IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2014] NZERA Wellington 28
5399804

	BETWEEN	JACQUELINE CRUMLISH Applicant
	AND	STREEDAGH LIMITED t/a THE GREENMAN PUB LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	Guido Ballara, Counsel for Applicant Peter Churchman QC, Counsel for Respondent
Submissions received:	28 February 2014 from the Applicant 12 February and 4 March 2014 from the Respondent
Determination:	25 March 2014

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination issued on 21 January 2014[1] I found the applicant had been unable to establish she had been unjustifiably constructively dismissed, unjustifiably disadvantaged or discriminated against. Claims for arrears of wages were also not upheld.

[2] Costs were reserved. The Authority has now received submissions as to costs from both parties.

[3] The respondent seeks an order for payment of actual costs of $40,571.80 – in effect an award of indemnity costs. The respondent reasons that the applicant unreasonably rejected a *Calderbank* offer made over two months in advance of the investigation meeting[2]. In addition it alleges that, following the rejection of its offer, the applicant's approach to litigation further increased its costs. The respondent

[1] *Crumlish v Streedagh Ltd t/a The Green Man Pub* [2014] NZERA Wellington 6
[2] The *Calderbank* offer was made on 4 September 2013 and the Authority's investigation meeting commenced on 13 November 2013.

requests an award for all actual and reasonable costs from the point in which the applicant declined its *Calderbank* offer. If indemnity costs are not awarded, the respondent submits costs above the usual daily tariff should be applied.

[4] Counsel for the applicant opposes an order of indemnity costs. He says the respondent's criticisms as to how the applicant's case was conducted are unjustified and submits that there are no factors which warrant an award above the application of Authority's notional daily tariff. Counsel also casts doubt about the ability to enforce an award of costs in circumstances where the applicant is out of the country indefinitely and has limited ability to pay.

Issues

[5] The Authority needs to consider what matters should be regarded in an assessment for costs. The following issues need to be examined:

i. what is the effect of the *Calderbank* offer;
ii. are there any other factors present which would warrant an uplifting or scaling back of costs.

What matters should be considered in an assessment for costs?

1. Offers to settle

[6] The respondent's offer to settle is not a *Calderbank* offer *per se* as Ms Crumlish was entirely unsuccessful with all her claims, however, I have adopted the term as that this is how the parties referred to the offer in their respective submissions. I note also that in its first memorandum associated with this application, the respondent referred to an offer, made by the applicant in August 2013, to settle the matter. The applicant fairly takes issue that privilege attached to that document has not been waived and accordingly I have disregarded information about that offer.

[7] Following the lodging of the applicant's statement of problem, but before an exchange of evidence was required by either party, on 4 September 2013 the respondent made a *Calderbank* offer proposing payment of $4,000 in full settlement of the applicant's claims. The respondent advised that if not accepted and the applicant was unsuccessful in achieving a better result, it would apply for full indemnity costs. The offer was transparent and held open for 7 days.

[8] Submissions on behalf of the respondent reiterated statements made in *Bluestar Print Group (NZ) ltd v Mitchell*[3] that a "'*steely approach' is required*"[4] to costs where reasonable settlement offers have been rejected. In that case the Court of Appeal stated:

> It have been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more that was previously offered.

[9] The Authority has a broad general discretion as to whether it makes orders for costs although that discretion must in exercised in a principled way. Submissions of behalf of both parties acknowledged that the principles set out in *PBO Ltd (formerly Rush Ltd) v Da Cruz*[5] are applicable to the exercise of the Authority's discretion when assessing costs. Those principles are so well established that I have not restated them in full.

[10] Relevant to this matter, costs generally follow the event but the Authority's notional tariff approach (currently set at $3,500 per day of investigation) should not be applied in a rigid manner. Depending on the circumstances of the case the rate can be adjusted upwards or downwards. *Calderbank* offers are a factor that can be considered, however, costs should not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.

[11] In *Metallic Sweeping (1998) Ltd v Ford*[6] Judge Couch noted:

> "…it is not automatic that a party who makes an offer of settlement which is unreasonably rejected is entitled to be indemnified for all subsequent costs.

[12] Counsel says that the applicant's claims were about addressing "*how she was victimised, including by taking a stand against how she was treated"*. He submits the *Calderbank* offer was reasonably rejected by the applicant as it did not assuage these aspects of her case.

[13] I accept that the applicant's claims were, in part, likely motivated by a desire for vindication in circumstances where the parties had previously enjoyed both a friendship and a productive employment relationship. However, I do not consider a

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[3] [2010] ERNZ 446
[4] Ibid at [19]
[5] [2005] 1 ERNZ 808
[6] [2010] NZEmpC 129 at [42]

failure by the respondent to acknowledge the impact events may have had on the applicant is sufficient to conclude that the *Calderbank* offer ought not to be taken into account during a costs assessment[7]. The Court of Appeal in *Bluestar* observed:

> …an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the plaintiff.

[14] I consider an award of indemnity costs in the sum of $40,571.80 is unreasonable in the circumstances of this a matter and would be punitive. However, I find the *Calderbank* offer put the applicant on notice that a decision to continue with legal proceedings carried with it a significant risk with respect to costs if the claim was not upheld. I consider the applicant's rejection of a reasonable *Calderbank* offer is a factor which should result in an increase to the notional daily tariff.

2. Conduct of the parties

[15] This matter involved three full days of investigation at the Authority. The applicant submits the respondent expended unnecessary time questioning the applicant's witnesses and leading irrelevant evidence and suggests the Authority assess costs as if the matter was heard over two days (or less).

[16] Each of the parties allege the other unreasonably introduced irrelevant evidence which prolonged the duration of the Authority's investigation.

[17] The onus lay with the applicant to establish that the respondent was in breach of express or implied terms of her employment. As is often the case where a claim of constructive dismissal is alleged, there is frequently no one discrete incident that gives rise to such a claim and the institutions are obliged to examine all the circumstances in which the resignation occurred. In this instance a significant volume of evidence was furnished to advance the applicant's position, including summonsing 5 witnesses.

[18] Equally, given the nature of the claims, the respondent was required to account for its actions over a wide range of matters, and was entitled to expend resources defending those matters.

[19] While there were no complex matters of law or procedural issues that arose in the investigation, as noted in the substantive determination, there was little by way of

[7] *New Zealand School of Education Ltd v Narfissi* [2012] NZEmpC 35

written evidence on matters central to the events in issue, a large portion of documents submitted by both parties were *"proffered to give background context and/or to discredit the parties' respective positions or credibility*".

[20] I am unwilling to conclude that either parties' conduct should be reflected in an increase or decrease to the daily tariff in all the circumstances. I am also unwilling to substitute a lesser number of days on which I assess costs as suggested by counsel for the applicant.

3. The respondent's costs

[21] Counsel for the respondent provided copies of invoices to evidence actual costs incurred.

[22] The applicant takes issue with the invoices furnished and states these documents do not sufficiently indicate the time spent on various tasks and by whom. Counsel for the applicant further alleges that the respondent's representative charged an unreasonably high hourly rate for services in this matter.

[23] I have already indicated that I am unwilling to make an award for indemnity costs. I consider an appraisal of the respondent's costs and whether they have been reasonably incurred has limited use in a tariff based costs environment such as that employed by the Authority. Having regard to the principle that costs generally follow the event, the focus of my assessment in this application is directed towards ascertaining what a reasonable contribution to costs would be.

4. Ability to pay

[24] As a matter of general principle there is an established approach in this jurisdiction of taking into account a party's ability to pay if payment would place an undue hardship on that party[8].

[25] *In Etimoa Fifita aka Eddy Bloomfiled v Dunedin Casinos Ltd*[9] the Court observed however that the principle can only apply where there is proper evidence of the applicant's financial position, including income, expenditure, assets and liabilities.

[8] *Gamble v AgResearch Ltd* Judge Couch CC 6/09
[9] [2013] NZEmpC 171 at [22]

[26] No documentation was provided to the Authority to support the assertion that the applicant is unable to pay, and I am unable to give any weight to this submission.

Determination

[27] The fundamental principle of an award of costs is to recompense the party who has been successful in litigation for the cost of being represented in that litigation by counsel. There is a need to do justice having regard to the interests of both parties.

[28] I have considered the effect of the *Calderbank* and am not satisfied that the applicant's refusal to accept the offer is such that the respondent is entitled to have its all costs indemnified. Equally I am unwilling to discount the *Calderbank* offer in its entirety and consider a moderate increase to the usual daily rate by $1,000 per day is an appropriate response that reflects the better course of action for the applicant would have been to accept the offer made and prevent the respondent from incurring costs defending a case that had a marginal possibility of success.

[29] For completeness, while the fact that the applicant now resides overseas may impact on how the respondent may enforce orders made in this determination, it is not a relevant factor to an assessment as to liability.

Order

[30] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act I order the applicant to pay the respondent the sum of $13,500 as a contribution towards the respondent's costs.

Michele Ryan
Member of the Employment Relations Authority