

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 345  
3150504

BETWEEN            SHARLENE EDWARDS  
                                 Applicant  
  
AND                    JS EWERS LIMITED  
                                 Respondent

Member of Authority:     Peter van Keulen  
  
Representatives:         Paul Mathews, advocate for the Applicant  
                                 Linda Ryder, advocate for the Respondent  
  
Investigation Meeting:    On the papers  
  
Submissions Received:    14 June 2023 from the Applicant  
                                 16 June 2023 from the Respondent  
  
Date of Determination:    30 June 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1]     In a determination dated 6 June 2023,<sup>1</sup> I found that JS Ewers Limited (JSE) had unjustifiably suspended Sharlene Edwards and I ordered JSE to pay Ms Edwards \$6,500.00. I also dismissed Ms Edwards claim for unjustifiable dismissal.

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<sup>1</sup> *Sharlene Edwards v JS Ewers Limited* [2023] NZERA 281.

[2] In my determination I reserved costs so that the parties could try to agree costs. The parties were unable to agree and now both parties seek costs.

### **Application for costs**

[3] Ms Ewers seeks an award of costs of \$3,500.00 together with \$71.56 for the lodgement fee. Ms Ewers seeks this amount based on the application of the daily tariff for a one day investigation meeting with a reduction for her mixed success.

[4] JSE seeks an award of costs because it claims it was the predominantly successful party. Ms Edwards lost her unjustifiable dismissal claim and was only successful in her unjustified disadvantage claim based on suspension.

[5] JSE says that the costs it should be awarded should be \$10,977.50 as this was the amount of cost it incurred from 22 June 2022 when Ms Edwards declined to accept a Calderbank offer it had made to her.

### **Analysis**

#### *Costs in the Authority*

[6] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Employment Relations Act 2000. The principles and approach adopted by the Authority in respect of this power are outlined in the Authority's practice note on costs.<sup>2</sup>

#### *Costs follow the event*

[7] The starting point is that costs should follow the event; that is the successful party should be awarded costs from the other party.

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<sup>2</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).

### *Mixed success*

[8] The issue that is raised in respect of this starting point, by JSE, is that there has been mixed success. Ms Edwards has only succeeded in one of her claims and JSE has been successful in defending the other claim. And JSE says that weighing the relative proportion of success based on the amount of time spent on the two claims it was successful with the predominant claim. So, it follows that it was the successful party.

[9] This issue has been resolved by the Employment Court in *William Coomer v JA McCallum and Son Limited*.<sup>3</sup> The short point is that Court decided that any success for an applicant is sufficient success for the purposes of costs; it does not matter that an applicant may have lost a significantly larger or more complex claim if it was successful with any claim.

[10] Applying the principle here it is clear that Ms Edwards was successful in one claim and is therefore entitled to an award of costs.

### *The Calderbank offer*

[11] One exception to the principle that costs should follow the event is where there has been a Calderbank offer from a respondent that has been unreasonably rejected by an applicant.<sup>4</sup> This can have the effect of reversing the principle.

[12] The basic premise here is that if a successful applicant has rejected a Calderbank offer to settle from the respondent and has then not been awarded an amount in the subsequent determination that betters the offer then the successful applicant should not be awarded costs.

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<sup>3</sup> *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.

<sup>4</sup> 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.

The rationale is that continuing with its claims after rejecting the Calderbank offer was futile and unnecessary because the applicant would have gained more from accepting the offer and also would have avoided the ongoing costs for both parties by ending its claims at that time. In essence the applicant was not successful in relative terms (considering the rejected offer) and therefore it should bear its own costs and contribute to the respondent's costs.

[13] The key requirements in applying this exception are that the Calderbank offer is a valid Calderbank offer, it was unreasonably rejected by the other side, and that party did not get an award from the Authority that was greater than the amount of the Calderbank offer.<sup>5</sup>

[14] The Calderbank offer in this case was an offer made by JSE on 21 June 2022. The offer was for payment of \$7,000.00 which was expressed in terms such that Ms Edwards could elect to have the amount divided between payment to her and payment for any legal costs as she wanted.

[15] This offer was a valid Calderbank offer.

[16] Ms Edwards rejected the offer on 22 June 2022 without any explanation, so I cannot conclude that the rejection was reasonable.

[17] However, Ms Edwards was awarded \$6,500.00 in compensation and she is entitled to an award of costs which will exceed \$500.00. This means as a result of pursuing her claims in the Authority Ms Edwards is entitled to receive more than \$7,000.00 from JSE, i.e., more than the Calderbank offer.

[18] On this basis the exception relating to Calderbank offers fails and the principle of costs following the event remains.

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<sup>5</sup> *Ogilvie & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943.

### *Costs for Ms Edwards*

[19] So, Ms Edwards is entitled to an award of costs.

### *Applying the daily tariff*

[20] The normal practice of the Authority when setting costs is to apply a set amount for each day of the investigation meeting calculating quantum based on the time spent in the investigation meeting; this is applying the daily tariff. The current daily tariff is \$4,500.00 for the first day of an investigation meeting and \$3,500.00 for every subsequent day of an investigation meeting.

[21] There is no reason to depart from this normal approach so I will calculate the award of costs based on the daily tariff.

[22] The investigation meeting for this matter took one day so the starting point for any costs award is \$4,500.00.

### *Adjusting the daily tariff*

[23] The daily tariff can be adjusted for relevant factors.

[24] Ms Edwards rightly concedes that the tariff can be reduced to reflect mixed success. And she proposes that the reduction is \$1,000.00.

[25] I accept Ms Edwards position and agree with the reduction.

### *Conclusion*

[26] Ms Edwards was the successful party and is entitled to receive an award of costs. The daily tariff should be applied to calculate the quantum of the award but subject to a reduction of \$1,000.00. This means Ms Edwards is entitled to an award of costs of \$3,500.00.

## **Order**

[27] JS Ewers Limited is to pay Sharlene Edwards \$3,500.00 as a contribution to her costs in this matter. JS Ewers Limited must also pay Ms Edwards \$71.56 for the lodgement fee for this matter.

Peter van Keulen  
Member of the Employment Relations Authority