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Ellison v Agresearch Limited (Wellington) [2017] NZERA 2042; [2017] NZERA Wellington 42 (29 May 2017)

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Ellison v Agresearch Limited (Wellington) [2017] NZERA 2042 (29 May 2017); [2017] NZERA Wellington 42

Last Updated: 10 June 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 42
5604001

BETWEEN NICHOLAS ELLISON Applicant

AND AGRESEARCH LIMITED Respondent

Member of Authority: Trish MacKinnon

Representatives: Andy Bell, Counsel for Applicant

Fiona McMillan, Counsel for Respondent

Submissions Received: 13 April 2017, from Applicant

3 and 26 April 2017, from Respondent

Determination: 29 May 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 28 February 2017 I dismissed Dr Ellison's claim to have been unjustifiably dismissed, reserving the issue of costs¹. The parties have been unable to resolve that matter between themselves and AgResearch Limited (AgResearch) now seeks a contribution to its costs in the sum of \$10,000.

[2] AgResearch acknowledges this is a higher sum than would be anticipated if the Authority were to apply its notional daily tariff but submits this is an appropriate case for the Authority to exercise its discretion to award an increased contribution.

[3] In support of that submission it refers to a Calderbank offer it made to Dr Ellison on 15 September 2016, some three weeks before the Authority's investigation took place. It also refers to the conduct of litigation by the applicant which, it says, added unnecessarily to costs particularly in relation to the additional submissions

called for following the investigation meeting.

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[4] The respondent's Calderbank offer, a copy of which was provided to the Authority, was for \$10,000 in full and final settlement of all matters relating to Dr Ellison's employment at AgResearch. The amount could be packaged flexibly if required to be partly paid as costs and partly as compensation under the provisions of [s.123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act). The letter specified the offer was open until close of business on 21 September 2016.

[5] Dr Ellison did not respond to that offer but, on 29 September, one week before the Authority's scheduled investigation, made a counter offer that he would accept

\$32,500, all of which was to be paid as compensation. That was rejected by

AgResearch which indicated it would be prepared to re-open its earlier offer of

\$10,000, with the offer remaining open until close of business on 4 October 2016.

[6] AgResearch submits it incurred costs of \$25,941.50 plus GST after it had made its Calderbank offer on 15 September of which \$17,621.50 was incurred after it repeated the offer on 3 October 2016. Invoices were provided to support its submission. AgResearch acknowledges costs awards in the Authority are generally modest but submits the increased contribution it seeks is justified in this instance for the reasons I have referred to above.

[7] It is not seeking to recover all costs it incurred and considers \$10,000 to be a reasonable sum contribution to its costs. AgResearch submits the Authority is required to take a "steely view" towards conduct leading to unnecessary costs, either by a party refusing a reasonable settlement offer, or by its conduct of the litigation. It

cites *Health Waikato v Elmsley*² and *Bluestar Print Group v Mitchell*³ in support of

this submission.

[8] Dr Ellison does not deny an award of costs to AgResearch is appropriate but submits an award should be based on the Authority's daily tariff at the time his proceedings were commenced in the Authority. Submissions made on his behalf cite *Stevens v Hapag-Lloyd*⁴ in which the Court expressed doubt over the application to the Authority of the Court of Appeal's encouragement of a "steely approach" to

Calderbank offers.

² [\[2004\] NZCA 35](#); [\[2004\] 1 ERNZ 172 \(CA\)](#)

³ [\[2010\] NZCA 385](#); [\[2010\] ERNZ 446 \(CA\)](#)

⁴ [\[2015\] NZEmpC 28](#)

[9] The Judge considered there were "difficulties with transplanting observations made by the Court of Appeal in relation to the assessment of costs in the Court to the way in which costs in the Authority are to be assessed"⁵. In that case, where Ms Stevens was found to have unreasonably rejected a Calderbank offer, the Court, standing in the shoes of the Authority, had rejected the respondent's submission that

\$20,000 was a reasonable contribution to its fees for a two day hearing. Its approach was to award an uplift to the daily tariff of \$1,000 for each day of the hearing.

[10] Dr Ellison submits AgResearch's Calderbank offers were unreasonable and his rejection of them was reasonable, given that, at the time the offers were made, he had incurred legal costs in excess of the amount offered. He denies any conduct on his part that would attract an uplift to a costs award.

[11] I note the judgment in *Stevens* predated by several months the Employment Court's judgment in *Fagotti v Acme & Co Limited* in which the Full Court saw no reason the steely approach urged by the Court of Appeal should not apply to the Authority as well as the Court⁶. The Full Court took the opportunity to review and confirm the continued relevance of broad principles relating to awards of costs in the Authority, ten years after articulating those principles in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*⁷.

[12] The principles are well known and do not need to be repeated in full here. Amongst them are the principles that cost awards usually follow the event; are to be modest; and are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct, although conduct that increased costs unnecessarily can be taken into account in inflating or reducing an award.

[13] After considering the parties' respective views I agree with AgResearch that it would be appropriate for at least its first Calderbank offer to be taken into account in determining this application for costs. That offer was made in time to avoid further substantial legal fees being incurred in preparing for the Authority's investigation meeting.

⁵ n4 above at [90]

⁶ [\[2015\] NZEmpC 135](#) at [109]

⁷ [\[2005\] NZEmpC 144](#); [\[2005\] ERNZ 808 \(EmpC\)](#)

[14] Dr Ellison submits AgResearch's offers were not reasonable attempts to resolve his personal grievances given the costs he had incurred by the time they were made. He had incurred over \$11,000 in legal fees by 15 September 2016, the date of the first Calderbank offer, and in excess of \$16,000 when the offer was again made available to him on 3 October 2016.

[15] I am not completely persuaded by his submission. While the offer of \$10,000 was low in relation to the remedies Dr Ellison was seeking, it is clear he would have been better off financially if he had accepted AgResearch's offer in September 2016 rather than proceeding to an investigation meeting in which his claims failed.

[16] He would not have incurred the additional costs that he did in the lead up to, and the period beyond, the investigation meeting. Nor would he have been faced with the prospect of contributing to his former employer's legal costs.

[17] With the benefit of hindsight that must also be obvious to Dr Ellison although he clearly would have been hoping, at the time the offers were made, for a more favourable outcome than he obtained. I am less inclined to take AgResearch's revived Calderbank offer of 3 October 2016 into account for two reasons. One is the very short time frame the offer was available for his acceptance. The second is the proximity to the investigation meeting which was due to take place within three days. By that stage the time and cost commitment Dr Ellison had made to proceeding to a hearing of his claims made his agreement to the offer unlikely.

[18] I do not find AgResearch's reasoning compelling in respect of the increase in its costs that were caused by my request for further submissions on one particular matter at the conclusion of the investigation. This arose from evidence given by a witness for AgResearch which could potentially have been important to my consideration of Dr Ellison's claims.

[19] In the event I determined it was not, but in the circumstances it would be unfair to impose an increased costs award on Dr Ellison in respect of that matter.

[20] Taking all factors into account, I consider an uplift to the daily tariff of \$2,000 to be appropriate. The Authority's investigation took place over the course of one day. At the time the proceedings were lodged in the Authority, the daily tariff was

\$3,500. Accordingly, I order Dr Ellison to contribute \$5,500 to the costs incurred by

AgResearch Limited.

Trish MacKinnon

Member of the Employment Relations Authority

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