

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 396
3064993

BETWEEN VIRAT VIJ
 Applicant

A N D SIGNORA CAFÉ LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Applicant in person
 Nick Mason, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 18 September 2020 from the Applicant
 8 September 2020 from the Respondent

Date of Determination: 2 October 2020

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 25 August 2020¹, I dismissed Virat Vij's claims of unjustified action causing disadvantage against the Signora Café Limited, these claims arising out of his dismissal under a valid trial period provision in his employment agreement.

[2] In my determination I also reserved costs so that the parties could try to agree costs. The parties were unable to agree and now Signora Cafe seeks costs.

¹ Vij v Signora Café Limited [2020] NZERA 338

Application for costs

[3] Mr Mason seeks an award of costs for Signora Café of \$11,500.00 as it was successful in defending Mr Vij's claims in a half day investigation meeting and because it had made a Calderbank offer which Mr Vij did not accept.²

[4] Mr Vij says that no award of costs should be made as he pursued his claims in good faith, he felt and still feels aggrieved by the way he was treated during his employment and only sought to clear his name. He did not cause any delays in this process and wanted to try and resolve it short of an investigation meeting by attending further mediation. Also, he did not receive the Calderbank offer. And finally he outlined the hardship he has suffered arising out of his dismissal from Signora Café and since then.

Analysis

Costs in the Authority

[5] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*³ and other relevant Employment Court and Court of Appeal decisions.⁴

Costs for Signora Café

[6] The starting point is that costs should follow the event. As Signora Cafe was successful in defending Mr Vij's claims it is entitled to an award of cost. I am not persuaded by Mr Vij's argument that this case is one where no costs should be awarded at all.

² A Calderbank offer is an offer made by one party, normally a respondent, to settle the claim on terms. The offer is marked "without prejudice save as to costs". The purpose of a Calderbank offer is to not only to attempt to settle a claim but by using the stated words the offering party is reserving 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 the offer can be used for assessing costs once the claim has been determined.

³ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808

⁴ *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, *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135, *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127

The effect of the Calderbank offer

[7] The next point is that the normal practice of the Authority when setting costs is to apply the daily tariff which comprises awarding an amount of costs based on a set amount for each day of the investigation meeting.

[8] However in this case Mr Mason seeks an award of costs outside of the normal daily tariff structure because of the Calderbank offer. Mr Mason says a Calderbank offer was made by Signora Café to Mr Vij on 16 July 2019, which was an offer by Signora Café to settle the claim against it by the payment of \$2,000.00 to Mr Vij. Mr Vij did not respond to the offer and subsequently, as Mr Vij was not successful with his claims, Mr Vij was not awarded any more than was offered to him. Mr Mason says, as Mr Vij failed to better the terms of the Calderbank offer this is relevant when assessing costs and it is a consideration which warrants costs being awarded at a much higher rate.

[9] The issue with the Calderbank offer is that Mr Vij says he never received the offer and had he, he would have responded and not simply ignored it as appears to have happened. Mr Vij also makes a number of further submissions which support his position that he never received the Calderbank offer.

[10] This is a difficult issue to resolve in the context of the costs application. On reflection and after weighing up the submissions made I accept that the appropriate course of action here is to not give any weight to the Calderbank offer. There are two main reasons for this. First for the reasons explained by Mr Vij, it seems more likely than not that Mr Vij did not receive the Calderbank offer. And second, in any event, the primary function of a Calderbank offer is to protect a respondent against a cost award and secure one for it even if it is unsuccessful because it has sought to resolve the claim appropriately at an early stage – in this case that is not an issue as Signora Café was successful and the Calderbank offer can only be relevant to the lesser secondary purpose of increasing a cost award if appropriate and I am not satisfied in the circumstances that that is appropriate.

Applying the daily tariff

[11] So I will apply the normal practice of awarding costs to Signora Café on the basis of the daily tariff. In this case my investigation took a half-day and therefore the initial quantum based on the daily tariff is \$2,250.00.

Adjusting the daily tariff

[12] The next point is to consider if the initial quantum of \$2,250.00 should be adjusted. The daily tariff amount can be adjusted for various reasons. The factors relevant to the consideration of the increase or decrease of the daily tariff include:

- (a) Costs awards in the Authority will be modest;
- (b) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- (c) Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;
- (d) Without prejudice offers can be considered;
- (e) Impecuniosity of the parties may be relevant;
- (f) A decision on quantum should be also in line with principle and not determined arbitrarily bearing in mind the equity and good conscience jurisdiction of the Authority.

[13] Having considered the various aspects of this claim including how it was conducted and Mr Vij's personal circumstances, I am not persuaded that it is appropriate to adjust the daily tariff.

Conclusion

[14] I award costs to Signora Café based on the daily tariff for a half day investigation meeting being \$2,250.00.

Order

[15] Mr Vij is to pay Signora Café Limited \$2,250.00 as a contribution to its costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority