**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI**
**ŌTAUTAHI ROHE**

[2019] NZERA 594
3021060

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| | BETWEEN | VIVIENNE MARSHALL<br>Applicant |
| | AND | NELSON ENGLISH CENTRE LIMITED<br>Respondent |
| Member of Authority: | Geoff O'Sullivan | |
| Representatives: | Nicole Ironside, counsel for the Applicant<br>Graham Downing, counsel the Respondent | |
| Submissions [and further Information] Received: | 5 September 2019 from the Applicant<br>9 September 2019 from the Respondent<br>9 October 2019 (invoices) | |
| Date of Determination: | 17 October 2019 | |

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## DETERMINATION OF THE AUTHORITY

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### Employment Relationship Problem

[1] On 20 August 2019 Christine Hickey issued a determination concluding Vivienne Marshall had personal grievances in that she had been unjustifiably disadvantaged and unjustifiably dismissed.[1] Costs were reserved, and the parties were encouraged to resolve costs between themselves. They have been unable to do so and Mrs Marshall as the successful party now seeks a contribution towards costs incurred.

[2] As was noted in the determination the Authority generally determines costs on its usual notional daily tariff-based approach to costs. This investigation took two days and accordingly the starting point is $4,500 for the first day and $3,500 for the second day. From there adjustments may be made depending on the circumstances.

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[1] [2019] NZERA 492.

**Cost submissions**

[3] Mrs Marshall seeks a contribution which exceeds the daily tariff and asks for an uplift as follows:

(a) $8,500 (over and above the daily tariff);

(b) A 15% uplift to address GST (Mrs Marshall is not registered for GST);

(c) Disbursements for photocopying and binding in relation to bundles of documents of:

(i) $203.50;

(ii) the cost of postage $15.90;

(iii) the filing fee of $71.56; and

(iv) the fee for the second day of the investigation meeting of $306.00.

[4] Mrs Marshall's representative has now forwarded invoices totalling some $32,832.50 inclusive of disbursements claimed and GST. Whilst the invoices do not break down time that may have been spent in mediation it is clear that Mrs Marshall has incurred costs well in excess of the $10,000 costs she asked for in her Calderbank.

[5] As at the date of the Calderbank offer, the parties had already attended mediation, and in considering an uplift I have taken into account costs incurred after that date only.

[6] Mrs Marshall's claim for an uplift is primarily based on a Calderbank offer made on her behalf in writing on either 24 October 2017 or 25 October 2017. Two letters have been put before the Authority which are identical other than the one day date difference. There is however no dispute that the respondent received the Calderbank offer which it rejected.

[7] The applicant offered to settle the matter with the respondent on the following terms:

(a) a payment of six months' salary including a 3% employer contribution towards KiwiSaver;

(b) $15,000 compensation pursuant to s 123(1)(c)(1) of the Employment Relations Act 2000 (the Act);

(c) a contribution of $10,000 towards legal costs. It is noted there is no reference to GST in respect of the contribution towards costs.

[8] Mrs Marshall was entirely successful in her claim and the respondent was entirely unsuccessful in its counterclaim. The Employment Relations Authority awarded Mrs Marshall the following:

(a) A sum equivalent to twenty-six weeks wages from 8 September 2017 until 9 March 2018;

(b) $20,000 in terms of s 123(1)(c)(1) of the Act;

(c) Costs were reserved but as noted tariff costs would equate to $8,000.

[9] Accordingly, if the matter had been settled on 24 October 2017, Mrs Marshall would have received six months' salary plus $25,000 less $10,000 costs incurred by that date. Likewise, the respondent would have also been better off if it had accepted the Calderbank offer at the time.

[10] On behalf of Mrs Marshall, her counsel has set out in her submissions the legal principles which should be taken into account in considering an uplift. Mr Downing on behalf of the respondent opposed an uplift from the normal tariff submitting that:

(a) There is nothing unique in the case which justifies the departure from the standard practice;

(b) That one cannot simply look at one of those offers in isolation and say that it was unreasonable for a party not to accept that offer;

(c) That on 18 October 2017 the respondent also made a Calderbank offer for $26,000 (plus a reference);

(d) That it is not reasonable to consider settlement offers made between the respective parties at that early stage in the dispute as a ground to depart from the standard practice of applying a tariff.

(e) Other submissions were made by the respondent which I have considered in reaching a decision.

[11] In terms of the counterclaims brought by the respondent, Mr Downing submitted that the claims were not unreasonably brought.

[12] The counterclaims made by the respondent were dismissed because of a singular lack of evidence not only in respect of any wrongdoing by Mrs Marshall but also in respect of any loss suffered.

[13] I therefore need to decide whether the circumstances support an increase over and above the normal tariff.

[14] The principles in respect of the approach adopted by the Authority under which an award of costs is made are well settled.[2] Mrs Marshall's settlement offer therefore needs to be considered in light of whether or not its acceptance would have put the recipient in a better place. If the answer is yes as it is here, then costs incurred by the other party as a result of the rejection is an issue warranting consideration and will often see an increase in the resulting award.[3]

[15] The purpose of a Calderbank offer is to attempt to settle matters between the parties at an early stage in the dispute. Accordingly, I do not agree with the submission that I should ignore settlement offers made at an early stage. I would accept, save for the existence of the Calderbank offer, there is nothing unique in the case justifying a departure from the standard practice. However, as indicated above the offer was timely in that it was sent at an early part of the proceedings and should be considered. I also accept that Mrs Marshall will have incurred costs in defending counterclaims which lacked substance.

[16] The respondent notes that the settlement offer was made very early in the proceedings. However, it was made after mediation and after the parties were well aware of their respective positions. I am satisfied that both parties would have been better off if the matter had settled on the basis of the 24 (or 25) October 2017 Calderbank offer.

[17] Further, I accept that Mrs Marshall incurred some unnecessary costs through her need to prepare for and address counterclaims which were not supported by the evidence. I however consider that bearing in mind the nature of the claims, not much time would have been spent in rebutting them.

[18] There is no mention of GST in the October 2017 Calderbank offer.

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2 *PPO Limited (formally Rush Security Limited) v Da Cruz* [2005] 1ERNZ 808 at *Fagotti v Acue and Co Limited* [2015] NZEmpC 135 at [114]

3 *Bluestar Print Group (NZ) Limited v Mitchell* [2010] ERNZ 446 (CA).

**Conclusion and Orders**

[19] For the above reasons I order Nelson English Centre Limited to pay a contribution towards costs incurred by Ms Marshall as follows:

(a) $11,000;

(b) Reimbursement of filing fees and hearing costs totalling $377.56;

(c) Photocopying and binding expenses of $203.50.

**Geoff O'Sullivan**
**Member of the Employment Relations Authority**