

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2024] NZERA 98  
3139505

BETWEEN

JOLINE GUNTER  
Applicant

AND

KIDS WORLD CHILDCARE  
LOWER HUTT LIMITED T/A  
ALL ABOUT CHILDREN  
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Dave Cain, advocate for the Applicant  
Mike Harrison, advocate for the Respondent

Submissions and affidavits received: 4 December 2023 and 5 February 2024 from Applicant  
6 December 2023 and 12 February 2024 from Respondent

Determination: 22 February 2024

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In its substantive determination of 20 November 2023, the Authority found that Jolene Gunter's dismissal was unjustified and she was awarded compensation of \$18,000.00 for humiliation, loss of dignity and injury to feelings and \$13,000.00 for lost wages as a result of the dismissal.<sup>1</sup> The Authority reserved costs and encouraged the parties to resolve any issue of costs between themselves.

[2] They have been unable to do that and both parties have now provided submissions and affidavits on costs.

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<sup>1</sup> *Joline Gunter v Kids World Childcare Lower Hutt Limited* [2023] NZERA 686.

[3] The parties have different positions and recollections about offers made on the day of the investigation meeting and what type of offer/s were made. Kids World Child Care Limited (Kids World), the respondent, submits an offer on the day of the investigation meeting supersedes a Calderbank offer made by Ms Gunter, the applicant, five days before the meeting.

[4] I have not found it necessary to resolve the conflict in their positions on this aspect of the matter because any offers made in the course of discussions to resolve the matter between them on the day of the investigation meeting are not considered to be valid Calderbank offers because the stage the proceeding was at.

### **Ms Gunter's submissions**

[5] Ms Gunter seeks an award of costs for a one-day hearing in the sum of \$8,321.56. This is based on preparation time for one day of meeting time plus submissions on costs with a 50 percent uplift to the daily tariff because of an effective Calderbank offer, plus the filing fee of \$71.56.

[6] Ms Gunter made a Calderbank offer on 15 November 2022 for \$21,000.00, inclusive of costs. This was rejected by Kids World. The total award for remedies in the Authority came to \$31,000.00.

### **Kids World Child Care submissions**

[7] Kids World submits the daily tariff for a one-day meeting would be appropriate. It rejects the uplift sought by Ms Gunter saying the earlier Calderbank offer was invalidated by further offers made and rejected on the day of the meeting. As set out above, I do not intend to take settlement offers made on the day into account because it was too late for valid Calderbank offers to be made.

### **Costs**

[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. Ms Gunter was successful.

[9] The Authority's investigation meeting time amounted to just short of one full day. The starting point for costs based on the Authority's daily tariff is \$4,500.00 for the first day. The Authority can from that starting point consider whether there are

factors justifying an increase or decrease in costs. This can include whether an effective Calderbank offer was unreasonably refused.<sup>2</sup>

*Calderbank offer*

[10] The consequences of unreasonably rejecting an effective Calderbank offer is that costs awarded may be increased. The Calderbank offer attached to Ms Gunter's submissions was marked "without prejudice except as to costs" and it informed Kids World in writing it was a Calderbank offer and should Ms Gunter be successful she reserved the right to bring a copy of the offer to the Authority's attention and seek an uplift to any costs award.

[11] There is a difference of \$10,000.00 between the Calderbank offer of \$21,000.00 made by Ms Gunter and the Authority's award of \$31,000.00. Given the Calderbank offer was made five days before the investigation meeting it is likely preparation for the meeting had been completed prior to that day. However, it was still in advance of the investigation meeting so costs from the day could have been saved had the offer been accepted.

[12] I consider that had Kids World accepted that offer, it would have been in a better position and a modest uplift to reflect the timing of that offer of \$750.00 would be appropriate.

**Orders**

[13] Kids World Childcare Lower Hutt Limited is ordered to pay Joline Gunter \$5,250.00 in costs and \$71.56 for the filing fee.

Sarah Kennedy-Martin  
Member of the Employment Relations Authority

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<sup>2</sup> [Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi](#)