

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 464  
3229479

BETWEEN	SEULBI GANG Applicant
AND	KNCC LIMITED (First Respondent)
	JAEHO HEO/HUH (Second Respondent)
	JAE JEONG JANG (Third Respondent)

Member of Authority:	Eleanor Robinson
Representatives:	Seungmin Kang, counsel for the applicant Melissa Johnston, counsel for the Respondent
Costs Submissions:	28 April 2023 from the Applicant None from the Respondent
Determination:	22 August 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] In a determination dated 23 January 2023 ([2023] NZERA 31), the Authority addressed the preliminary issue of whether or not Ms Gang had raised a personal grievance within the 90 statutory time limit and determined that she had done so.

[2] In a determination dated 14 April 2023 ([2023] NZERA 182) the Authority found that Ms Gang had been constructively dismissed by the First Respondent KNCC, and awarded her remedies. Penalties were also awarded against KNCC and the Second Respondent, Mr Heo/Huh.

[3] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and Mr Kang has filed submissions on behalf of Ms Gang in support of a contribution to costs.

[4] The matter involved one day of meeting time, plus time spent determining the preliminary issue which was determined ‘on the papers’. Mr Kang, on behalf of Ms Gang is seeking a contribution to costs from KNCC and Mr Huh in the amount of \$15,982.37 for costs and disbursements incurred. This takes into account costs in respect of the preliminary matter in which costs were reserved.

[5] In support of the application Mr Kang submits that:

- a) The starting point should be \$6,250.00 based upon 1.5 days notional daily tariff based upon 0.5 days in respect of the preliminary issue, and the one day investigation meeting in respect of the substantive issue, including an allowance for written submissions being filed after the investigation meeting.
- b) The uplift is sought on the following basis:
  - i. KNCC’s rejection of offers made by Ms Gang to settle the matter prior to the substantive investigation in the form of three Calderbank offers, that is a “without prejudice save as to costs” offer.<sup>1</sup> ; and
  - ii. KNCC ‘s non-compliance with the Authority’s directions to file witness statements.

#### *The Calderbank Offers*

[6] There were three Calderbank offers made by Ms Gang.

[7] The first was made on 23 November 2021 in the sum of \$15,000.00 immediately after the parties had met in mediation, and before the preliminary matter had been determined and before the investigation meeting

[8] The second was made on 29 July 2022 in which it was suggested that Ms Gang would not claim any costs in respect of the preliminary matter if KNCC withdrew its claim that it had been raised out of time.

[9] The third offer was made on 6 March 2023 and offered to settle the matter by the payment to Ms Gang of \$35,000.00 as compensation.

[10] The first and the third offers were for monetary sums below what Ms Gang was subsequently awarded by the Authority.

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<sup>1</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA)

[11] 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.

[12] Costs are at the discretion of the Authority<sup>2</sup>. 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 (Da Cruz)*<sup>3</sup>.

[13] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary, modest, and awards made are consistent with the Authority's equity and good conscience jurisdiction.

[14] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a one day Investigation Meeting plus a half day determination on the papers, this would normally equate to an award of \$6,750.00.

**Costs Award**

[15] I have considered whether any costs award should be made against Mr Heo/Huh. A penalty has been awarded against Mr Heo/Huh for his part in the situation which resulted in Ms Gang's resignation. I therefore consider that any costs award should be made against KNCC as Ms Gang's employer.

[16] In regard to the fact that KNCC filed no witness statements, whilst that did not assist the Authority, the substantive determination reflects the quality of the evidence received. No uplift is awarded on that basis.

[17] I do consider it appropriate to give weight to the Calderbank Offers as a reason supporting an uplift in the tariff award.

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<sup>2</sup> *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

<sup>3</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

[18] The Court of Appeal in *Health Waikato Limited v Van Der Sluis*<sup>4</sup> observed that: “the Calderbank letter field is fully discretionary”. The nature of this wide discretion is such 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.

[19] Whilst taking note of the comments made by Judge Inglis as regards the ameliorating of the ‘steely’ approach noted in the judgment in *Stevens v Hapag-Lloyd (NZ) Ltd*<sup>5</sup>, I also take note of the full Employment Court judgment in *Fagotti v Acme & Co Ltd*<sup>6</sup> in which it was stated:

[109] We do not agree with the defendant’s submission that the remarks of the Court of Appeal about a “steely” approach to Calderbank offers expressed in *Bluestar Print Group* applies only to Employment Court proceedings and not to matters before the Authority. That submission cannot, logically, be correct. The vast majority of matters in which Calderbank offers are considered by the Employment Court are in proceedings brought to the Court by a challenge to the Authority’s determination. Calderbank offers are most usually made before the Authority’s investigation meeting. So it follows that the Court of Appeal’s remarks about the fortitude with which they are approached, should apply also to Calderbank offers before an Authority investigation meeting. They are, therefore, applicable also to the Authority’s first instance jurisdiction as well as to the Court’s appellate role in the same cases.

[20] I consider that Calderbank Offers may still be taken into consideration in the matter of costs in the Authority on the basis that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted<sup>7</sup>.

[21] The first and third Calderbank Offers were both made well in advance of the Investigation Meeting and there was therefore ample time for the Respondents to consider them fully prior to taking any part in that proceeding. They offered to settle the matter for significantly less than Ms Gang was awarded in determination [2023] NZERA 182.

[22] I determine that that starting point of \$6750.00 should be uplifted to take into account the rejection of the First and Second Calderbank Offers.

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<sup>4</sup> [1997] 10 PRNZ 514

<sup>5</sup> [2015] NZEmpC 137

<sup>6</sup> [2015]m NZEmpC 135

<sup>7</sup> *Aoraki Corporation Ltd v McGavin*<sup>7</sup> [2004] 1 ERNZ 172 (CA) at [53]

[23] Ms Gang has also claimed reimbursement of \$2,467.48 in respect of disbursements as supported by invoices. This includes the sum of \$1,750.87 in respect of travel expenses for Mr Kang's accommodation and flights from Napier to the investigation venue at Auckland.

[24] It is not normal practice for disbursements to be awarded in respect of travel costs incurred by counsel attending an investigation meeting since it is a prerogative of parties to choose the representation of their choice.

[25] Whilst I accept that Mr Kang's assistance to Ms Gang as a fluent Korean speaker was valuable to her, and that he is a legal aid provider, the combination of both attributes being not available in Auckland; I am surprised that another civil legal aid lawyer could not have been instructed and advised on this case.

[26] In all the circumstances, I award costs and disbursements as follows:

[27] **The First Respondent KNCC, is ordered to pay Ms Gang \$ 9,000.00 in respect of costs.**

[28] **KNCC is ordered to pay disbursements to Ms Gang in the sum of \$1,125.00.**

*Filing Fee*

[29] **KNCC is also ordered to reimburse Ms Gang the filing fee of \$71.56.**

Eleanor Robinson  
Member of the Employment Relations Authority