

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 416
5383703
5392710

BETWEEN RICHARD and NOELA
 GUNSON
 Applicants

A N D WAIPU COVE RESERVE
 BOARD
 Respondent

Member of Authority: T G Tetitaha

Representatives: D Flaws, Advocate for Applicants
 P McGee, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 26 July 2013 from Respondent
 8 August 2013 from Applicants

Date of Determination: 16 September 2013

COSTS DETERMINATION OF THE AUTHORITY

A. Richard and Noela Gunson shall pay to the Waipu Cove Reserve Board costs of \$19,879.17

[1] The Waipu Cove Reserve Board (the Board) seeks costs following the withdrawal then dismissal of the applicants' application for wage arrears on 15 July 2013. It seeks an increase to the Authority's notional daily tariff of \$3,500 to \$5,000 due to a *Calderbank* offer for \$55,000 dated 17 November 2011 and conduct which increased costs unnecessarily by claims which were statute barred. The Board has incurred legal expenses of \$28,105.00, professional witness expenses of \$1,142.50 for an accountant, Mr John Draper, and client expenses totalling \$3,138.25. The Board seeks a significant award of costs.

[2] Mr and Mrs Gunson resist the claim for costs on the basis the Board is a public body operating in surplus and the *Calderbank* offer lacked clarity, transparency and validity and should not be considered by the Authority. A daily notional tariff of \$2,500 should apply.

Issues

[3] The following issues are for determination:

- (a) What is the starting point for assessing costs?
- (b) Are there factors that warrant reduction or uplift in costs?

What is the starting point for assessing costs?

[4] The starting point for costs in the Authority is its notional daily tariff of \$3,500. There are no matters which warrant a departure from this starting point.

[5] This matter occupied 1½ days of hearing time. Accordingly, the starting point for assessing costs is \$5,250.

Are there any factors that warrant adjusting the notional tariff?

Factors which warrant a reduction in the notional daily tariff

[6] Conduct which increased costs unnecessarily can be taken into account when inflating or reducing an award¹. There is no conduct by the Board to warrant reducing costs.

[7] Costs awards must take into account the ability to pay². There is no evidence Mr and Mrs Gunson are unable to meet an award of costs. The Board's status as a public body and its operating surplus ability may infer it can meet its own costs, but this is not relevant to an award against Mr and Mrs Gunson.

Factors which warrant an increase in the notional daily tariff

[8] There are three factors which warrant an increase to the notional daily tariff. These are the *Calderbank* offer, the pursuit of claims which were statute barred due to time limitations and the withdrawal of this application after 1 ½ days hearing time.

¹ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808 (EmpC) at [35]

² *Richardson v. Board of Governors of Wesley College* [1999] 2 ERNZ 199, 229/12 ff

[9] The legal costs of \$28,105.00 cover the period following the *Calderbank* offer. The Gunsons dispute the complexity of the matter and the Boards need for *close analysis of a large number of documents*. The Authority benefitted from the Board's analysis during hearing. It clarified a number of the generic wage arrears claims being made including their alleged activities for which they sought payment, possible duplication of claims and leave taken but not recorded. A schedule was produced quantifying these claims and (it is assumed) resulted in the withdrawal of the application. If this analysis had been undertaken by the Gunsons, this hearing may not have occurred at all.

[10] A *Calderbank* offer was made on 17 November 2011 to pay the Gunsons six month's wages (\$55,000) pursuant to s123(c)(i), seeks their resignation and provide a positive reference. It was rejected.

[11] *Calderbank* offers are a discretionary factor 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. An offeror has the burden of persuading the Authority to exercise its costs discretion in her favour.³ Public interest in fair and expeditious resolution of disputes would be undermined if a party were able to ignore a *Calderbank* offer without consequence on costs.⁴ A "steely" approach to reasonable settlement offers is required.⁵

[12] The settlement offer was clear, transparent and made in a timely manner. It was clearly referenced to their wage arrears claims. If it had been accepted, it would have produced a far better outcome than what occurred.

[13] This matter first came before the Authority on 26 February 2013 in a teleconference. A ruling was made that the wage arrears claims more than 6 years prior to the commencement of this proceeding were statute barred pursuant to s142. This matter should have been resolved by consent. The requirement of the ruling incurred further costs for the Board which should have been avoided.

[14] The hearing occurred on 11 – 12 July 2013. All of the Respondent's witnesses were required to attend, including their accountant Mr Draper. On the second day the Gunson's belatedly sought to withdraw their wage arrears claim and the application

³ *Mayne v Polychem Marketing Ltd* [2013] NZEmpC 127 at [16]

⁴ *Aoraki Corp Ltd v McGavin* [1998] 3 NZLR 276, [1998] 1 ERNZ 601 (CA)

⁵ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20]

was struck out. The Board was required to undertake full preparation and the matter almost completed prior to discontinuance.

[15] The late withdrawal of applications has resulted in the award of costs.⁶ In setting costs the Authority will have regard to the steps a party would have been bound to take up to the point of discontinuance.⁷ On appeal, the Court has made awards of two thirds of a successful party's costs in the Authority.⁸

[16] Taking into account the conduct leading up to and including the late discontinuance of this matter, the Authority determines an award of two thirds of the Boards actual legal costs is warranted. Accordingly a contribution towards the Board's costs of \$18,736.67 is ordered.

[17] The Board was required to incur professional witness expenses of \$1,142.50 for Mr Draper. This is a reasonable disbursement which should be recovered. No order for the recovery of client expenses is made.

[18] Accordingly, Richard and Noela Gunson shall pay to the Waipu Cove Reserve Board costs of \$19,879.17.

T G Tetitaha
Member of the Employment Relations Authority

⁶ *R & T Ostern Trading v Hunter* (EMC, 25/06/01)

⁷ *Data Group Ltd v Gillespie* (EMC, 22/03/04)

⁸ *Watson v New Zealand Electrical Traders Ltd t/a Bray Switchgear* (EMC, 24/11/06)