

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 176A/10
5277854

BETWEEN SUZETTE MARTIN
Applicant
AND NORTHLAND EDUCATION
TRUST INC
Respondent

Member of Authority: R A Monaghan
Representatives: R Harrison, counsel for applicant
J Phipps, advocate for respondent
Memoranda received: 14 May 2010 from applicant
27 May 2010 from respondent
Determination: 14 June 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 19 April 2010 I found Suzette Martin's dismissal was justified. Costs were reserved.

[2] The respondent filed a memorandum in respect of costs. It relied in particular on two Calderbank offers, citing costs of \$8,302.28 (excl GST) incurred since the first of the offers. There was a deduction of \$240 (GST excl) in respect of discussions about the attendance of a witness, leaving the sum of \$8,062.28 (excl GST).

[3] The applicant's memorandum in reply was less than one page long, comprised four paragraphs, and made no mention of the Calderbank offers or any matter relevant to the offers. I assume the largely pro forma nature of the memorandum is related to the fact that the substantive determination is under challenge. However the result is that the Authority does not have the benefit of full information about the applicant's position on costs.

The Calderbank offers

[4] The first Calderbank offer was dated 23 February 2010. It offered the sum of \$10,000 under s 123(1)(c)(i), inclusive of costs and open until 1 March 2010.

[5] It appears there was a counter offer, which was not produced to the Authority. The second Calderbank offer, dated 2 March 2010, rejected the counter offer for reasons which were explained and increased the amount of the respondent's offer to \$12,500. The offer remained open until the end of the day.

[6] The 23 February offer was made on the date timetabled for the contemporaneous filing by the parties of their witness' statements and supporting documents. That date was one week in advance of the investigation meeting scheduled for 3 and 4 March 2010¹. Ms Martin's and all but one of the respondent's statements were filed on 23 February.

[7] I am unable to reconcile precisely the respondent's schedule of invoices with the costs it has cited, and more particularly to identify whether the figure includes disbursements and the cost of the attendance at the investigation meeting of two advocates. It appears, however, that these amounts were included. I do not accept this is a case where the other party should meet the cost of the attendance and travel expenses of two advocates, so with reference to the schedule of invoices I deduct the attendance and expenses of one of the advocates. The deduction is \$1,439.91 (excl GST), leaving \$6,622.37 (excl GST).

[8] There were no submissions based on the second Calderbank offer. In the absence of any other relevant factor, because the respondent was the successful party and the first Calderbank offer was reasonable I would assess costs in the respondent's favour at \$6,622.37.

The Authority's 'tariff'

[9] I understood counsel for the applicant to be inviting the Authority to determine costs with reference to the notional daily rates applied as appropriate in the Authority.

¹ The substantive determination records in error that the meeting was held on 2 and 3 March.

[10] Further to that, the meeting was scheduled to begin at 10 am and there was a delay while the parties made another attempt to resolve the problem. The meeting continued beyond 5 pm in an attempt to avoid a need to return for a second day. I regard the meeting as requiring a little more than a full day, but for the purposes of any notional daily rate I would approach the matter as if the investigation had taken one full day.

[11] However because of the view I take of the first Calderbank offer, I do not apply a notional daily rate to costs here.

Ability to pay

[12] Ms Martin's ability to pay has been raised. There was evidence of her employment status and income since her dismissal. The difficulty is that, as almost always occurs when an inability to pay is asserted in respect of costs in the Authority, barely more than assertion was available and there was no additional information regarding Ms Martin's assets or other sources of income.

[13] However, since Ms Martin qualified for an unemployment benefit I accept at least that her income is limited. Her distress while recounting her circumstances since her dismissal supports a view that her financial position is difficult. I give some weight to that matter but there is too little information to bring it fully into account.

Conclusion

[14] My view of Ms Martin's ability to pay means I take a less steely response to the Calderbank offer than I would otherwise have taken. I order that she contribute to the respondent's costs in the sum of \$4,400.

R A Monaghan

Member of the Employment Relations Authority