IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 86
5437196

	BETWEEN	ERIN DENT Applicant
	A N D	WAIKATO DISTRICT HEALTH BOARD Respondent

Member of Authority:	T G Tetitaha
Representatives:	Applicant in person A Russell, Counsel for the Respondent
Investigation Meeting:	On the papers
Submissions:	30 December 2014 and 15 January 2015 from the Applicant 23 December 2014 from the Respondent
Date of Determination:	24 February 2015

COSTS DETERMINATION OF THE AUTHORITY

A. The effect of the *Calderbank* offers is the reversal of the costs position and I decline to make any award of costs to the applicant. Only the respondent's costs application shall be considered as a consequence.

B. I direct the applicant to pay costs of $8,000 to the respondent by way of instalments of $50.00 per week. The first instalment is due within two weeks of the date of this determination.

Employment relationship problem

[1] The Authority in its substantive determination dated 19 December 2014 found the applicant, Erin Dent, was unjustifiably disadvantaged and dismissed, and awarded

remedies of $2,500 pursuant to s.124(1)(c)(i) of the Employment Relations Act 2000 (the Act).[1]

[2] Both parties have applied for costs. Ms Dent seeks recovery of her legal fees of $2,552.00 (excluding mediation costs) and disbursements of $323.00.

[3] The respondent refers to two *Calderbank* offers and seeks a reversal of costs. It seeks a contribution of $15,000 (GST exclusive) to costs incurred of $55,000 (GST exclusive).

Issues

[4] The following issues are to be determined:

a. What effect upon costs do the *Calderbank* offers dated 1 April and 12 September 2014 have?

b. What is the starting point for assessing costs?

c. Are there any factors that warrant adjusting the notional daily tariff?

What effect upon costs do the Calderbank offers dated 1 April and 12 September 2014 have?

[5] It is common ground the respondent made two *Calderbank* offers on 1 April 2014 of $27,000 and on 12 September 2014 of $42,000. The applicant did not accept either offer. The respondent submits the costs position should therefore be reversed and it is now entitled to costs from Ms Dent.

[6] Ms Dent submits the offer did not address her remedies sought including reputational damage and reinstatement. She also submitted it did not address the personal vindication element which was at the heart of the applicant's claims or the inherent power imbalance between doctors and clerical staff that embroiled the applicant. She states the monetary value of the *Calderbank* offer would only return her to the position she would have been in at the date of hearing, if not for the dismissal.

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1 *Dent v. Waikato District Health Board* 19 December 2014 (2014) NZERA Auckland 526

[7] *Calderbank* offers are discretionary factors for the Authority in determining an appropriate costs award. The making of such an offer does not automatically result in a more favourable award of costs. The offeror has the burden of persuading the Authority to exercise its costs discretion in their favour.[2]

[8] The Court has expressly sanctioned the use of *Calderbank* offers.[3] In order to be effective a *Calderbank* offer ought to be clear as to its terms, and the recipient should be allowed a reasonable time to consider the offer.[4]

[9] Greater weight will be given to the making of such an offer if the party has in the Authority's view unreasonably proceeded with a claim that could have been readily settled and has then recovered less or not significantly more.[5]

[10] In determining costs it is necessary to measure the degree of success the respondent achieved. It is then necessary to take into account the *Calderbank* offer and if it was more than what the applicant achieved, the normal effect of a *Calderbank* offer is that the costs position is reversed.[6]

[11] There may be cases where vindication through seeking a statement of principle in the employment context may be relevant to the exercise of the Authority's discretion toward costs. The relevance of reputational factors means that cost assessment are not confined solely to economic considerations. But equally, 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.[7]

[12] A "steely" approach to *Calderbank* offers is required. The scarce resources of the Authority should not be burdened by litigants who choose to reject a reasonable settlement offer, proceed with litigation and then fail to achieve any more than was previously offered. Where respondents have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the applicant in the absence of compelling countervailing factors.[8]

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2 *Aoraki Corp Ltd v. McGavin* [1998] 3 NZLR 276, [1998] 1 ERNZ 601 (CA)
3 *Ogilvy & Mather (NZ) Limited v. Darroch* [1993] 2 ERNZ 943 (EmpC)
4 See above
5 See above
6 *Blue Star Print Group (NZ) v. Mitchell* [2010] ERNZ 446 at para.24
7 See above at para.[19]
8 See above para.[20]

[13] The settlement offer dated 1 April 2014 of $27,000 was expressed as a payment pursuant to s123(1)(b) of the Employment Relations Act 2000. Two options for payment were proposed - either $27,000 pursuant to s123(1)(b) or $24,000 pursuant to s123(1)(b) and an additional sum of $3,000 plus GST on invoice as a contribution to legal expenses. The settlement was to be endorsed by a mediator from the Ministry of Business Innovation and Employment (MBIE), confidential to the parties and in full and final settlement between the parties. Payment was to occur within 14 days of the mediator's endorsement.

[14] The settlement offer dated 12 September 2014 of $42,000 was expressed as an offer in full and final settlement. Two options for payment were proposed - reimbursement of wages or a combination of wages and legal costs. The settlement was to be endorsed by a MBIE mediator, confidential to the parties and in full and final settlement between the parties. Payment was to occur within 14 days of the mediator's endorsement. The offer also stated the respondent considered it could successfully defend the numerous personal grievances, the dismissal for incompatibility was both substantively and procedurally fair and the chances of reinstatement were low given the interpersonal issues.

[15] Both settlement offers substantially exceeded the monetary amounts awarded to Ms Dent. Following hearing Ms Dent was awarded $2,500 pursuant to s123(c)(i) of the Act. This included a reduction of 50 percent for her contributory conduct pursuant to s124 of the Act. The remedy of reinstatement was declined. The remedy of lost remuneration was also declined.

[16] The settlement offers were made in a timely manner. The first settlement offer was made one month following the termination of Ms Dent's employment. The second settlement offer was made prior two weeks prior to the start of the hearing. Both settlement offers were clear as to their terms, separately addressing payment of wages from costs. The costs offered would have met the entirety of Ms Dent's legal costs sought, excluding mediation. The fact neither settlement offer included reinstatement is irrelevant. Reinstatement was declined and it is no longer the primary remedy under s125 of the Act.

[17] The central issue is whether the settlement offers failed to address personal vindication and reputational factors and should be set aside as a consequence.

[18] Both settlement offers, even taking into account the taxation payable, were significantly in excess of the monetary compensation Ms Dent was awarded.

[19] The alleged principle about an inherent power imbalance between doctors and clerical staff that embroiled the applicant was not sustained in findings. Ms Dent was found to be substantively responsible for the incompatibility.

[20] The reputational damage alleged was assessed in the initial compensatory award of $5,000 (subsequently reduced to $2,500 due to contribution). This amount was substantially less than the settlement sums offered.

[21] Ms Dent refers to vindication by the publication of the determination, submitting she *"has achieved reputational success in the ERA reversing the unlawful Haysom charge"*[9] and presumably the determination she was unjustifiably dismissed.

[22] However the fact a *Calderbank* offer omits reference to an apology or an acceptance of wrongdoing does not necessarily lead to the conclusion that it ought not to be taken into account in assessing costs.[10] The settlement offers may not have included any apology or acknowledgement of wrongdoing, but that does not, in my opinion, justify them being set aside. Any success by Ms Dent may be taken into account in reducing costs.

[23] There are no other countervailing factors which would justify the setting aside of the settlement offers in my assessment of costs.

[24] I determine the effect of the *Calderbank* offers is the reversal of the costs position and I decline to make any award of costs to the applicant. Only the respondent's costs application shall be considered as a consequence.

What is the starting point for assessing costs?

[25] The correct approach to assessing costs in this matter is for the Authority to adopt its usual notional daily tariff based approach to costs[11]. The current notional daily tariff is $3,500. This matter involved a three days investigation meeting. The starting point for assessing costs is therefore $10,500.

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9 Para 33 Memorandum of Applicants seeking costs dated 30 December 2014

10 *New Zealand School of Education Ltd v Nafissi* [2012] NZEmpC 35 at [26]

11 *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [16]

Are there any factors that warrant adjusting the notional daily tariff?

[26] Ms Dent submits the respondent increased costs by the undue influence of Mr Peploe towards a Union delegate, reporting to Kevin Harris as opposed to Dr Buchanan, the respondent's 50 percent responsibility for incompatibility, ignored evidence she was attending to her duties when it asserted she was not, the 'relentless' number of charges, their objection to transcribing her recordings of the meetings, her personal circumstances leading to the presentation of witnesses whose evidence was disallowed, the respondent's late filing of their amended pleading, delays in serving Kevin Harris with a summons, fear of her job loss impacting upon delays in bringing her claim, having been 'corrected in remedies' no further penalty ought to be imposed, delays due to the combining of five personal grievances into one hearing, her partial success in the unjustified disadvantage and dismissal, the considerable hardship of a $15,000 costs award, the lack of discipline by Dr's Buchanan, Hopgood and Rudman around leave, alleged serious fraud, a mental health breakdown 8 weeks prior to hearing and the respondent's omission to include in the joint bundle documents pertaining to her claims, the *Calderbank* and other privileged correspondence and separating other documents she presented into a separate third Volume.

[27] Costs are not an opportunity for re-litigation of the determination. All of the above matters seek to re-litigate matters which were dealt with at hearing with the exception of the late filing of the statement of problem, partial success and hardship.

[28] The late filing of their pleading justifies a reduction in costs. The respondent had been directed to file the amended pleading and omitted to do so. A reduction of $500 is sufficient to reflect this.

[29] Ms Dent was successful in her unjustified disadvantage and dismissal claims. Her contribution to the personal grievance was assessed at 50 percent. Conversely the employer's contribution to the situation must also be of a similar amount. Accordingly a 50 percent reduction in costs shall be applied to reflect her success.

[30] The evidence of Ms Dent's hardship is equivocal. She had credit balance of $6,259.95 as at 21 December 2014. Some of her living expenses do not appear essential such as a payment to Ruapehu Alpine Lifts of $488.58 on 29 October 2014. I have no evidence about her sources of income. I am not convinced any costs

reduction is required or that payments by weekly instalments would be beyond her means.

Factors which may increase an award of costs

[31] Besides the three day hearing in Hamilton, there were three pre-trial matters which required intervention and assistance from both parties. These included:

a. Declining to hear the evidence of three applicant witnesses on 15 September 2015;

b. Declining a further application to introduce the evidence of Hamzi Mahagna on 19 September 2014;

c. Summonsing Kevin Harris and the necessity to discharge it due to him being overseas at the time of hearing.

[32] The respondent seeks an uplift of $4,500 to the notional daily tariff on this basis.

[33] An uplift of $1,000 for each of the unsuccessful interlocutory applications is warranted. Accordingly an increase of $3,000 shall be made to the daily notional tariff.

[34] Overall the costs assessed as payable are $8,000. I also exercise my discretion to require payments by way of instalments of $50 per week.

Outcome

[35] I direct the applicant to pay costs of $8,000 to the respondent by way of instalments of $50.00 per week. The first instalment is due within two weeks of the date of this determination.

TG Tetitaha
Member of the Employment Relations Authority