

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 12
5393847

BETWEEN NICOLA CATHERINE
 MOORE
 Applicant

A N D ELECTRIX LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: PJ Pa'u, Advocate for Applicant
 CF Parkill/JVR Janes , Counsel for Respondent

Submissions Received: 29 October 2013 from Applicant
 18 October 2013 from Respondent

Date of Determination: 16 January 2014

DETERMINATION OF THE AUTHORITY

A. There shall be no order for costs.

[1] Both parties apply for costs following Ms Moore's partial success of her personal grievance claim¹. Ms Moore seeks a \$7,000 contribution to her costs.

[2] Electrix Limited seeks a contribution towards its costs of \$40,000 plus GST. This is because it made a settlement offer \$3,000 better than what Ms Moore achieved before the Authority.

Issues

[3] The following issues are to be determined:

- (a) What is the starting point for assessing costs;
- (b) Are there any factors that warrant adjusting the notional daily tariff?

¹ *Moore v. Electrix Ltd* [2013] NZERA Auckland 463

What is the starting point for assessing costs?

[4] The starting point for assessing costs in this matter is the Authority's usual daily tariff. The current notional daily tariff is \$3,500. This matter involved a 1½ day investigation meeting. The starting point for assessing costs is therefore \$5,250.

[5] Neither party has produced evidence of their actual costs by way of invoices. Ms Moore simply seeks \$7,000. Electrix Limited submits it has incurred over \$50,000 excluding GST in costs and, if required, can provide copies of invoices and breakdowns.

[6] The parties were directed to file their costs submissions within 14 days of the determination. No further time for filing evidence shall be given. The failure to file invoices with costs submissions has left the Authority in the position of being unable to properly assess the reasonableness or otherwise of either party's application for costs. This is dealt with further below.

Are there any factors that warrant adjusting the notional daily tariff?

Factors which warrant a reduction in the notional daily tariff

[7] Ms Moore was partially successful in respect of a claim of unjustified disadvantage. The principal claim of unjustified dismissal was wholly unsuccessful. This occupied the majority of hearing time. A reduction of two-thirds of the notional daily tariff is appropriate in these circumstances. Accordingly any award of costs in favour of Ms Moore would be limited to \$1,750.

[8] Electrix Limited seeks an award of costs in its favour. The basis for this submission is a *Calderbank* offer of \$8,000 and \$2,000 towards her legal costs made on 24 August 2012. The offer was clear as to its terms and allowed Ms Moore a reasonable time to consider it. Ms Moore achieved an award of compensation of \$7,000 only.

[9] Ms Moore submits the offer was not effective because it did not address reputational factors and her need for public vindication. Her reputation and public vindication was at issue primarily in respect of the unsuccessful claim for unjustified dismissal. The amount of the *Calderbank* offer should have been an effective

settlement of her unjustified disadvantage claim having regard to the outcome she achieved.

[10] An offer to pay compensation at a level that is reasonable might be regarded as conveying vindication. A “steely” approach is required. The scarce resources of the Authority 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. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling and countervailing factors². There are no other factors here to warrant an award of costs in favour of Ms Moore.

[11] The effect of a *Calderbank* offer having not been beaten by Ms Moore at hearing is to reverse the normal costs position. Accordingly, the Authority declines to make any award of costs in favour of the applicant in these circumstances.

[12] However there is an absence of evidence of Electrix Limited’s actual costs, it is difficult to see any justification for an award of \$40,000 plus GST – \$34,000 in excess of the starting point for assessing costs. There are no factors warranting an increase in the notional daily tariff of that magnitude. In the circumstances the Authority also declines to make a costs award in favour of the respondent.

[13] Costs shall lie where they fall. There shall be no order for costs.

T G Tetitaha
Member of the Employment Relations Authority

² *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [19] and [20]