

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 551
3180279

BETWEEN JOANNA NIGHTINGALE
 Applicant

AND NEW ZEALAND WOOL
 DUMPING GROUP (2019)
 LIMITED PARTNERSHIP
 Respondent

Member of Authority: Rowan Anderson

Representatives: Seungmin Kang, counsel for the Applicant
 David McLeod, advocate for the Respondent

Investigation Meeting: On the papers

Submissions received: 1 September 2023 and 7 September 2023 from the
 Applicant
 7 September 2023 and 18 September 2023 from the
 Respondent

Determination: 25 September 2023

COSTS DETERMINATION OF THE AUTHORITY

Background and submissions

[1] On 18 August 2023 the Authority issued a determination in which I found that Joanna Nightingale was unjustifiably disadvantaged in her employment and that she was unjustifiably dismissed.¹ In awarding remedies to Ms Nightingale in relation to her personal grievance claims, I ordered that the relevant remedies be reduced by 20% on account of contributory blameworthy conduct.

[2] Costs were reserved. The parties have not been able to agree on costs, and Ms Nightingale now asks the Authority for orders as to the costs she incurred in pursuing

¹ *Joanna Nightingale v New Zealand Wool Dumping (2017) Limited Partnership* [2023] NZERA 456.

her claims against New Zealand Wool Dumping Group (2019) Limited Partnership (NZ Wool Dumping).

[3] Ms Nightingale seeks a total contribution towards its costs of \$14,709.56 based on the daily tariff approach adopted by the Authority for a two-day investigation meeting, including an uplift of \$6,500 on the basis of a refusal by NZ Wool Dumping of a *Calderbank* offer said to have been made on 16 May 2022. Ms Nightingale also seeks disbursements for reimbursement of the filing fee of \$71.56 and \$138.00 for costs relating to the service of documents. Ms Nightingale's total costs of representation were confirmed by counsel as being \$14,732.56.

[4] NZ Wool Dumping submits that it is accepted that the daily tariff should apply and that it accepts the disbursements claimed by Ms Nightingale. As such, it accepts that an order for \$8,000 in costs and \$209.56 in disbursements should be made. As to the *Calderbank* offer and uplift claimed by Ms Nightingale, NZ Wool Dumping submits that Ms Nightingale has benefited from the rejection of the offer and that as such it is irrelevant, and that an uplift is not otherwise warranted.

Costs principles

[5] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.²

[6] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that *Calderbank* offers may be taken into account, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.³

[7] The daily tariff is usually taken as a starting point,⁴ although not used in a rigid manner, with principled adjustments made having regard to the particular characteristics of a case.

² Employment Relations Act 2000, Schedule 2, clause 15.

³ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

⁴ Practice Note 2: Costs in the Employment Relations Authority, issued 29 April 2022.

Consideration

Costs to follow the event

[8] Ms Nightingale was successful in pursuing her claims against NZ Wool Dumping and it is appropriate that costs follow the event.

Application of the daily tariff

[9] The substantive proceeding involved the setting down of a two-day investigation meeting. I consider the appropriate starting point for daily tariff approach would see a contribution of \$8,000 (\$4,500 for the first day, \$3,500 for the second day).

Calderbank offer

[10] Ms Nightingale made an offer of settlement on 16 May 2022, well prior to the investigation meeting or any other substantive steps being required in the Authority. NZ Wool Dumping was provided a full week to consider and respond to the offer, that being until 23 May 2022. The settlement offer was made on the basis of a full and final settlement involving NZ Wool Dumping being required to make payment of \$8,000 to Ms Nightingale.

[11] I consider that the Calderbank offer made was in clear terms and was otherwise reasonable. The offer was made well before any substantive steps were required in terms of the Authority's investigation. The offer was clearly marked "without prejudice save as to costs" and Ms Nightingale has been successful in her application being awarded more than the sum sought by way of the Calderbank offer.

[12] I consider that the offer of 16 May 2022, and its rejection, should be taken into account. I do not accept NZ Wool Dumping's submission that the offer is irrelevant, and I consider it relevant that ultimately costs for both parties increased because of the offer being rejected. However, any uplift should be modest, and I consider an uplift of \$1,800 appropriate in the circumstances.

Disbursements

[13] I consider it appropriate that an order be made requiring NZ Wool Dumping to reimburse Ms Nightingale the filing fee of \$71.56. Additionally, I accept the disbursements claimed by Ms Nightingale relating to the services of the process server in the amount of \$138.00.

Orders

[14] I order New Zealand Wool Dumping (2017) Limited Partnership to pay Ms Nightingale, within 28 days:

- (a) the sum of \$9,800 as a contribution towards the costs she incurred in pursuing her claims; and
- (b) the total sum of \$209.56 relating to disbursements.

Rowan Anderson
Member of the Employment Relations Authority