IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 400
3096452

	BETWEEN	DIANNE MARSHALL Applicant
	AND	W GARTSHORE LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	David Balfour, advocate for Applicant Sophie Law, counsel for Respondent
Investigation Meeting:	On the papers
Submissions received:	02 October 2020 from Applicant 30 September 2020 from Respondent
Determination:	6 October 2020

COSTS DETERMINATION OF THE AUTHORITY

A. Costs will lie where they fall.

Employment Relationship Problem

[1] In a determination dated 21 September 2020 I declined Ms Marshall's application for compliance orders and penalties.[1]

[2] I reserved costs and invited the parties to resolve the issue between them. In the event that they could not resolve the matter I set a timetable for submissions.

[1] *Marshall v W Gartshore Limited* [2020] NZERA 376.

Application for costs

[3] W Gartshore Limited (WGL) applied for an uplift from the Authority's usual daily tariff seeking full solicitor costs amounting to $14,439.95 including GST.

[4] Ms Marshall opposes the application. Ms Marshall has taken the position that costs should be awarded to her or at the very least costs should lie where they fall. In summary, this was because she was successful in achieving a determination that the comments made by Mr Robert Gartshore, a director of WGL, during his interview with Worksafe breached the terms of the settlement agreement.

Legal principles

[5] 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 has the power to order any party to pay to any other party such costs and expenses as the Authority thinks reasonable.[2] The principles applying to costs are well settled and do not require repeating.[3]

[6] An assessment of costs in the Authority will normally start with the notional daily tariff which is $4,500 for the first day of an investigation meeting and $3,500 for each subsequent day.[4] The investigation into Ms Marshall's application was largely dealt with on the papers, although a brief telephone conference was held to seek clarification about the Worksafe interview from Mr Gartshore.

Mixed success

[7] I regard the present case as being one in which there has been a mixed measure of success. Although WGL was successful in escaping compliance orders or penalties, Ms Marshall was successful to the extent that the comments made by Mr Gartshore were found to be disparaging.

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[2] Employment Relations Act 2000, Schedule 2, clause 15.
[3] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].
[4] Practice Note 2, Costs in the Employment Relations Authority.

[8] The situation of mixed success has been examined by the Court in *Coomer v JA McCallum and Son Limited*.[5]

[9] Ultimately, I must stand back and look at things in the round.[6] Having done so I have concluded that neither party can be said to be more successful than the other.

Calderbank offers

[10] The Authority will take into account any offers made by the parties to settle matters.[7] If the Applicant does not beat the offer, there should be a steely response by the Courts, as that would be in the broader public interest.[8]

[11] That approach was reiterated by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* where the Court said:[9]

> 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. … The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

[12] WGL wrote to Ms Marshall on 12 June 2020 setting out an offer to settle Ms Marshall's claim with the payment of $1,000 to cover both legal costs and compensation. The offer was open for acceptance until 15 June 2020.

[13] Ms Marshall rejected the offer on 15 June 2020. She was seeking an apology and a withdrawal of the comments made by Mr Gartshore in order to resolve matters.

[14] I have concluded Ms Marshall's rejection of the calderbank offer was reasonable. Ms Marshall was seeking more than monetary compensation, she wanted to have the comments recognised as being a breach of the record of settlement and at the least, an apology for the comments being made. Accordingly, no uplift in the daily tariff will be applied.

Conclusion

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[5] *Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.
[6] Ibid at [43].
[7] *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].
[8] *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172, (2004) 17 PRNZ 16 (CA) at [53]
[9] Above n 5 at [18]-[20].

[15] In all of the circumstances of this case I consider costs should lie where they fall and I decline to make any costs award to either party.

Vicki Campbell
Member of the Employment Relations Authority