

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 112
5392389**

BETWEEN

CAROLYN FITZPATRICK
Applicant

AND

ELDERCARE SERVICES
LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Stan Austin, Advocate for Applicant
None for Respondent
Submissions received: 18 March 2013 from Applicant
None from Respondent
Determination: 02 April 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] By determination [2013] NZERA Auckland 65 the Authority found that the Applicant, Ms Carolyn Fitzpatrick, had been unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, Eldercare Services Limited (Eldercare). Ms Fitzpatrick was wholly successful and is entitled to a contribution towards her actual costs.

[2] Costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and Ms Fitzpatrick has filed submissions in respect of costs.

[3] This matter involved a half day of an investigation meeting. Mr Austin, on behalf of Ms Fitzpatrick, is seeking costs of \$8,298.40 in addition to the filing fee of \$71.56.

[4] Mr Austin submits that Ms Fitzpatrick made a Calderbank¹ offer, that is a without prejudice save as to costs offer, to Eldercare. The Offer was made in a letter dated 29 October 2012 (the Offer), which is before the Authority.

[5] Eldercare responded by way of a counteroffers to Ms Fitzpatrick on 29 October 2012 and 10 January 2012.

[6] Mr Austin submits that as a result of Eldercare's decision not to participate in the Authority's investigation following the initial stages, Ms Fitzpatrick had needed to produce, schedule and collate information from old payslips which would normally have been provided by Eldercare, and this unnecessarily increased Ms Fitzpatrick's costs.

Principles

[7] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[8] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*².

[9] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³.

[10] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁴ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁵ at para [48] "*As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.*"

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA)

² [1996] 2 ERNZ 622

³ [2005] 1 ERNZ 808

⁴ [2005] 1 ERNZ 808

⁵ [2001] ERNZ 305

Determination

[11] The amount proposed for settlement contained in the Offer was \$9,750.00.

[12] Eldercare rejected the Offer on 29 October 2012, and counter-offered with an undertaking to provide Ms Fitzpatrick with a certificate of service. Eldercare further counter-offered on 10 January 2013 with an offer to transfer shares in Eldercare to Ms Fitzpatrick, on offer which it advised Ms Fitzpatrick was worthless in an email dated 11 January 2013.

[13] The Authority Investigation Meeting was held on 22 January 2013. The Offer was made well in advance of the Investigation Meeting and consequently before preparation costs had been incurred. There was ample time for Eldercare to consider the Offer prior to the Investigation Meeting.

[14] It is necessary to consider what effect the Offer should have upon the award of costs in this matter. The Court of Appeal in *Health Waikato Limited v Van Der Sluis*⁶ observed that: “*the Calderbank letter field is fully discretionary*”. The nature of this wide discretion is that if the Authority awarded a lesser amount than the amount offered in the Calderbank letter, there would be no absolute protection to the party which had made the offer in terms of costs. Equally, the Authority may take into consideration a Calderbank letter when more has been awarded than was offered.

[15] The Court of Appeal in *Aoraki Corporation Ltd v McGavin*⁷ in commenting on the exercise of this discretion, noted that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore these Calderbank offers without costs being impacted:

The discretion as to costs is a judicial one to be exercised according to what is reasonable and just to both parties and the public interest in the fair and expeditious resolution of disputes requires that full weight be given to the extent to which costs were properly incurred subsequent to the non-acceptance of an offer of settlement at a figure above the amount eventually awarded in the litigation.

[16] The need for a “*more steely*” approach to costs where reasonable settlement proposals have been rejected was noted by the Court of Appeal in *Health Waikato Limited v Elmsley*.⁸

⁶ [1997] 10 PRNZ 514

⁷ [1998] 1 ERNZ 601

⁸ [2004] 1 ERNZ 172 (CA) at [53]

[17] The Offer was a genuine attempt to resolve the matter without further expenditure on litigation made at an early stage in the proceedings. I have concluded that taking all these circumstances into account, the Offer should be given full weight.

[18] Accordingly, Eldercare is ordered to pay Ms Fitzpatrick \$8,298.40 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[19] Ms Fitzpatrick is to be reimbursed the filing fee of \$71.56.

Eleanor Robinson
Member of the Employment Relations Authority