

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 281  
3082552

BETWEEN                      TBN  
   Applicant  
  
AND                                UQE  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Tim Oldfield, counsel for the Applicant  
   David Grindle, counsel for the Respondent  
  
Costs Submissions            4 June 2021 from the Applicant  
   29 June 2021 from the Respondent  
  
Determination:                02 July 2021

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]        In a determination dated 21 May 2021 ([2021] NZERA 219), I determined that UQE had not breached the terms of the record of settlement entered into by the parties on 12 June 2019, did not discriminate against TBN on the basis of his union membership, but that TBN did suffer a detriment in his employment.

[2]        In that determination I considered that in the circumstances of the case, costs should lie where they fell, however the Applicant has sought costs. Both parties have filed submissions in respect of costs, with the Respondent seeking leave, which was granted, to do so.

[3]        The matter involved a half day investigation meeting on 24 March 2021.

[4]        Mr Oldfield, on behalf of TBN, is seeking a costs award of \$2,250.00 plus disbursements on the basis of a Calderbank Offer.

*The applicant's submissions*

[5] Mr Oldfield for the applicant submitted that he made a *Calderbank*<sup>1</sup> Offer in a letter headed 'Without prejudice save as to costs' to the respondent on 14 January 2021 (the Calderbank Offer). The Calderbank Offer was an offer to settle the matter on the basis that TBN would withdraw his claim and costs would lie where they fell.

[6] TBN was not successful in the majority of his claims before the Authority but was awarded a modest amount as remedy in respect of the detriment suffered. This was more than that offered by him to settle the matter in the Calderbank Offer.

[7] In support of the application for costs Mr Oldfield submits that although TBN did not incur costs personally, the Pulp and Paper Workers Union Kawerau Inc (the Union) did so on his behalf and it incurred more in costs than the amount sought as costs from the date of the Calderbank Offer on 14 January 2021 to the conclusion of the investigation meeting. It is submitted that it is well established that a union may recover costs in employment institutions.<sup>2</sup>

*The Respondent's submissions*

[8] Mr Grindle for the Respondent submits that costs should lie where they fall as indicated in the Authority's determination. He submits that the Respondent declined the Applicant's Calderbank Offer and counterclaimed with a Calderbank Offer dated 21 January 2021 in which UQE asked for a contribution of \$4,500.00 to its actual costs which were in excess of \$20,000.00.

[9] It is submitted that the Respondent was justified in declining the applicant's Calderbank Offer on the basis that the respondent had incurred, and continued to incur until the Determination, significant and increased costs due to the applicant's unusual and inconsistent claims.

[10] These included TBN changing on multiple occasions the date of the catalyst event which underpinned his grievance claim. It is submitted that TBN also misled the respondent about when the catalyst event occurred. This resulted in the respondent being forced to make inquiries and respond to evidence in excess of what should have reasonably been expected to have been required.

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<sup>1</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA)

<sup>2</sup> *Unkovich v Air NZ Ltd* [1995]1 ERNZ336 at 340; *O'Malley v Vision Aluminium Ltd (No 3)* [1992] 2 ERNZ 1043 at 1045

## *Principles*

[11] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

### **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.

[12] Costs are at the discretion of the Authority<sup>3</sup>.

[13] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*<sup>4</sup>.

[14] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

[15] Of relevance in this instance is the principle that costs will be modest. The Employment Court further observed at para [47]:

... we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.

### **Costs Award**

[16] In this matter both parties had a degree of success, the respondent was found not to have breached a settlement agreement, or to have discriminated against the applicant. The applicant was found to have suffered a detriment. That was the basis on which I opined that costs should lie where they fell.

[17] However there have been Calderbank Offers which should be taken into consideration in determining the appropriate level of costs.

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<sup>3</sup> *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

<sup>4</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

[18] Whilst taking note of the comments made by Judge Inglis as regards the ameliorating of the ‘*steely*’ approach noted in the judgment in *Stevens v Hapag-Lloyd (NZ) Ltd*<sup>5</sup> which referred to ‘*significant costs awards*’, I consider that Calderbank Offers may still be taken into consideration in the matter of costs in the Authority on the basis that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted<sup>6</sup>.

[19] The Calderbank Offer set out in the letter dated 14 January 2021 was made well in advance of the investigation meeting. The respondent responded in a timely manner pointing out its concerns with the manner of proceeding in the case.

[20] TBN was awarded a remedy by the Authority, which meant that he benefitted financially by the respondent rejecting his Calderbank Offer. He was also in a better position financially than he would have been if he accepted the respondent’s Calderbank Offer.

[21] Taking the normal daily rate in the Authority of \$4,500.00 as a starting point, a half day investigation meeting would merit an award of \$2,250.00. Taking all the submissions into consideration, I consider that \$1,250.00 is the appropriate costs award in this case.

[22] **I order UQE to pay TBN a contribution to costs in the sum of \$1,250.00 plus disbursements of \$728.38, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.**

[23] **UBE is also ordered to pay TBN the Authority filing fee of \$71.56.**

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>5</sup> [2015] NZEmpC 137 at para [95]

<sup>6</sup> *Aoraki Corporation Ltd v McGavin*<sup>6</sup> [2004] 1 ERNZ 172 (CA) at [53]