

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

[2012] NZERA Christchurch 219  
5371618

BETWEEN ETIMOA TALU FIFITA (aka  
EDDIE BLOOMFIELD)  
Applicant

AND DUNEDIN CASINOS LIMITED  
Respondent

Member of Authority: M B Loftus

Representatives: Len Andersen, counsel for Applicant  
Diana Hudson, counsel for Respondent

Submissions received: 21 September 2012 from Applicant  
20 September 2012 from Respondent

Determination: 12 October 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] On 27 August 2012 I issued a determination concluding Mr Fifita had a personal grievance in that he was unjustifiably dismissed. Costs were reserved.

[2] When assessing an appropriate amount to award as a contribution toward costs the Authority will normally use a daily tariff approach (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 a day and from there adjustment may be made depending on the circumstances.

[3] Notwithstanding a finding in Mr Fifita's favour, it was the respondent, Dunedin Casinos Limited, which initially sought a contribution toward the costs it had incurred. It applied the normal daily tariff approach and seeks \$7,000 as a contribution toward \$10,146 plus GST incurred after rejection of a Calderbank upon which it relies for its application.

[4] The Calderbank offer of \$8,000 exceeds the \$6,957 (minus PAYE) Mr Fifita was awarded as recompense for his unjustified dismissal.

[5] Mr Fifita's reply contends it is he, as the successful party, who should be the recipient of a contribution toward costs. He also seeks a payment calculated according to the normal daily tariff approach.

[6] In arguing why the Calderbank offer should be disregarded Mr Andersen notes the offer was made on a confidential basis which meant Mr Fifita's *status would remain that of a dismissed person who ... could not reveal the fact he was compensated to future employers* and the priority was reinstatement, which was not offered. He goes on to say even though Mr Fifita failed to get his job back, he was successful in establishing he was unjustifiably dismissed. This alleviated the stigma of dismissal and put him in a *significantly better* position to that he would have occupied had he accepted the offer as his status has changed from that of *dismissed* to *unjustifiably dismissed*. The outcome is also said to put him on a par with two ex-colleagues who were involved but allowed to resign.

[7] In the event the above is not accepted it is submitted that costs not be awarded against Mr Fifita as it would effectively deprive him of any benefit from the favourable finding as he is *not in a position to meet any order for costs except from the proceeds of the award*.

[8] As already said, both parties seek an award calculated in accordance with the daily tariff approach. The question is to whom the award (if any) should be made and whether or not the amount should be adjusted. Influencing a decision here is one key factor – the Calderbank.

[9] The underlying principle of a Calderbank offer is the offer would have led to a more beneficial outcome for the *successful* party than that ultimately obtained, thus putting the *losing* party to costs that (albeit with the benefit of hindsight) could have been avoided. If the Calderbank is delivered in a timely manner and addresses the issues, rejection puts the offering party to unnecessary costs and is a factor to be considered. Furthermore the Courts have urged a more steely approach in this respect (refer *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 CA).

[10] Mr Fifita is, however, trying to assert his present position is better than that which would have resulted had he accepted, thus rendering the Calderbank nugatory.

I do not accept that assertion. The distinction between *dismissed* and *unjustifiably dismissed* is fine – it remains a dismissal. The amount obtained was less than that offered and I do not accept the argument about the importance of reinstatement. The claim is untenable as reinstatement was never viable for reasons discussed in paragraphs 48 to 52 of the substantive decision. The Casino's rejection of it was reasonable. Furthermore I reject the suggestion the decision put Mr Fifita on a par with his two ex-colleagues. For reasons explained in paragraph 42 of the substantive decision I conclude his situation was never comparable.

[11] Finally there is the issue of loss of benefit that would result from having to fund an award from the monies awarded as a result of my finding in Mr Fifita's favour. That faces two obstacles. First, and for reasons expressed in paragraph 54 of the substantive decision, I have doubts about the efforts Mr Fifita has put into trying to avoid possible impecuniosity. Second, and more importantly, the Casino tabled a valid Calderbank. Its existence should be recognised.

[12] Having considered the above issues, the circumstances and the fact neither party has suggested a departure from a standard daily tariff, I believe a contribution of \$5,250 to be appropriate. I choose that amount as while the parties both based their calculations on two full hearing days, my record of start and finish times would indicate something closer to a day and a half.

### **Conclusion**

[13] The applicant, Mr Fifita, is to pay the respondent, Dunedin Casinos Limited, the sum of \$5,250 (five thousand, two hundred and fifty dollars) as a contribution toward the Casinos costs.

Mike Loftus

Member of the Employment Relations Authority