

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 247
3031173

BETWEEN ADELE RIDDLE
Applicant

A N D HILTON HAULAGE LIMITED
PARTNERSHIP
Respondent

Member of Authority: Peter van Keulen

Representatives: Kevin Murray, advocate for the Applicant
Amy Keir, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and further 10 April 2019 and 26 April 2019 from the Applicant
information received: 25 March 2019 and 24 April 2019 from the Respondent

Date of Determination: 29 April 2019

COST DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 26 February 2019¹, I determined that Hilton Haulage Limited Partnership had not unjustifiably dismissed Adele Riddle but it had acted in an unjustified manner, which caused disadvantage to her. I awarded Ms Riddle \$2,000.00 for compensation pursuant s123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[2] In my determination, I reserved costs in order to give the parties an opportunity to try to resolve the question of costs. The parties have been unable to agree costs and now Hilton Haulage seeks costs.

Application for costs

[3] Ms Keir on behalf of Hilton Haulage, says:

- (a) Whilst Ms Riddle was successful with her unjustified action personal grievance, she failed to better a Calderbank offer made by Hilton Haulage so I should award costs to Hilton Haulage.
- (b) The costs award should be based on costs incurred by Hilton Haulage from the date the Calderbank offer was made.
- (c) Based on the failure to beat the Calderbank offer and because of Ms Riddle's conduct which increased costs counsel submits that I should award Hilton Haulage 75% of the costs it incurred from the date of the Calderbank offer.

[4] Mr Murray on behalf of Ms Riddle says:

- (a) As Ms Riddle was successful with her unjustified action personal grievance she is entitled to costs for that success based on the daily tariff.
- (b) Any impact of Ms Riddle's failure to beat the Calderbank offer should sound in a separate award to Hilton Haulage, which I should then offset against the award I would make to Ms Riddle.

¹ *Adele Riddle v Hilton Haulage Limited Partnership* [2019] NZERA 103

- (c) These two awards would cancel each other out and therefore costs should lie where they fall.

Analysis

[5] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are well settled.² Based on clause 15 and the relevant case law³, the approach to be adopted by the Authority includes:

- (a) An award of costs is discretionary and the exercise of that discretion should be made in accordance with principle and not arbitrarily;
- (b) The decision to award costs is consistent with the equity and good conscience jurisdiction of the Authority but equity and good conscience should be considered on a case-by-case basis in terms of the award of costs;
- (c) Costs will generally follow the event but in some instances this will not be the case where, for example, the nature of the case is such that costs should lie where they fall or alternatively where an applicant has not bettered the terms of a *Calderbank* offer which he or she unreasonably rejected prior to the investigation meeting.

Costs for Hilton Haulage

[6] The starting point on costs is that an award of costs should follow the event, that is, a successful party should normally be awarded costs. However, in this case that starting premise is disrupted by a *Calderbank* offer made by Hilton Haulage.

[7] On 9 November 2018, Hilton Haulage sent Ms Riddle a *Calderbank* offer. This was the same day that Hilton Haulage lodged and served its witness evidence. And it was just over two weeks before the investigation meeting on 26 November 2018.

² *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808, reaffirmed by the Full Court in *Daive Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135

³ See also *Victoria University of Wellington v. Alton-Lee* [2001] ERNZ 305; *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385; *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4; *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28.

[8] The offer was for a payment of \$10,000.00 in full and final settlement of Ms Riddle's claim and Hilton Haulage offered to pay any proportion of that amount as costs, including adding GST to the cost proportion, as Ms Riddle would like. The offer was stated to be available for acceptance for six days.

[9] Ms Riddle did not respond to the offer and it lapsed after six days.

[10] I am satisfied that the offer of 9 November 2018 met the requirements to be a valid Calderbank offer.⁴

[11] The purpose of a Calderbank offer is to not only attempt to settle a claim but it also a mechanism by which the offering party reserves the right to bring the offer to the Court's (or in this case the Authority's) attention if the claim is not settled. This is so that it can be used for assessing costs once the claim has been determined.

[12] A Calderbank offer will not be relevant to assessing costs if the receiving party reasonably rejects it or if the receiving party is successful and is awarded a greater amount than the Calderbank offer.

[13] Ms Riddle did not accept the Calderbank offer and she did not provide any explanation for this. Therefore, I cannot determine that it was reasonably rejected by her. And, whilst Ms Riddle was successful with part of her claim she did not beat the Calderbank offer. This means the Calderbank offer is relevant to my assessment of costs.

[14] The Court of Appeal was very clear on the impact of a failure of a successful applicant to beat a Calderbank offer, which had not been reasonably rejected – "(t)he normal effect of a Calderbank offer is that the cost position is reversed."⁵

[15] The Court of Appeal⁶ and the Employment Court⁷ also advocate adopting a "steely approach" to Calderbank offers.

[16] So, whilst Mr Murray's submission that I should assess costs in two parts, dealing with Ms Riddle's success and then Hilton Haulage's entitlement to costs based on the

⁴ *Ogilvie & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943.

⁵ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385 at [24].

⁶ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385.

⁷ *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135.

Calderbank offer, is at first take a reasonable proposition it does not account for the clear direction from the courts on applying Calderbank offers.

[17] For all of these reasons, I determine that Hilton Haulage is entitled to an award of costs in respect of this matter. I must now turn to consider the quantum of that award.

Quantum

[18] The starting point for quantum is the daily tariff. I can depart from applying the daily tariff in appropriate circumstances where, for example, indemnity costs may be appropriate or actual costs incurred since the rejection of a Calderbank offer are more appropriate.

[19] Ms Keir submits that the quantum of any costs award should be based on the costs Hilton Haulage incurred from the date of the Calderbank offer. Her submission is that given various aspects of this claim I should award Hilton Haulage 75% of the actual costs incurred from the date of the Calderbank offer.

[20] I think it is appropriate to base the quantum of the costs award on the actual costs incurred by Hilton Haulage since the Calderbank offer lapsed. This is not however indemnity costs in terms of that amount – I note that Ms Keir has not submitted this is the approach I should adopt. And, similarly this does not mean the quantum be significant. A number of factors must be considered in terms of quantum and Judge Inglis (as she was then) observed in *Stevens v. Hapag-Lloyd (NZ) Ltd* that it would be inconsistent with the statutory imperatives for significant costs awards to be imposed on unsuccessful litigants in the Authority.⁸

[21] Considering all of these factors as well as the submissions made by Ms Keir I conclude that I will award costs to Hilton Haulage based on 50% of the costs it incurred since the Calderbank offer lapsed.⁹ From the breakdown of the costs charged to Hilton Haulage by Ms Keir I calculate this amount to be 50% of \$7,920.00, which is \$3,960.00.

⁸ *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28.

⁹ This is consistent with the Authority's approach to quantifying costs in other cases; see *Sunder v Vasona Networks Inc* [2016] NZERA 530.

Order

Ms Riddle is to pay \$3,960.00 as a contribution to Hilton Haulage's costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority