IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 99
3054752

	BETWEEN	RAFE FANNIN Applicant
	AND	LIDDINGTON ELECTRICAL LIMITED Respondent
Member of Authority:	Anna Fitzgibbon	
Representatives:	Amelia Brookland, advocate for the Applicant Shelley Kopu, counsel for the Respondent	
Submissions [and further Information] Received:	28 January and 19 February 2020 from the Applicant 29 January and 21 February 2020 from the Respondent	
Date of Determination:	02 March 2020	

COSTS DETERMINATION OF THE AUTHORITY

A. Mr Rafe Fannin must pay Liddington Electrical Limited (Liddington) $10,000 as a contribution to its reasonably incurred costs of representation in successfully defending personal grievance claims brought in the Authority by Mr Fannin against it.

Substantive determination

[1] By determination on 7 January 2020, the Authority found that Mr Fannin was not dismissed by Liddington and that he had resigned from his employment. Accordingly, Mr Fannin was found not to have an employment relationship problem.[1] Costs were reserved. The parties were invited to exchange memoranda as to costs.

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1 *Fannin v Liddington Electrical Limited* [2020] NZERA 1.

Submissions as to costs

[1] Ms Kopu, counsel for Liddington filed a memorandum as to costs. The total fees incurred by Liddington according to the memorandum as to costs and invoices submitted on its behalf, amounted to $33,447.69 (including GST).

[2] Ms Kopu seeks full reimbursement of costs incurred, or, in the alternative a significant uplift in costs. Ms Kopu advanced the following reasons for seeking a full reimbursement of costs incurred or a significant uplift in the Authority's daily tariff, namely:

(a) A reasonable *Calderbank* offer[2] at an early stage of the proceedings was made and rejected by Mr Fannin who refused to engage in further settlement negotiations;

(b) Mr Fannin's conduct unnecessarily increased Liddington's costs in defending Mr Fannin's claim against it. Ms Kopu cited conduct which she says was unnecessary and unprofessional by both Mr Fannin and his representative and required that she respond formally and at a cost to Liddington. This conduct included raising a claim with the Authority that Liddington had intimidated her by placing an "angry emoji" on a Facebook photo. A matter which Ms Kopu says could have been dealt with between counsel. The second issue related to an improper communication which appeared to amount to blackmail of Mr Liddington referred to by the Authority in its substantive determination[3]. This, too, had to be dealt with by Ms Kopu and required a formal response and increased the costs for Liddington.

[3] In his memorandum as to costs in reply, Mr Fannin submits that "the legal expenses should remain where they are". Mr Fannin says in the event that the Authority decides to make an award of costs, then a half-day tariff is sufficient, given what he described as contribution by Liddington to the circumstances that led to the personal grievance claim.

[4] Mr Fannin also submits that he does not have the ability to pay an award of costs. He says that he has been on a sickness benefit for the past year, has four young children and a wife to support. Mr Fannin further states that he is paying $20 per week in compensation for his

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2 *Calderbank v Calderbank* [1975] 3 All ER 333.
3 Fn 1 at paras [32] and [34].

crimes of 2015 and the remaining $35,000 is being paid over the next 30 years. Therefore, he has no ability to pay and no career prospects. No supporting documentation was provided.

Costs determination

[5] The Authority's power to award costs against a party is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which provides as follows:

> **15 Power to award costs**
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> (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
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> (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit and may at any time vary or alter any such order in such manner as it thinks reasonable.

[6] The Authority has a discretionary power to award costs which must be exercised on a principled basis.

[7] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Limited) v Da Cruz*[4]. Principles set out in *Da Cruz* include that costs are to be modest, not used as a punishment and reasonable. As to quantification of costs the principle is one of reasonable contribution to costs actually and reasonably incurred.

The Authority's assessment of costs usually starts from a notional daily tariff which may be adjusted upwards or downwards to account for relevant factors or particular circumstances in the case. The applicable tariff is $4,500 for the first day of an investigation meeting and $3,500 for each day thereafter. For this two-day investigation meeting, the applicable tariff is $8,000.

***Calderbank* offer**

[8] A factor that may warrant an upward adjustment of the tariff is where the successful party has made an earlier offer to settle, in this case, for an amount more than eventually awarded by the Authority as a remedy.

[9] On 27 March 2019, a *Calderbank* offer was made by Ms Kopu on behalf of Liddington to Mr Fannin. The letter stated:

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4 [2005] 1 ERNZ 808.

> Without prejudice save as to costs
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> Dear Rafe and Helena
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> …However, in the interests of bringing this matter to an expedient close, and without any admission of wrongdoing whatsoever, Liddington Electrical is prepared to put forward its earlier offer of settlement of $8,000 under section 123(1)(c)(i) of the Employment Relations Act 2000. In addition, the usual confidentiality, full and final and non-disparagement clauses would apply. This offer is a *Calderbank* offer and accordingly, should matters proceed to the Authority, Liddington Electrical may use this email in any application for costs as evidence that it attempted to settle prior to matters progressing further. This offer will remain open until 5pm, Monday 1 April 2019 at which time it will cease. I look forward to hearing from you …

[10] This offer was made approximately eight months prior to the investigation meeting held between the parties. The day after receiving the Calderbank offer, on 28 March 2019, Mr Fannin responded as follows:

> Dear all. I have just found out how the Calderbank offer works and I find it a rather sneaky technique to use. Because of this technique I officially declare the following. The negotiations/mediations have officially stopped as parties were not able to meet a common ground. Any further communications which contain offers of settlement from Dave Liddington to settle this dispute will not be read or accepted by myself. …

[11] Mr Fannin rejected the Calderbank offer and any future attempts to resolve his employment relationship problem with Liddington.

[12] The Employment Court in *Lancom Technology Limited v Forman*[5] referred to the following statement made by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell*[6] in relation to *Calderbank* offers:

> It has 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 than was previously offered. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors."

[13] It is my view that the *Calderbank* offer made by Liddington is a factor that should be taken into consideration in determining the appropriate level of costs.

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5 [2018] NZEmpC 30 at [38].
6 [2010] ERNZ 446 at [18]-[20].

[14] Liddington is seeking costs incurred of $33,447.69 (including GST). I have reviewed the invoices and note that there appear to be costs incurred at the rate of $160 plus GST an hour for administrative support. Counsel's charge out rate is $350 plus GST an hour. The sum of $2,124.80 has been included being the cost of attendances at mediation, which is not appropriate.

[15] Mr Fannin submits that costs should lie where they fall and if the Authority is minded to award costs it should take into account his financial circumstances, including payments being made by instalment in respect of his crimes. No further information in relation to Mr Fannin's family's income has been provided and no supporting documents.

[16] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However, Judge Inglis in *Tomo v Checkmate Precision Cutting Tools Limited*[7] stated:

> … the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account.

[17] Having considered the submissions made by both Mr Fannin and Ms Kopu, I find that Liddington as the successful party is entitled to an award of costs in excess of the normal tariff. A full reimbursement of costs is not appropriate, in the circumstances.

[18] Accordingly, Mr Fannin is ordered to pay Liddington the sum of $10,000 costs, which includes an uplift in the Authority's daily tariff of $2000 to take into account the rejection of the Calderbank offer by Mr Fannin and his refusal to continue attempts to resolve the matter.

[19] I order payment of the sum of costs of $10,000 to be paid by Mr Fannin to Liddington within 28 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority

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7 [2015] EmpC 2 at [22].