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## Dunnings v Serious Fun "n" Mind Trust (Auckland) [2010] NZERA 965 (21 December 2010)

Last Updated: 14 January 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 464A/10 5291930

BETWEEN

SHERRIE DUNNINGS Applicant

AND

SERIOUS FUN "N" MIND  
TRUST  
Respondent

Member of Authority:

Eleanor Robinson

Costs Submissions

26 November 2010

Determination:

21 December 2010

### COSTS DETERMINATION OF THE AUTHORITY

[1] By determination AA464/10 the Authority found that Ms Dunnings had been unjustifiably dismissed by Serious Fun 'n' Mind Trust ("the Trust").

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and Mr Austin for Ms Dunnings has filed submissions in respect of costs.

[3] Mr Austin submits that the Applicant made a Calderbank offer, that is a without prejudice offer save as to costs, to the Trust. This offer was made in a letter dated 25 March 2010 ("the Offer") which is before the Authority.

[4] Mr Austin refers in his submission to *PBO Limited (formerly Rush Security 1 Calderbank v Calderbank [1976] Fam 93 (CA)*  
2 [\[2005\] NZEmpC 144](#); [\[2005\] 1 ERNZ 808](#)

*Ltd) v Da Cruz* and submits that the principles on which an award of costs are made are well settled. These well established principles are that costs generally follow the event, without prejudice offers can be taken into account, and costs are modest. I have relied upon the principles as set out in *Da Cruz* in determining this matter.

**Determination**

[5] The amount proposed for settlement contained in the Offer was \$15,000.00. In the determination issued by the Authority Ms Dunnings was awarded \$13,000.00 as compensation under [s. 123](#) (1)(c)(i) of the [Employment Relations Act 2000](#) ("the [Act](#)") and lost wages under [s 123](#) (1)(b), which sum Mr Austin submits is in excess of \$18,000.00

[6] The Authority Investigation Meeting was held on 20 September 2010. The Offer was made well in advance of the Investigation Meeting and consequently before preparation costs had been incurred. There was ample time for the Trust to consider the Offer prior to the Investigation Meeting.

[7] It is necessary to consider what effect the Offer should have upon the award of costs in this matter. The Court of Appeal in *Health Waikato Limited v Van Der Sluis* observed that: "the *Calderbank* letter field is fully discretionary". The nature of this wide discretion is that if the Authority awarded a lesser amount than the amount offered in the *Calderbank* letter, there would be no absolute protection to the party which had made the offer in terms of costs. Equally, the Authority may take into consideration a *Calderbank* letter when more has been awarded than was offered.

[8] The Court of Appeal in *Aoraki Corporation Ltd v McGavin*<sup>[1]</sup> in commenting on the exercise of this discretion, noted that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore these *Calderbank* offers without costs being impacted:

3 [\[1998\] NZCA 88](#); [\[1997\] 10 PRNZ 514](#)

*The discretion as to costs is a judicial one to be exercised according to what is reasonable and just to both parties and the public interest in the fair and expeditious resolution of disputes requires that full weight be given to the extent to which costs were properly incurred subsequent to the non-acceptance of an offer of settlement at a figure above the amount eventually awarded in the litigation.*

[9] Ms Dunnings was awarded more than the amount contained within the Offer. Ms Dunnings also claimed, and was awarded, the remedy of reinstatement pursuant to [s 123](#) (1) (a) of the [Act](#).

[10] The Offer was a genuine attempt to resolve the matter without further expenditure on litigation made at an early stage in the proceedings. I have concluded that taking all these circumstances into account, the Offer should be given full weight.

[11] Mr Austin submits that the costs claimed as detailed on a schedule submitted to the Authority are in all the circumstances reasonable and modest. I take into consideration, as submitted, the fact that the claim involved two causes of action, an unjustifiable disadvantage and an unjustifiable dismissal; and that additional time needed to be expended to obtain information relevant to the claims; and I accept the costs as claimed are reasonable in all the circumstances.

[12] Accordingly, Serious Fun 'n' Mind Trust is ordered to pay Ms Dunnings \$5,800.00 costs, pursuant to clause 15 of Schedule 2 of the [Employment Relations](#)

[Act 2000](#).

**Eleanor Robinson**

**Member of the Employment Relations Authority**

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[\[1\] \[1998\] NZCA 88](#); [\[1998\] 1 ERNZ 601](#)

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