

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2019] NZERA 82
3026692

BETWEEN JEAN COWAN
 Applicant

AND IDEA SERVICES LIMITED
 First Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Meikle for Applicant
 Guido Ballara for Respondent

Submissions received: 14 January 2019 from Applicant
 28 January 2019 from Respondent

Determination: 15 February 2019

COSTS DETERMINATION OF THE AUTHORITY

**A. Ms Cowan is ordered to pay to Idea Services the sum of \$4,000
 within 28 days of the date of this determination.**

[1] In a determination dated 17 December 2018 I found Ms Cowan's dismissal was justified.¹

[2] I reserved costs, indicating that if the parties were unable to resolve costs, both parties would have the opportunity to file cost memoranda and evidence. The parties have been unable to resolve the matter.

¹ [2018] NZERA Wellington 114.

[3] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. Under normal circumstances the Authority would apply a starting point of a notional daily tariff for quantifying costs.

[4] The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks' reasonable.² The principles applying to costs are well settled and do not require repeating.³

[5] An assessment of costs will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.⁴

[6] The investigation meeting took less than one day with an oral determination being issued. On the basis of a four hour hearing the starting point for costs is \$3,000.

[7] On 25 June 2018 Idea Services made an offer to settle Ms Cowan's employment relationship problems on a without prejudice except as to costs basis. The offer was for Idea Services to provide Ms Cowan with an expression of regret for any injury to feelings caused and the payment of a sum of money.

[8] The Authority will take into account any offers made by the parties to settle matters:⁵

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.

[9] The Employment Court has stated:⁶

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a "steely approach" ought to be adopted. No such

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

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].

⁴ Practice Note 2, Costs in the Employment Relations Authority.

⁵ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

⁶ *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15; [2014] ERNZ 1 at [27].

statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court's observation in Da Cruz that Authority awards will be "modest". What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a de novo challenge, having regard to the circumstances of the particular case.

[10] The calderbank offer was rejected. I have not been furnished with the communications made on Ms Cowan's behalf setting out her reasons for the rejection of the offer at that time. In submissions Mr Meikle said the reasons for rejecting the offer were because the offer included settlement of not only Ms Cowan's application in the Authority but also any subsequent proceedings in the Court and it did not address vindication of Ms Cowan's position and the need for her to confront the allegations about her professionalism.

[11] Had Ms Cowan accepted the offer in resolution of her application there could have been no subsequent proceedings. When resolving employment relationship problems without first testing each sides position resolution will be made without addressing vindication of either party. That is the choice to be made when deciding to accept or reject an offer to settle.

[12] Had Ms Cowan accepted the offer she would have been better off and the parties would not have been put to the expense of continuing the litigation. Given Ms Cowan's lack of success I have determined the rejection of the offer was unreasonable and Idea Services is entitled to an uplift from the daily tariff.

[13] Having considered the submissions of the parties an appropriate contribution to costs is \$4,000. Ms Cowan is ordered to pay to Idea Services the sum of \$4,000 within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority