

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 409  
5401625

BETWEEN                      GRAEME ANDERSON  
Applicant

A N D                              OCEANIA GROUP (NZ)  
LIMITED  
Respondent

Member of Authority:        James Crichton

Representatives:              Warwick Reid, Advocate for the Applicant  
Richard Upton, Counsel for the Respondent

Submissions Received:        9 September 2014 from Applicant  
2 September 2014 from Respondent

Date of Determination:        7 October 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1]     I issued the Authority's substantive determination on 11 July 2014 as [2014] NZEA Auckland 299. In that determination, I found exclusively for the respondent employer who I was satisfied had successfully resisted Mr Anderson's various claims.

[2]     Costs were reserved.

**The claim for costs**

[3]     Oceania Group seek costs as the successful party and invite the Authority to fix costs at \$7,500.

[4]     That figure represents an uplift on the daily tariff approach which might otherwise have applied. The justification for the uplift sought is the furnishing by Oceania Group to Mr Anderson of two *Calderbank* letters each of which would have

placed him in a materially better position than the effect of the Authority's determination.

[5] Moreover, the respondent also contends that it was put to additional cost by reason of having to defend a disparity argument which Mr Anderson subsequently withdrew in his closing submissions.

### **The response**

[6] Mr Anderson's response proceeds on the footing that while he accepts costs should follow the event, costs should be fixed at the daily tariff rate and not at the uplifted figure proposed by Oceania Group.

[7] The suggestion that the applicant makes in inviting the Authority not to take the *Calderbank* offers into account is that because Mr Anderson sought vindication, it is appropriate not to take the *Calderbank* offers into account.

### **Determination**

[8] The law on costs fixing in the Authority is well settled and need not be recited again here. The submissions for both parties properly reflect the legal principles involved. There is an acceptance by Mr Anderson that he must contribute to the costs of Oceania Group's successful defence of his personal grievance claim on the basis of the fundamental precept that costs follow the event. However, Mr Anderson says that the extent of those costs ought to be fixed at the daily tariff rate whereas Oceania Group seeks an uplift based first on the disparity argument and second on the *Calderbank* offers made and rejected.

[9] I have to say that the arguments advanced by Oceania Group for an uplift are persuasive. It is the case that Oceania Group were put to additional cost and expense by defending an allegation of disparity which was not persevered with, being effectively withdrawn in Mr Anderson's closing submissions. The effect of that was to put Oceania Group to the cost of responding to that particular allegation, including the legal attendances associated with that issue alone, but then have the issue withdrawn from consideration at the last minute. The fact that it was withdrawn was neither here nor there; the costs had already been incurred.

[10] The argument for the taking into account of the two *Calderbank* offers is equally strong; the usual rule is that public policy considerations prevent a Court or tribunal from not taking an operative *Calderbank* letter into account because parties are to be encouraged to use their best endeavours to resolve matters without recourse to the scarce judicial resources available to the community.

[11] The argument for ignoring the *Calderbank* offers is that Mr Anderson was seeking vindication on the basis he was effectively accused of theft.

[12] I make two observations. The first is that he was not accused of theft; that allegation was not used by the employer and it seemed to me Oceania Group were very careful to avoid any such suggestion.

[13] Second, even if the impression were given that the complaint was one of theft, I accept Oceania Group's submission in the costs setting that the effect of the *Calderbank* offers made to Mr Anderson and both rejected would have been to provide him with the vindication he sought. This is because amongst other things, both *Calderbank* offers give him the opportunity to have his dismissal recorded as a resignation, specifically entitling him to speak about his departure as a resignation.

[14] In those circumstances, I am satisfied that Oceania Group have dealt with the two objections Mr Anderson advances to an uplift in costs and I direct that Mr Anderson is to pay to Oceania Group the sum of \$7,500.

James Crichton  
Member of the Employment Relations Authority