

[3] The parties have not been able to resolve costs between themselves and have filed memoranda accordingly.

[4] Ms Flavin seeks to recover her full legal costs of more than \$33,000, or alternatively, “as close to the full costs as possible”, or alternatively, a contribution to costs in the value of \$7,000 plus disbursements of \$358.01.

[5] Te Whatu Ora resists this claim. It states that it was the party that was mostly successful, and should be awarded costs based on the usual daily tariff of \$4,500 plus a modest uplift. It also points out that Ms Flavin should not be awarded costs on the basis that she refused a Calderbank offer that would have put her in a better position than the Authority’s award.

Submissions

Ms Flavin

[6] Ms Flavin submits that she achieved success, on the basis that what is described as the “main thrust” of her claims, that Te Whatu Ora did not engage with her fairly, was upheld. Other claims are described as “incidental”. The award of \$18,000 as compensation for hurt and humiliation is described as “reasonably substantial”¹.

[7] Ms Flavin explains that she incurred costs totalling \$33,586.72, including GST and disbursements. She submits that she is seeking recovery of her full legal costs, or as close to this as possible, on the grounds that she is “entitled to reap the benefits of her success without a heavy burden of costs for which she has incurred due to the conduct of the other party, or where such have been incurred unnecessarily or unreasonably.”²

[8] Ms Flavin says that “but for the Respondent’s breach of fundamental employment obligations (to engage with the Respondent [sic] properly, including being communicative), the Applicant would not have taken these proceedings.”³

¹ At paragraph 2 of the applicant’s submissions.

² At paragraph 18 of the applicant’s submissions.

³ Paragraph 13 of the applicant’s legal submissions.

Te Whatu Ora

[9] Te Whatu Ora submits that it was the successful party, on the grounds that it successfully defended Ms Flavin's claims that she was not covered by the Order, that she was unjustifiably suspended, and that she suffered a breach of confidentiality.

[10] It states that the daily tariff should be the starting point.

[11] It relies on the Calderbank offer sent to Ms Flavin, and says that her refusal to accept it was unreasonable, and therefore the Calderbank offer should be taken into account in the normal way. It says that it made an offer of \$15,000 compensation, plus a further \$15,000 contribution to costs. The total offered, being \$30,000, was demonstrably higher than the award of \$18,000 Ms Flavin achieved in the Authority.

[12] Te Whatu Ora seeks a costs award in its favour of the daily tariff of \$4,500, plus an uplift of \$500 to take into account what it says was Ms Flavin's unreasonable refusal of its Calderbank offer. In the alternative, it says costs should lie where they fall.

Principles

[13] The power of the Authority to award costs is contained in clause 15 of schedule 2 of the Employment Relations Act 2000 (the Act).

[14] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*⁴ as confirmed in *Fagotti v Acme and Co Limited*.⁵ The principle set out in the above cases is that costs are to be modest, not to be used as a punishment, and that costs usually follow the event.

[15] The Authority has adopted a daily tariff approach as the starting point for considering costs. This is well known, and the current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days.⁶ The parties can expect the Authority to adhere to this approach, unless there is good reason to depart from it.

⁴ [2005] 1 ERNZ 808.

⁵ [2015] NZEmpC 135 at 114.

⁶ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

Analysis

[16] The Investigation meeting in this matter was for one day and was held in person. Both parties attended together with their respective counsel, together with witnesses.

[17] There has been mixed success. While I acknowledge that Ms Flavin was unsuccessful in her claim that she was not covered by the Order, she still achieved success.

[18] Even when there is “mixed success” a party is entitled to costs.⁷

[19] In these circumstances, I consider Ms Flavin is entitled to costs as the successful party. While Ms Flavin was not completely successful in her claim I accept her submission that the investigation meeting was needed to address matters, especially in light of the history of communication between the parties set out in the substantive determination.

[20] However, I do not accept that there is any entitlement to actual costs. The Authority’s practice note refers to a contribution to costs, and that the daily tariff is the starting point. There was no conduct by either party that unnecessarily complicated or prolonged the investigation. Indeed, Ms Flavin has, in her submissions, not claimed otherwise. Instead, she refers to needing to take these proceedings because of Te Whatu Ora’s breaches. However, costs awards are not to be used for re-litigating the substantive proceedings, or to further punish a party, so I do not consider this to be grounds for an award of indemnity costs.

[21] I find that there is nothing that would merit an award of actual costs. The daily tariff is the correct starting point. Given that this was a one-day investigation meeting, the starting point is therefore \$4,500.

[22] I must then consider whether there should be any change from this starting point. As I have already said, I accept that it was necessary for this matter to be heard, but I do not consider there was any surprising or untoward conduct by either party which would merit any significant uplift in this case. The starting point remains the daily tariff.

[23] I must now therefore consider the impact of the Calderbank letter both parties refer to.

⁷ *William Coomer v JA McCallum and Son Ltd* [2017] NZEmpC 156.

The Calderbank offer

[24] Although the principle is that costs should follow the event, if an otherwise successful party unreasonably rejects a Calderbank offer, then this position can be reversed. The Authority has described this as follows⁸:

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. 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.

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.

[25] I have already discussed the Calderbank offer above. This offer was a valid Calderbank offer.

[26] In addition, the offer was one which was greater than the amount which Ms Flavin was awarded by the Authority. Ms Flavin rejected that offer. This leaves the question of whether Ms Flavin's rejection of the offer was reasonable.

[27] Ms Flavin rejected this offer, by way of email from her representative. In that email, she expressed her reasons for doing so as follows:

Our client declines the offer and maintains it is reasonably refused on the basis that it comes far too late in the piece and fails to include any apology or acknowledgement that the employer failed to consult with her and was incorrect in its interpretation of the order.

[28] The difficulty faced by Ms Flavin is immediately apparent, in that the determination found that Te Whatu Ora was correct in its interpretation of the Order. This claim was not upheld. However, the email also refers to the need for an acknowledgement that Te Whatu Ora failed to consult with her, which was upheld and compensation awarded.

⁸ *Edwards v JS Ewers Limited*, [2023] NZERA 245, at [12] and [13].

[29] By a fine margin, I consider that Ms Flavin's rejection of the Calderbank offer was reasonable, and she remains entitled to a contribution to costs in the usual way.

[30] As Ms Flavin was only partially successful, she cannot expect to receive the same entitlement she would have received if she were completely successful. For reasons above and reflecting the outcome of the substantive proceedings, I consider it appropriate to order Te Whatu Ora to contribute to Ms Flavin's costs in the sum of \$4,000.00.

Disbursements

[31] Ms Flavin has also claimed for disbursements, being the filing fee, and the costs of stationary, paper, and photocopying costs, and a single uber fare for her representative. The total amount claimed is \$358.01. The amount claimed is actual and reasonable, and Ms Flavin is entitled to recovery as she claims.

Orders

[32] I order Te Whatu Ora to pay to Ms Flavin the sum of \$4,000.00 as a contribution to costs, and the sum of \$358.01 as disbursements, within 28 days of the date of this determination.

Claire English
Member of the Employment Relations Authority