

**NOTE: This determination  
contains an order prohibiting  
publication of certain  
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2023] NZERA 649  
3185740

BETWEEN

LNF  
Applicant

AND

THE DEPARTMENT OF  
CORRECTIONS  
Respondent

Member of Authority: Davinnia Tan

Representatives: Ashleigh Fechney, advocate for the Applicant  
Ruvín Pattiaratchi, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 10 August 2023 from Applicant  
24 August 2023 from Respondent

Determination: 6 November 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] On 27 July 2023 the Authority issued a determination in this matter finding that LNF was unjustifiably dismissed from her employment with the Department of Corrections (Corrections). The Authority awarded LNF lost wages for a period of six months in the amount of \$36,500.00 and compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) in the amount of \$23,000.00. There is also a permanent non-publication order over the Applicant's name and information that may tend to identify her.

[2] In that determination, the parties were encouraged to resolve any issue of costs between them, and the Authority made reference to its usual practice of applying the daily tariff to determine costs.

[3] The parties have not been able to resolve costs between themselves and have filed memoranda accordingly.

### **Applicant's submissions**

[4] The applicant submitted that the starting point for costs ought to be the daily tariff of \$8,000.00 on the basis that the investigation meeting was held over two full days and LNF was the successful party.

[5] In addition an uplift is sought on the basis that LNF's Calderbank offer which involved payments of \$25,000.00 for compensation under s 123(1)(c)(i), \$20,000.00 for lost wages, and \$15,000.00 for legal fees was rejected by Corrections.

[6] The applicant noted that the Authority's award for lost wages was more than its offer to Corrections and considerably more than what the Corrections offered the applicant. The applicant submitted that its offer was therefore reasonable and had Corrections accepted it, it would have saved both parties additional time, costs, and stresses associated with the Authority's process.

[7] The applicant noted that both parties' Calderbank offers included a contribution to legal fees of \$15,000.00 + GST and as such the applicant seeks an uplift to this effect. In addition, the applicant seeks reimbursement of the filing fee of \$71.56 and investigation meeting fees estimated to be \$306.66, which equates to a total of \$15,378.22 sought.

### **Respondent's submissions**

[8] Corrections submitted that there is no basis to uplift costs beyond the daily tariff and that it did not unreasonably reject the applicant's Calderbank offer of 7 February 2023. Corrections also rejects the applicant's claim for reimbursement of "investigation meeting fees" of \$306.66 on the basis that the applicant did not supply any information to support those expenses and that in the absence of that evidence it cannot be ascertained whether those expenses were reasonably incurred.

[9] In reliance on *Elisara v Allianz New Zealand Ltd*<sup>1</sup> Corrections referred to the principle that costs in the Authority will be modest.

[10] Corrections also noted that the Employment Court established that Calderbank offers do not grant automatic protection in the event of lesser recovery but are simply a discretionary factor.<sup>2</sup>

[11] Corrections submitted that it first made a Calderbank offer to the applicant on 7 February 2023 which involved compensation under s 123(1)(c)(i) in the sum of \$20,000.00, a further tax-deductible ex-gratia payment of \$15,000.00 and up to \$15,000.00 + GST for contribution to legal fees.

[12] The applicant then declined the offer and made its counteroffer as set out above in paragraph 5.

[13] On 14 February 2023, Corrections rejected the applicant's offer again and made the same offer, which was rejected.

[14] On 22 March 2023, Corrections made a further Calderbank offer after it considered the applicant's evidence. Corrections noted that this offer was not referred to in the applicant's costs submissions.

[15] Under Correction's revised offer of 22 March 2023, it offered compensation of \$25,000.00 under s 123(1)(c)(i) of the Act, a further tax-deductible ex-gratia payment of \$15,000.00 and up to \$15,000.00 + GST as a contribution to legal fees.

[16] The applicant rejected this offer. Corrections advised the offer remained open until the commencement of the investigation meeting.

[17] Corrections noted that its offer was only \$4,500.00 less than the total value awarded to the applicant by the Authority and is therefore not significant having regard to the high value involved. Corrections submitted that the Calderbank offers should be assessed in their entirety against the applicant's success.

[18] In particular, Corrections submitted that a relevant factor to consider is whether the party who rejected the offer acted unreasonably in doing so.<sup>3</sup>

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<sup>1</sup> *Elisara v Allianz New Zealand Ltd* [2020] NZEmpC 13.

<sup>2</sup> *Ogilvy & Mather (NZ) Ltd v Darroch* [1993] 2 ERNZ 943.

<sup>3</sup> *Xtreme Dining Ltd v Dewar* [2017] NZEmpC 10 at [28].

[19] Corrections submitted that it did not act unreasonably when it rejected the applicant's initial offer on the basis that Corrections was not provided sufficient information to assess the merits of the applicant's claim. It had no evidence at that time about the applicant's lost wages and that information, which was only provided during and after the investigation meeting, was necessary and crucial to making an informed assessment of the applicant's offer.

[20] In support of this submission, Corrections referred to several emails dating back to February 2023 in which it requested information about the applicant's earnings for the purposes of assessing her estimated lost wages and assessing the merits of the applicant's counteroffer. Corrections requested that information on at least two occasions prior to the investigation meeting. On 5 March 2023, the applicant's advocate advised that the applicant would do so only at the investigation meeting.

[21] Corrections submitted that this meant it did not have all the relevant information to make an informed assessment regarding the applicant's earnings at the time and that the limited information it did have as they related to the Calderbank offers was incorrect. At the investigation meeting, the applicant confirmed that the information Corrections did have was incorrect and it was that information Corrections relied on in assessing the merits of the applicant's offer.

[22] Corrections submitted that in *McDonald v FAI (NZ) General Insurance Co Ltd*<sup>4</sup> the High Court held that as a matter of natural justice, a party faced with a Calderbank offer is entitled to have all information available to assess the offer.<sup>5</sup> Corrections noted that in that case the plaintiff's ability to assess the offer was affected by late disclosure of evidence and documents.

[23] Corrections submitted that similarly, in these circumstances, it did not have all the information available to assess the applicant's offer due to late disclosure of that evidence; additionally, the information it did have was incorrect. Hence, Corrections considers that its offer to the applicant on 22 March 2023 was reasonable notwithstanding it was slightly less than the total award by the Authority, and that it

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<sup>4</sup> *McDonald v FAI (NZ) General Insurance Company Ltd and New Zealand Law Society* HC Auckland CP507/96, 31 May 2002.

<sup>5</sup> *McDonald v FAI (NZ) General Insurance Company Ltd and New Zealand Law Society* HC Auckland CP507/96, 31 May 2002 at [17]- [23].

was not unreasonable for Corrections to reject the applicant's offer (which exceeded the value awarded to her by the Authority).

[24] Corrections further submitted that the applicant had acted unreasonably in withholding that information which it sought explicitly for the purposes of settlement negotiations and consequentially, deprived parties the opportunity to resolve the matter outside the Authority's processes.

[25] Therefore Corrections considers that in these circumstances, costs should lie where they fall.

[26] As an alternative submission, if the Authority finds that Corrections unreasonably rejected the applicant's Calderbank offer, it submitted that there is no reasonable basis to award a \$7,000.00 uplift from the daily tariff in these circumstances. Corrections referred to recent cases in which uplifts were limited to \$1,000.00-\$2,000.00 where a party was found to unreasonably reject a Calderbank offer.

[27] Corrections considers that both parties were responsible for the matter not being settled and that both parties made similar Calderbank offers and share responsibility for not resolving the matter earlier; and as such the Calderbank offer should be a neutral factor.

[28] Corrections has emphasised that in offering \$15,000.00 + GST for legal costs, it had done so for the purpose of reaching a settlement only and by no means did it accept that this reflected a likely award of costs.

[29] Following the investigation meeting, Corrections offered to pay to the applicant the daily tariff of \$8,000.00 for the purposes of resolving the matter of costs.

## **Principles**

[30] The power of the Authority to award costs is contained in s 15 of schedule 2 of the Employment Relations Act 2000 (the Act) which states:

### **15 Power to award costs**

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[31] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*<sup>6</sup> as confirmed in *Fagotti v Acme and Co Limited*.<sup>7</sup> The principle set out in the above cases is that costs are to be modest. As to quantification, the principle is one of a reasonable contribution to costs actually and reasonably incurred. Costs are not to be used as a punishment, and as the Court of Appeal has stated several times, a “steely approach” is to be adopted when considering Calderbank offers.<sup>8</sup>

[32] The Authority has adopted a daily tariff approach as the starting point for considering costs. This is well known, and the current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days.<sup>9</sup>

[33] The daily tariff is usually taken as a starting point, although is not to be used in a rigid manner, with principled adjustments made having regard to the particular characteristics of a case.<sup>10</sup>

## **Analysis**

[34] Having reviewed parties’ submissions on costs, I consider that it is appropriate to award the applicant the daily tariff of \$8,000.00 and \$71.56 for the filing fee. My reasons are as follows:

- (a) I agree with and accept Corrections’ submissions that relevant information was withheld by the applicant that would have otherwise assisted Corrections in assessing the applicant’s counteroffer. It would be unfair to penalise Corrections for applicant’s refusal to provide this relevant information for the purposes of considering the offer. Further, it was confirmed at the investigation meeting that the information Corrections did hold was incorrect following the applicant’s

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<sup>6</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

<sup>7</sup> *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 114.

<sup>8</sup> *Health Waikato v Elmsly* [2004] 1 ERNZ 172 (CA) at [53] and *Blue Star Print v David Mitchell* [2010] NZCA 385 at [20].

<sup>9</sup> For further information about the factors considered in assessing costs, see:

[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)

<sup>10</sup> [Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi](#), page 5.

evidence. As such, I do not consider that Corrections unreasonably rejected the applicant's offer.

(b) It is a clearly established principle that costs in the Authority are to be modest. The applicant has not identified any additional or persuasive reasons to justify an uplift of \$7,000.00, nor has the applicant provided supporting evidence to support the claim for investigation meeting fees of \$306.66 and as such I agree with Corrections that the Authority is not able to properly assess whether those expenses were reasonably incurred.

### **Orders**

[35] I order Corrections to pay the applicant \$8,000.00 as a contribution to legal costs and the filing fee of \$71.56, a total of \$8,071.56, within 28 days of the issuing of this determination.

Davinnia Tan  
Member of the Employment Relations Authority