position.

[13] The applicant further submits the Calderbank offer was not effective on the basis the "contribution towards costs" component of the Calderbank offer should not be included in calculating the quantum offered or a "minimum costs contribution" should have been factored into the respondent's calculations in assessing whether it had an effective Calderbank offer.

[14] I am not persuaded by either of those arguments and the respondents position in this regard has merit. This means the ultimate question for the Authority is whether or not the applicant would have been in a better position had she accepted the offer on 18 June. I have found that she would have been and a small deduction in costs would therefore be appropriate.

GST and disbursements

[15] Where a party is entitled to an award of legal costs, and has incurred a GST charge which he or she cannot recover, not being GST registered, it is appropriate to take into account the extra liability when reimbursing legitimate disbursements.⁴ The respondent accepts that GST should be factored into any costs award.

[16] Given my findings above this is not an appropriate matter for disbursements of travel and accommodation to be taken into account in setting an appropriate award for costs.

Conclusion and orders

[17] Ms Furniss was successful with her claim for an unjustified dismissal, but an effective Calderbank offer was unreasonably rejected. I consider that an award of costs comprised of the following would be appropriate:

⁴ *Banks v Hockey Manawatu Incorporated* [2016] NZEmpC 97.

- \$6,000.00 reduction in tariff costs;
- \$75.73 filing fee
- \$911.36 GST

Order made

[18] I order that Waikanae Beach Motel Ltd pay to Jacqueline Furniss costs in the amount of \$7,000.00

Sarah Kennedy-Martin
Member of the Employment Relations Authority