

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 730
3213959

BETWEEN KELLY DRAKE
Applicant

AND MANIOTOTO HEALTH
SERVICES LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Marilyne Suchley, advocate for the Applicant
Brenda Thom, counsel for the Respondent

Submissions Received: 16 October 2024 from the Applicant
29 October 2024 from the Respondent

Date of Determination: 09 December 2024

COSTS DETERMINATION OF THE AUTHORITY

Substantive determination

[1] The Authority in its determination dated 3 October 2024 found that Ms Drake was unjustifiably disadvantaged in her employment and awarded the sum of \$8,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).¹

[2] The Authority reserved the issue of costs and timetabled for an exchange of submissions in the event the parties were unable to agree about costs.

[3] Non-publication orders made in the substantive determination for the residents of Maniototo Health Services Limited (Maniototo) and their families and other employees referred to who did not give evidence remain in effect.

¹ *Kelly Drake v ETE* [2024] NZERA 582.

[4] The Authority did not, as Maniototo requested, prohibit from publication the substantive determination in its entirety. An interim non-publication order in respect of the respondent's identity was made to enable a challenge within 28 days. The interim order was stated to lapse after that time in the absence of a further order from the Authority or Employment Court. Ms Thom confirmed there has been no challenge. The interim order has lapsed. The respondent can be named in this determination.

[5] The parties were not able to resolve costs and submissions have now been received.

The applicant's costs submission

[6] Ms Suchley set out in a succinct submission that she had taken the file over from Mr Allan Halse in early 2024. She attached to her submission two offers in the nature of Calderbank offers expressed to be "without prejudice save as to costs." One offer was made on behalf of Maniototo in a letter dated 26 May 2023 and the other on behalf of Ms Drake in a letter dated 28 March 2024. Both offers were rejected.

[7] Ms Suchley refers to the basic tenets set out in the full Court judgment of *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* that the Authority has held to when considering costs.²

[8] Ms Suchley submits that as the successful party there should be costs awarded to Ms Drake in the sum of \$4,500 for the one-day investigation meeting.

The respondent's cost submissions

[9] Ms Thom in a lengthier submission says that looking at things in the round Ms Drake should not be awarded costs.

[10] The reasons advanced for this are summarised below:

- (a) The statement of problem was lodged before an attempt at mediation.
- (b) Ms Drake initially sought more than \$140,000.
- (c) A Calderbank offer was made on 26 May 2023 and was open until 9 June 2023. The "without prejudice save as to costs offer" was on the

² *PBO v Da Cruz* [2005] ERNZ 808 at [44].

basis that Ms Drake resign effective 9 June 2023. Maniototo would pay the sum of \$35,000 within 14 days of signing a record of settlement in the standard form with appropriate confidentiality and non-disparagement clauses. A certificate of service would be provided. The offer was rejected on the same day it was made.

- (d) A three-day investigation meeting scheduled for 10 October 2023 had to be adjourned because Mr Halse was unwell at late notice. On 18 April 2024 there was confirmation that Ms Suchley now represented Ms Drake.
- (e) Directions were not complied with.
- (f) Ms Suchley sent a “without prejudice save as to costs” letter containing the in essence the same offer on behalf of Ms Drake dated 28 March 2024. Maniototo rejected that offer as it had fully prepared for the late May investigation meeting.

[11] Ms Thom seeks costs be awarded to Maniototo in the sum of \$4,500 and not Ms Drake. Alternatively, that costs lie where they fall.

Analysis and conclusions

Costs in the Authority

[12] Clause 15(1) of the second schedule to the Employment Relations Act 2000 (the Act) provides that the Authority may order any party to a matter to pay to the other party such costs and expenses as it thinks fit.

[13] The Authority has a discretion whether to award costs and in what amount. The discretion is to be exercised in accordance with principle and not arbitrarily. Costs are not to be used as a punishment or an expression of disapproval and costs generally follow the event. Frequently costs are judged against a notional daily tariff which is set at \$4,500 for the first day and \$3,500 for each subsequent day. Calderbank offers can be considered by the Authority in the exercise of its discretion as to costs.³

[14] The difference between the Authority and Employment Court was recognised in *Da Cruz* as being such to warrant the Authority taking a different approach to the

³ Above n 2 at [44].

question of costs.⁴ This difference was re-emphasised in a cost setting by the Employment Court in *Stevens v Hapag-Lloyd (NZ) Ltd*.⁵

The Calderbank offers

[15] The Employment Court in *Stormont v Peddle Thorp Aitken Limited* considered the approach to Calderbank offers in the exercise of the discretion as to costs.⁶ The judgment of the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* about settlement offers in the employment area was referred to. The following observations of the Court were set out:⁷

... It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors. The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

[16] In *Stormant* there was a statement that the reasonableness or otherwise of the decision to decline a settlement offer is assessed at the time the offer is rejected.⁸ Further, that a Calderbank offer is one of a number of factors to have regard to in the exercise of the Court's discretion. This point was held to apply with particular force to costs in the Authority with regard to reasons explained in *Stevens v Haplag -Lloyd (NZ) Ltd*.⁹

[17] Mr Halse on behalf of the applicant rejected the offer made by Maniototo claiming that it would be easily exceeded in the Authority. The amount offered exceeded by a considerable margin what Ms Drake was awarded by the Authority. Ms Drake would have been better off financially had she accepted the Calderbank offer from Maniototo on 26 May 2023. It was presented at an early stage of the proceedings before either party had incurred significant preparation costs.

[18] There is one aspect of the offer that requires more careful consideration in assessing the reasonableness of the rejection of the offer. Ms Drake was still an

⁴ Above n 2 at [39].

⁵ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [[94] - [98].

⁶ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 159 at [22].

⁷ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20].

⁸ Above n 6 with reference to *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10 at [28].

⁹ Above n 5.

employee when the 26 May 2023 offer was made. One of the claims in the statement of problem was a comprehensive return to work plan which ensured Ms Drake's safety. The Calderbank offer included that Ms Drake resign. In rejecting the offer on the same day it was made Mr Halse wrote amongst other matters in his email to Ms Thom:

...You will be aware that Kelly has required MSHL address the workplace bullying and write to the family of the resident Kelly (allegedly) witnessed being assaulted, apologising for not notifying them of the alleged assault. These requirements, I suggest will disqualify your Calderbank anyway.

[19] Ms Drake had remained away from the workplace because she said she had been bullied by other employees at Maniototo and it was unsafe for her to return. Her absence from Maniototo was initially covered by a series of medical certificates. The last medical certificate was provided on 11 April 2023 indicating unfitness for work until 1 July 2023. No further medical certificates were received from Ms Drake after 1 July 2023. It was subsequently clarified Ms Drake had been working elsewhere when a statement of evidence was lodged in August 2023 because she said she could not afford to not work when her leave entitlements had run out. Ms Drake obtained employment for a period away from her hometown and family in 2023 but then was able to obtain employment closer to home.

[20] The claim for a return-to-work plan that ensured safety was not addressed in the offer. It was not set out in the offer why Maniototo considered that was not possible or preferable and that Ms Drake should instead resign with a monetary payment. Calderbank offers should be transparent. In those circumstances Ms Drake had a proper reason to reject the offer on that basis at the time it was made.

[21] The same offer was made ten months later on behalf of Ms Drake. It included an offer to resign. Maniototo had a proper reason to reject that offer on the basis that the offer to settle included a payment of the same amount offered ten months previously of \$35,000. By that time Maniototo had fully prepared for an investigation meeting and incurred costs in doing so.

[22] The Authority in the exercise of its discretion as to costs does not take the Calderbank offers into account. The offers were rejected for proper reasons.

Should there be a reduction to the costs awarded?

[23] Ms Drake was the successful party. She is entitled to consideration of a contribution towards her costs.

[24] Ms Thom submits that unjustified disadvantage claims in the statement of problem were not successful and that Ms Drake's only success was with respect to a matter not particularised in the statement of problem. The finding of unjustified disadvantage concerned an aspect or subset of the claim that there was an unsafe workplace due to bullying which had not been investigated or addressed.

[25] Ms Drake was not completely successful with all of her claims. The Authority needed to hear most of the evidence to determine the grievance it found made out. Whilst initially the investigation meeting was set for three days it was able to be investigated efficiently within one day. Only one of the anticipated seven summoned witnesses was called and issues with her evidence were able to be resolved constructively by agreement. The Authority is not minded in the exercise of its discretion to reduce the costs awarded on the basis of limited success.

[26] Mr Halse was a day late with Ms Drake's statements of evidence but that does not call for a reduction. There were some issues around an index for the bundle and "will say" statements. Only one of the summoned witnesses was called and that witness had a "will say" statement. The index aspect is not significant enough to weigh in an assessment of an award. The Authority and parties managed without an index in the circumstances.

[27] Mr Halse's unwellness necessitated an adjournment. Whilst clearly inconvenient there is no direct evidence of the additional costs incurred as a result that were unrelated to the later investigation meeting that proceeded. The Authority does not conclude that matter should sound in a reduction of costs.

[28] There is one matter that is relevant to costs. Maniototo was the successful party in a preliminary determination on the papers regarding whether a letter dated October 2021 raised a grievance within the 90-day statutory time limit or there were exceptional circumstances for leave to raise outside that timeframe. Costs were reserved to be dealt with after the substantive determination.¹⁰ That matter was dealt with on the papers. A \$500 reduction to the daily tariff is appropriate.

[29] In all the circumstances a fair and reasonable award for costs is the sum of \$4000.

¹⁰ *Drake v Maniototo Health Services Limited* [2023] NZERA 359.

[30] Maniototo Health Services Limited is ordered to pay to Kelly Drake the sum of \$4000 being costs.

Helen Doyle
Member of the Employment Relations Authority