

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2017] NZERA Wellington 1  
5608911

BETWEEN LYN WOODCOCK  
Applicant

A N D AGRISSENTIALS NZ  
LIMITED  
Respondent

Member of Authority: T G Tetitaha

Representatives: R Ward, Counsel for the Applicant  
R Nabney, Counsel for the Respondent

Submissions Received: 11,12 and 19 December 2016 from Applicant  
14 December 2016 from Respondent

Date of Determination: 6 January 2017

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**COSTS DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A. Agrissentials New Zealand Limited is ordered to pay Lyn Woodcock the sum of \$4,500 as a contribution towards her legal costs.**

**Employment relationship problem**

[1] The Authority's substantive determination dated 21 November 2016<sup>1</sup> found Lyn Woodcock was unjustifiably dismissed by Agrissentials Limited. Agrissentials was ordered to pay three months' ordinary remuneration less PAYE to be reduced by 25% and compensation of \$5,625 inclusive of a reduction of 25% for contributory behaviour. Costs were reserved.

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<sup>1</sup> [2016] NZERA Wellington 148.



[2] Ms Woodcock applies for costs. She has not been invoiced nor paid any costs because her solicitor was “working under an allowable conditional (or contingency) basis.”<sup>2</sup> The accumulated billable hours total \$14,225.00 exclusive of GST.<sup>3</sup> The respondent objects to any award of costs where there has been no invoicing or payment.

**What is the starting point for assessing costs?**

[3] The correct approach to assessing costs in the Authority is to adopt its usual daily notional tariff as a starting point (currently \$3,500 for this matter) then increasing or decreasing the notional daily tariff according to any relevant factors.

[4] This matter involved a one day investigation meeting. The starting point for assessing costs is therefore \$3,500.

**Costs paid on a contingency basis**

[5] Lawyers are permitted to enter into conditional fee arrangements provided they meet the requirements of the Lawyers and Conveyancers Act 2006 and its Rules.<sup>4</sup> The amount of \$14,225.00 exclusive of GST appears to be the “normal fee” she would be invoiced for legal services conditional upon her success. The fact she is yet to be invoiced does not affect the validity of her conditional fee arrangement. It also does not affect the ability for her to seek to recover some of the costs she has incurred.

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

[6] Ms Woodcock submits the tariff should be increased because she made an open offer to settle matters on 15 December 2015 for payment of \$5,000 under s123(1)(c)(i) and \$1,500 plus GST towards her legal fees. A subsequent *Calderbank* offer on 17 December 2015 sought payment of \$7,500 and a costs contribution of \$1,500 plus GST. Neither were accepted.

[7] This is not a case that warrants the imposition of indemnity costs. Indemnity costs may only be ordered where a party has behaved either badly or very

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<sup>2</sup> Second email R Ward dated 12 December 2016.

<sup>3</sup> First email R Ward 12 December 2016.

<sup>4</sup> Rule 9.8 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

unreasonably<sup>5</sup>. Rejection of a *Calderbank* offer does automatically result in full recompense of legal costs if the party rejecting the offer is unsuccessful. The effect (if any) that the making of a *Calderbank* offer has on the question of costs is at the discretion of the Court<sup>6</sup>.

[8] However there must be consequences upon costs of parties ignoring *Calderbank* offers. A steely approach is now required<sup>7</sup>. Courts may order a party to pay increased costs if without reasonable justification a party fails to accept an offer of settlement, whether or not that is in the form of a *Calderbank* offer<sup>8</sup>.

[9] The correct approach to costs in the Authority is to assess an appropriate contribution to the successful parties costs have regard to *Calderbank* offers. This is to meet two key policy considerations – first, that conduct unnecessarily increasing costs ought to be discouraged; and second, that costs in the Authority should generally be modest (and bear a degree of proportionality, including to the notional daily rate)<sup>9</sup>.

[10] In the circumstances, this justifies an uplift of \$1,000 to the notional daily rate. This equates with the same approach taken by the Court in setting costs in the Authority where there has been an unreasonable rejection of a *Calderbank* offer<sup>10</sup>.

[11] Agrissentials New Zealand Limited is ordered to pay Lyn Woodcock the sum of \$4,500 as a contribution towards her legal costs.



**TG Tetitaha**  
**Member of the Employment Relations Authority**



<sup>5</sup> *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 at [27]; followed in *Bracewell v Richmond Services Ltd* [2014] NZEmpC 171 at [11]-[12].

<sup>6</sup> Rule 14.11, HCR 2016.

<sup>7</sup> *Blue Star Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [18] and [20].

<sup>8</sup> Rule 14.6(3)(b)(v), High Court Rules 2016.

<sup>9</sup> *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [98].

<sup>10</sup> *Ibid.*