

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 45
3013476

BETWEEN CORAL SHANKS
 Applicant

A N D ALLIANCE GROUP LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Karina Coulston, Counsel for Applicant
 Lucia Vincent, Counsel for Respondent

Submissions Received: 28 February 2018 from Applicant
 28 March 2018 from Respondent

Date of Determination: 13 April 2018

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant is entitled to a contribution towards her legal costs from the respondent in the sum of \$7,000 plus a further sum of \$195.73 in relation to disbursements (excluding GST).**

[1] By way of a determination dated 9 February 2018¹ the Authority found that Ms Shanks had been unjustifiably disadvantaged in her employment and was awarded \$10,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Costs were reserved and the parties were directed to seek to agree how they would be dealt with. Evidently, no agreement was able to be reached. Accordingly, this determination addresses the question of legal costs.

¹ [2018] NZERA Christchurch 15

[2] Ms Coulston lodged submissions in reply which were not directed, and which I do not believe were required. I have therefore not taken any account of these additional submissions.

[3] Ms Shanks alleged a number of actions amounting to unjustified disadvantage in her employment, of which 22 were investigated by the Authority (as some allegations overlapped). Ms Shanks was successful in respect of seven allegations, none of which could reasonably be seen as being trivial or unsubstantial.

[4] Ms Coulston submits that Ms Shanks was successful in the “overall majority” of her substantive claims and that costs should follow the event. She submits that the charge out rate of \$275 per hour is reasonable, and that an award of costs should be made on the basis that the daily tariff should be uplifted. This submission is made on the basis that the costs of the second mediation, attendance at which was directed by the Authority, were unnecessarily incurred because the respondent had “abandoned the first mediation shortly after it began”. Ms Coulston also asserts that the matter was reasonably complex in terms of events and the legal issues.

[5] Ms Coulston submits that costs in relation to the substantive investigation should be awarded in favour of Ms Shanks in the sum of \$13,700, which is half of the costs incurred, excluding GST but including the sum of \$2,400 in relation to the second mediation.

[6] Ms Coulston refers to an offer to settle made to Ms Shanks via Ms Coulston by the respondent dated 24 November 2017 marked ‘without prejudice except as to costs’, which she identifies as a purported Calderbank offer. Ms Coulston submits that the offer made to Ms Shanks was not a valid, effective or operative Calderbank offer and should not be taken into account. She says that it was unclear as to its terms, as it contained two offers, and lacked transparency, as the first offer (\$12,000 compensation under s 123(1)(c)(i) of the Act) did not deal with pre offer costs. Ms Coulston also says that it gave Ms Shanks too little time to consider it, namely, only four hours and 41 minutes before its stated expiry.

[7] In addition, Ms Coulston submits that the offer made was less advantageous to that which had been made previously via a mediator, but which the respondent denied making.

[8] Ms Coulston says that the second offer contained in the letter (\$8,000 compensation plus \$4,000 costs) also failed to be an effective Calderbank offer in that the level of compensation awarded to Ms Shanks by the Authority exceeded the amount of compensation offered. As the costs element would have gone to the union, Ms Shanks would not have had the benefit of that aspect of the offer.

[9] Ms Coulston also states that the Calderbank offer did not offer vindication and, in fact, potentially stifled it as the offer was made subject to confidentiality. Ms Coulston also points out that the offer also did not offer an acknowledgment of wrong doing or acceptance of responsibility, which was an important factor given that Ms Shanks was still employed by the respondent.

[10] Finally, Ms Coulston also seeks a contribution towards the costs incurred in writing submissions on costs, in the sum of \$1,100 excluding GST. This is on the basis that she made an offer to settle costs in the form of a 'without prejudice save as to costs' offer, which was rejected by the respondent. Ms Shanks therefore seeks a total contribution towards costs in the sum of \$14,800.

[11] Ms Vincent's reply submissions assert that the respondent successfully defended the majority of the claims advanced in the Authority, and that the majority of costs and time involved was for defending claims the applicant did not succeed in. Ms Vincent comments that two claims were unsupported, in respect of which I had commented in the determination that there was "absolutely no evidence". I had also expressed the view that the Authority had no jurisdiction to interfere with or comment on the sanction imposed upon someone who was not a party to the proceedings.

[12] Ms Vincent asserts that costs should be awarded to the respondent in the sum of \$10,000, which is the daily tariff for a two day investigation meeting plus an uplift of \$2,000. In the alternative she submits that costs should lie where they fall.

[13] Ms Vincent had also put an offer to settle costs in the form of a ‘without prejudice save as to costs’ offer, which was rejected by the applicant. However, Ms Vincent does not seek a contribution towards the costs incurred by the respondent of making submissions on costs.

The issues

[14] The following issues need to be determined:

- a. To which party should costs be awarded, if either?
- b. If costs should be awarded to Ms Shanks, does it matter that she did not personally incur any costs liability, being supported by her union?
- c. What effect should the Calderbank offer dated 24 November 2017 have on costs?
- d. If costs should be awarded to Ms Shanks, should they be reduced or uplifted by reference to the daily tariff?

General principles

[15] The Authority’s power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[16] The Authority is bound by the principles set out in *PBO Ltd v. Da Cruz*² when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

To which party should costs be awarded, if either?

[17] It is true that, on a pure numerical tally, the respondent was more successful, as it defeated 15 claims of unjustified action against 7 which Ms Shanks successfully defended. In *William Coomer v JA McCallum and Son Limited*³ the Employment

² [2005] 1 ERNZ 808

³ [2017] NZEmpC 156

Court considered the position where a party had mixed success in a matter. At paragraphs [37] to [43] His Honour Judge Smith stated the following (omitting citations):

[37] Determining which party has been successful can be problematic. Where both parties have had a measure of success determining which of them is entitled to costs is often a nuanced assessment of competing considerations. In *Weaver*, the Court said that the appellants were the only party to have succeeded by any “realistic appraisal”. That conclusion followed because they obtained a monetary award and a finding the Council had breached a duty owed to them. It was immaterial that they had not succeeded to the full extent of their claim because “...success on more limited terms is still success”.

[38] In the earlier decision of *Health Waikato Ltd v Elmsly*, the Court of Appeal considered costs in the Employment Court, stating they usually follow the event. It observed that in most cases it is clear who has been successful and is, prima facie, entitled to an award. The Court said cases where the parties have mixed success are by no means rare and:

... in such instances it is not necessarily easy to determine who “won” the case so as to be entitled presumptively to costs.

[39] That difficulty is illustrated by the costs order that was made. In *Elmsly* both parties had spent approximately the same amount of money on the case. Most of that was spent in arguing about issues where, in the end, Health Waikato was successful. However, Health Waikato was required to pay a contribution towards Dr Elmsly’s costs.

[40] The Court of Appeal said that the trial Judge’s implicit conclusion, that Dr Elmsly had sufficient success at trial to warrant an award of costs, was open to him. The Court had this to say on the entitlement to costs:

The result of the present case was that Dr Elmsly was awarded relief and it would appear (given that there was no *Calderbank* letter) that

he had to go to Court to receive that relief. Conventional practice (probably influenced by the way in which the old payment in rules used to operate) has been to regard a plaintiff in this situation as having an entitlement to costs. While this is no doubt a simplistic and not entirely logical approach, it is reasonably straightforward to apply. Further, it is not unjust to defendants, providing Judges are prepared to react appropriately where there has been a *Calderbank* offer. In any event, whatever the merits of current costs practice, there is nothing out of the ordinary in the conclusion of the Judge that Dr Elmsly was entitled to costs.

[41] The comments in *Elmsly* were echoed by the Supreme Court in *Manukau Golf Club Inc v Shoye Venture Ltd*. The Court held that a fundamental principle applying to the determination of costs, in all the general courts in New Zealand, is that they follow the event.

[42] While I accept the submission for McCallum & Son that the Authority is not a court, the fixing of costs by it is subject to the principles in *Da Cruz* and *Fagotti* which acknowledge that costs generally follow the event. Inevitably that involves assessing which party has succeeded. *Weaver* is an illustration of that principle.

[43] I agree with the Authority that it was appropriate to consider costs in this case by standing back and looking at things “in the round” and, in doing so, to conclude there had been mixed success. That only takes this assessment so far. The agreed statement of facts, and the determination, do not disclose why Mr Coomer’s success in establishing his personal grievance and being awarded compensation was outweighed by what was perceived to be the company’s success. His success, limited as it was, could not have been achieved without lodging a claim in the Authority. Furthermore, there is no evidence Mr Coomer behaved in some inappropriate way or engaged in practices which unreasonably prolonged the investigation.

[18] When I consider the situation presented in this case, Ms Shanks succeeded in seven substantial allegations relating to the way she was treated after having been verbally abused by a supervisor. She had remained an employee of the respondent throughout the Authority's process and, arguably, should not have had to have brought proceedings before the Authority to achieve the outcome she did, as the respondent continued to owe her a duty of good faith. To paraphrase *Coomer*, her success, limited as it was, could not have been achieved without lodging a claim in the Authority.

[19] In summary, taking account of the principles expressed above, I am satisfied that Ms Shanks was sufficiently successful to be awarded a contribution towards the costs incurred in bringing her claim.

Does it matter that Ms Shanks did not personally incur any costs liability, being supported by her union?

[20] I understand from her submissions that Ms Coulston was instructed by the New Zealand Meat Workers' Union (NZMWU) on behalf of Ms Shanks, and that Ms Shanks has no direct liability to Ms Coulston for her costs. Should she therefore be awarded costs at all, given that she incurred no costs personally?

[21] The leading cases on this issue are *O'Malley v Vision Aluminium Ltd (No 3)*⁴ and *Unkovich v Air New Zealand Ltd*⁵. Both of these cases were decided under the Employment Contracts Act 1991 (the 1991 Act), and both decided that costs may be awarded in favour of the employee for the purpose of reimbursing the union even when the union is not a party to proceedings. The relevant costs provisions under the 1991 Act (ss 98 and 108) were materially identical to clause 15 of Schedule 2 of the Act.

[22] In *O'Malley* the Employment Court held that, despite the costs of the legal representation having been met by the union, equity and good conscience meant that s 108 of

⁴ [1992] 2 ERNZ 1043 (EmpC)

⁵ [1995] 1 ERNZ 336 (EmpC)

the 1991 Act could be used to deal with the costs. The employee was entitled, in consultation with the union, to seek a costs order reimbursing the union for costs incurred by the union on the employee's account.⁶

[23] The Court clarified that it was not necessary for the union to be a party to the proceedings. Awarding costs on the union's behalf did not accord party status; it merely recognised, in equity and good conscience, that the union stood behind the employee and would have reimbursed the employee for any costs orders had they been made against the employee⁷.

[24] In *Unkovich*, the court noted, at page 340 that:

[M]embership of an employee organisation, a union, is akin to a form of insurance in which, in consideration for the subscriptions paid, the employee organisation will fund the cost of conduct of litigation involving its members.

[25] Ms Shanks is a member of the NZMWU, and presumably pays her union dues. I also presume that, as a union member, she has a right to support from the union when she needs it in relation to her employment. That right will extend to legal support and representation in the Authority when certain criteria are met.

[26] I am reasonably confident in concluding that Ms Shanks would not have been able to have afforded to have personally instructed Ms Coulston, or any other counsel of the same level of experience and competence. It was not appropriate for the union to have been a party to Ms Shanks' proceedings, as they had no direct role in the personal grievances that she had against the respondent. Yet, without the union's backing Ms Shanks would have found it much harder to have pursued her grievances against the respondent.

⁶ *O'Malley*, page 1045.

⁷ *O'Malley*, pages 1045-1046.

[27] On this basis, I believe that it is appropriate to make an award of costs in Ms Shanks' favour on the basis that the union is entitled under the doctrine of equity to be subrogated to the rights of Ms Shanks in the recovery of its costs in the same way that an insurer has subrogation rights to recover its costs when it has funded successful litigation on behalf of an insured. Any award that the respondent is ordered to make to Ms Shanks is to pay the union's costs in engaging Ms Coulston.

What effect should the Calderbank offer dated 24 November 2017 have on costs?

[28] *Ogilvie & Mather (NZ) Ltd v. Darroch*⁸ sets out the two principal criteria that must be satisfied when a Calderbank offer is made, so as to ensure the recipient is not prejudiced unfairly by the offer by undue pressure being exerted. These safeguards are as follows:

- a) A "modicum of time" for calm reflection, and the taking of advice, before a decision has to be made to accept the offer or reject it; and
- b) The offer must be transparent if the offeror is later to be given the protection the Calderbank offer furnishes.

[29] First, I do not agree that the offer was not transparent or clear because it contained two offers. They were expressed in the alternative, so that Ms Shanks could either accept \$12,000 in compensation, or \$8,000 compensation plus \$4,000 costs. An offer made in the alternative is perfectly proper, and was appropriate in circumstances where the union was funding the litigation. It also did deal with costs, of course.

[30] Normally, giving less than five hours within which to consider such an offer would not be sufficient time, but I accept Ms Vincent's submission that the offer has to be viewed against the context of a recent mediation and continuing negotiations after the mediation. I do not know what was offered and counteroffered in the on-going discussions, but it is clear from the face of the Calderbank letter that it was written with those negotiations firmly in mind.

⁸ [1993] 2 ERNZ 943

Furthermore, the Authority's investigation meeting was due to commence two working days after its expiry. Therefore, in this context, giving just under five hours for acceptance was not unreasonable.

[31] I agree with Ms Coulston that the Calderbank offer did not offer 'vindication' as it stated that a record of settlement would be signed with "the usual confidentiality and full and final settlement clauses". This was a case where Ms Shanks had been publically humiliated by her supervisor, and had tried to obtain some redress by formally complaining. Whilst the respondent did deal with her complaint, and disciplined the aggressor, it did not take steps to ensure that she felt safe and protected.

[32] The issue of vindication was examined by the Employment Court in *Gini v Literacy Training Limited*⁹. In *Gini* Judge Ford considered the previous authorities of *Bluestar Print Group (NZ) Ltd v Mitchell*¹⁰ and *Pathways Health Ltd v Moxon*¹¹. The question that emerges from these authorities is to consider whether the importance of reputational factors outweigh purely financial considerations, whilst bearing in mind that "...an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the plaintiff".¹²

[33] The difficulty with assessing how important it was to Ms Shanks to achieve 'vindication' lies in the fact that the union supporting her seems to me to have instructed Ms Coulston to pursue matters before the Authority which went beyond the strict confines of Ms Shanks' grievance, as I will examine below. Whilst this is understandable, given that it was funding the proceedings, it resulted in Ms Shanks' grievance sharing the stage with these wider issues, and I find it hard to ascertain just how important it was to Ms Shanks to have the issues aired.

⁹ [2013] NZEmpC 25 at [30] et seq.

¹⁰ [2010] NZCA 385 at [17]

¹¹ [2013] NZEmpC 18

¹² *Bluestar*, at [17].

[34] On balance, I believe that vindication was an important factor for Ms Shanks, given the public nature of the verbal abuse she suffered, and her expressed feelings that she had been blamed for the stopping of the chain which led directly to the verbal abuse¹³. If she had accepted the offer made in the Calderbank letter of 24 November 2017, she would not have been able to have told anyone what had been agreed, save presumably, that she had settled matters on a confidential basis. Given the close knit community of co-workers in which she worked, I believe that would have caused her some difficulty. On that basis I find that it had not been unreasonable for her to have rejected the offer.

[35] I will address briefly the issue of whether or not Ms Shanks ‘beat’ the Calderbank offer of 24 November. She had a choice of accepting \$8,000 compensation plus \$4,000 costs or \$12,000 compensation with no contribution to costs. Clearly she beat the \$8,000 offer as she was awarded \$10,000. However, was it realistic for her to have accepted \$12,000 knowing that there would be no contribution to her union’s costs at all? The fact that she was not going to bear those costs personally is not the end of the matter. The costs were incurred on her behalf, and I do not accept that she could just turn a blind eye to pre-offer costs. Ms Coulston has not disclosed what the costs were up to the date of the offer, but they would have been more than \$4,000 in my opinion given the late stage at which the offer was made.

[36] Taking into account the likely costs incurred on her behalf up to 24 November, I find that Ms Shanks would not have been better off having accepted an offer of \$12,000 compared with the award of \$10,000 she achieved and the contribution to costs that the Authority will make in this determination, in respect of which the union has subrogated rights.

[37] In conclusion, I find that the Calderbank offer was not unreasonably rejected by Ms Shanks, and that it cannot be used to justify reversing the burden of costs.

¹³ I refer to paragraphs [4] and [5] of the substantive determination for an account of what occurred.

Should costs be reduced or uplifted by reference to the daily tariff?

[38] The investigation meeting took place over two days, from 09.30 to 17.20 on the first day and from 10.00 to 15.00 on the second day. The second day was a little curtailed therefore. The daily tariff for the first day is \$4,500, whereas the daily tariff for the second day is normally \$3,500. Normally I would reduce the tariff for the second day to \$2,500 on the basis that only five hours were spent sitting, but as Ms Coulston would have had to have travelled back to Christchurch from Timaru, there is justification in retaining the full daily tariff I believe.

[39] Should the resultant combined tariff of \$8,000 be uplifted? First, I do not accept that the matter was unduly complicated, either factually or legally. Any complication that existed was largely due to the multitude of unjustified action claims brought by Ms Coulston on behalf of Ms Shanks. I shall address that below. Therefore, I decline to increase the costs on the basis of complexity.

[40] Should the costs of the second mediation be included? The rationale, that the respondent abandoned the first mediation, refers to matters which are confidential pursuant to s 148 of the Act, which prevents the respondent from rebutting. I therefore have to put that allegation of the mediation being abandoned by the respondent to one side. Should the costs of attending mediation that has been directed be recoverable? As Ms Vincent submits, the authorities are in conflict as to whether or not they are. They are not definitively precluded therefore.

[41] However, the standard practice in the Authority is that the costs of attending mediation are not awarded, so that there have to be exceptional circumstances for it to be warranted. I am not satisfied that it is warranted in this case. The Authority has a duty to direct mediation, *or further mediation*, be used before it investigates a matter unless it considers that the use of mediation or further mediation falls within one of four specified exceptions set out in s 159(1)(b) of the Act. In this case, I considered that a direction to further mediation was warranted. Such circumstances cannot be considered to be exceptional, especially when there

was an ongoing employment relationship. I therefore decline to uplift the daily tariff to take into account the second mediation.

[42] I see no other reason to uplift costs. I shall deal with whether there should be costs awarded to take into account the cost of preparing submissions on costs below, after I have arrived at the amount of the contribution that the respondent should make for the substantive investigation.

[43] Should the contribution be reduced? As I noted above, there were a large number of alleged unjustified actions which were brought before the Authority on behalf of Ms Shanks. Some the Authority either had no jurisdiction to consider or were allegations which were wider than Ms Shanks' personal grievances, or were long shots, based on little cogent evidence¹⁴. In my estimation, these issues did take a sufficiently material time out of the investigation meeting to warrant a reduction in the costs awarded to Ms Shanks. I estimate that it would be just to reduce costs by \$1,000.

[44] Ms Shanks does not seek any disbursements, and so the only disbursements that should be refunded are the Authority's lodgement costs. These are the \$71.56 lodgement fee, and the fee of \$153.33 for half of the second day. However, as the NZMWU will be GST registered, it will have been able to have recouped the GST element of the two sums, and so I deduct GST from them.

[45] Should there be an uplift to take into account the cost of preparing submissions on costs? Ms Coulston sent a Calderbank offer with respect of costs on 22 February 2018, offering to settle costs for \$8,000. This was rejected by the respondent. However, Ms Shanks has not achieved or beaten that sum ,and so I shall not take into account the offer. Furthermore, it is not usual to award costs on costs, so I shall decline to do so, as I see no special circumstances justifying it in this case.

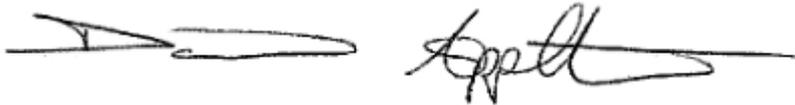
¹⁴ Issues set out in paragraph [42](a), (o), (r), (s) (u) and (v) in the determination of the substantive investigation.

Orders

[46] I order the respondent to make a contribution to Ms Shanks' costs in the following sums within 14 days of the date of this determination:

- a. \$7,000;
- b. \$62.23; and
- c. \$133.50.

[47] I further order that, once these sums have been received by Ms Shanks, she is to pay them immediately and directly to the NZMWU, in such manner and to such account as the NZMWU may direct her to do.

A handwritten signature in black ink, appearing to read 'David Appleton', with a long horizontal stroke extending to the right.

David Appleton
Member of the Employment Relations Authority