

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 674
3201539

BETWEEN

SHARON LENOEL
Applicant

AND

WAIKATO
WINDOWARE
LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Alex Kersjes, advocate for the applicant
Meredith MacKenzie, advocate for the respondent

Submissions Received: 8 September 2023 from the applicant
13 September and 6 November 2023 from the
respondent

Date of Determination: 14 November 2023

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In 2022 Sharon Lenoel worked for Waikato Windoware Limited (WWL or the company).

[2] The Authority found that Ms Lenoel was unjustifiably dismissed by WWL and awarded her lost wages and compensation.¹

¹ *Sharon Lenoel v Waikato Windoware Limited* [2023] NZERA 481.

[3] The parties were encouraged to resolve the question of costs but were unable to do so. Ms Lenoel applied to the Authority for costs with WWL opposing that application.

Submissions from the parties

[4] The parties provided submissions on costs.

[5] For Ms Lenoel these included:

- Provision of an invoice of over \$11,000 costs
- Confirmation that the invoice included no travel time or costs
- The daily tariff plus uplifts were sought
- A *Calderbank* offer and unreasonable behaviour were identified as grounds for uplifts.

[6] For WWL submissions included:

- The company attempted to resolve the question of costs in good faith
- Ms Lenoel was only partially successful as a 30 % deduction was made for her contribution to the situation giving rise to her dismissal. A 30 % deduction should be made from costs reflecting Ms Lenoel's contribution
- A *Calderbank* offer was made to settle the costs issue
- WWL is a small business facing a significant downturn at present.

Costs principles

[7] The Authority is empowered to award costs.² Its discretion is governed by principles.³ These include that costs will usually follow the event and will be modest. The Authority specifies a notional daily tariff system with reductions and uplifts permitted.⁴

² Employment Relations Act 2000, Schedule 2, clause 15.

³ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.

⁴ Employment Relations Authority Te Ratonga Ahumana Taimahi Practice Direction, <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era>.

Costs outcome

Starting point

[8] The investigation meeting lasted almost a full day, making \$4,500 the place to start under the daily tariff.

Attempts to resolve

[9] A *Calderbank* (without prejudice save as to costs) offer was made on Ms Lenoel's behalf on 16 September 2022. This offered to settle for \$5,000 compensation and \$2,750 plus GST for costs. The offer was open for a week. WWL rejected the offer. Then in May 2023, a couple of weeks before the investigation meeting, Ms Lenoel's representative contacted WWL's representative to suggest possible further resolution discussions. The company's representative expressed confidence in its position and rejected further discussions.

[10] The amount awarded by the Authority to Ms Lenoel is well in excess of the amount in her *Calderbank* offer. The offer was made at a point where significant costs could have been avoided. I consider that an uplift of \$1,000 is justified.

[11] WWL made a *Calderbank* offer to settle costs. On 6 September 2023 it emailed Ms Lenoel's representative offering \$5,000 plus \$71.56 filing fee as a contribution to costs. This is a not unreasonable offer. However, it was made very shortly before submissions were due from Ms Lenoel. Insufficient time for consideration was available. In any event the impact would not be substantial as the vast majority of costs would already have been incurred at this point and costs are not usually awarded for the creation of costs submissions.

Conduct

[12] Both parties suggest that the other's conduct should be taken into account in the costs assessment.

[13] Submissions for Ms Lenoel refer to the matter being complicated and drawn out by WWL. The company's behaviour is described as unreasonable. This is seemingly based on a failure to appreciate difficulty with its case and not resolve the matter.

[14] Generally the company's conduct did not increase costs. WWL's representative identified herself promptly to the Authority. A modest extension of four days was sought for

the lodging of the statement in reply due to technical difficulties accessing emails and documents. The matter proceeded to a case management conference and was set down for an investigation meeting less than four months later. The meeting proceeded on that date. Evidence was heard from four witnesses with the only minor complication being that one was unwell so gave evidence over the phone.

[15] Essentially the argument for Ms Lenoel seems to amount to the same grounds raised in terms of the *Calderbank* offer – failure to settle when it was reasonable to do so. I am not persuaded that there is an additional basis for an uplift here.

[16] I also reject WWL’s submission that a deduction should be made from costs which would otherwise be awarded, to reflect Ms Lenoel’s contribution to the circumstances. Ms Lenoel’s contribution has already been reflected in the deduction made from remedies. She was in any event successful in establishing her grievance. Any success can be seen as success. The only way Ms Lenoel was able to gain recompense for her grievance was to proceed to an Authority determination. No deduction is made from costs for her conduct when working for WWL.

Conclusion

[17] The starting point of \$4,500 with the uplift of \$1,000 totals \$5,500.

[18] Waikato Windoware Limited is to pay Sharon Lenoel within 28 days of the date of this determination:

- (a) \$5,500 as a contribution to her costs; and
- (b) \$71.56 for the Authority’s filing fee.

Nicola Craig
Member of the Employment Relations Authority