

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 130
5539530

BETWEEN DEBORAH GALBRAITH
 Applicant

AND THE JELLCOE LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 Mark Beech and Amy Baker for Respondent

Submissions received: No submissions from Applicant
 6 April 2016 from Respondent

Determination: 28 April 2016

COSTS DETERMINATION OF THE AUTHORITY

A. Ms Galbraith is ordered to pay to The Jellicoe Limited the amount of \$3,500 without deduction as a contribution to its costs within 14 days of the date of this determination.

[1] In a determination dated 9 March 2016¹ I held Ms Galbraith had not been unjustifiably disadvantaged in her employment at The Jellicoe Limited (“TJL”).

[2] I reserved costs, indicating that if the parties were unable to resolve that issue, both parties would have the opportunity to file cost memoranda and evidence. The Authority has received submissions from TJL in accordance with the timetabled directions set out in the determination however no submissions were received from Ms Galbraith.

[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. The Authority applies a

¹ [2016] NZERA Auckland 75.

starting point of a notional daily tariff for quantifying costs and may uplift where there is conduct which increases costs unnecessarily.

[4] The Employment Court has held that the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.² As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*,³ awards in the Authority will be modest taking into account conduct which increases costs unnecessarily. Indemnity costs may be justified in relatively rare cases where a party's conduct is particularly egregious.⁴

Calderbank offers

[5] The Authority will take into account, when dealing with the issue of costs, any offers made by the parties to settle matters. As stated by the Court of Appeal⁵:

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.⁶

[6] As was held by the Employment Court in *Mattingly v Strata Title Management Limited*⁷:

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 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.⁸

[7] In its submissions TJJ refers to a written offer made to Ms Galbraith to settle the matter and seeks an uplift from the normal daily tariff based on this offer. I have not had the opportunity of reviewing the offer and therefore am unable to assess whether the offer was reasonable in all of the circumstances and whether Ms Galbraith's rejection of the offer was reasonable.

² *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

³ (2006) 7 NZELC 98,128; [\[2005\] ERNZ 808](#); (2005) 3 NZELR 1 (EMC).

⁴ *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2 at [9].

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

⁶ *Ibid* at [18].

⁷ [\[2014\] NZEmpC 15](#); [\[2014\] ERNZ 1](#).

⁸ *Ibid* at [27].

[8] The investigation meeting took one day. TJJ was successful in defending Ms Galbraith's claim. Applying the daily tariff would see the award of a contribution to costs in the order of \$3,500. TJJ seeks an uplift of \$1,750 amounting to a total contribution of \$5,250. I am not satisfied that an increase in the daily tariff is warranted in this case.

[9] In *Stevens v Hapag Lloyd*⁹ the Employment Court reiterated that proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical.¹⁰

[10] There is nothing in the submissions received from TJJ that indicate a deviation from the normal tariff based approach should apply.

[11] I consider it appropriate that Ms Galbraith pay to The Jelicoe Limited the amount of \$3,500 without deduction as a contribution to its costs and that this payment is made within 14 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority

⁹ [2015] NZEmpC 28.

¹⁰ Ibid at [94].