

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 261  
5425135

BETWEEN SEIONALA HAMMOND  
Applicant

A N D RADIUS RESIDENTIAL  
CARE LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Warwick Reid, Advocate for Applicant  
Peter Kiely, Counsel for Respondent

Submissions Received: 23 April 2014 from Applicant  
6 May 2014 from Respondent

Date of Determination: 25 June 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1] The Authority's substantive determination issued on 7 April 2014 as [2014] NZERA Auckland 132. In that determination, I found that the applicant (Ms Hammond) had been unjustifiably dismissed by the respondent (Radius) and I ordered that she be reinstated, together with awarding other remedies.

[2] Costs were reserved.

**The claim for costs**

[3] Submissions for Ms Hammond seek costs. The starting point is said to be \$7,000 because the Authority's investigation meeting took most of two hearing days and therefore the daily tariff approach would dictate that the starting figure was \$7,000.

[4] However, an uplift from that base figure is sought based on a purported *Calderbank* offer which it is suggested the Authority ought to take into account.

### **The response**

[5] Radius accepts the general principle of costs being fixed according to the daily tariff often applied in the Authority but rejects the contention that the starting point in the present case ought to be \$7,000. Radius says that the correct figure is actually \$5,250 because the investigation meeting actually took about a day and a half rather than about two full hearing days.

[6] Moreover, Radius says that the purported *Calderbank* offer ought not to be considered as it is not an operative *Calderbank* offer at all but simply a without prejudice communication not plainly marked as either a *Calderbank* letter or a “*without prejudice save as to costs*” letter.

### **Discussion**

[7] The law on costs setting in the Authority is well settled and need not be recited again here.

[8] The principles governing the fixing of costs in the Authority include the following: costs will usually follow the event, costs in the Authority will usually be more modest than in the Court, the Authority will often apply a daily tariff approach to costs fixing, the Authority will consider other factors which determine whether there should be an uplift or a reduction of the daily tariff and those factors include whether there is an operative *Calderbank* offer and/or whether there is an inability to pay on the part of the unsuccessful party.

[9] Here, there is agreement between the parties that the daily tariff ought to be the starting point, and implicit agreement that costs should follow the event but disagreement about the quantum of the daily tariff in the present case and disagreement about whether there should be an uplift in the applicable figure, because of the purported *Calderbank* offer.

[10] Dealing first with the appropriate starting figure, I agree with Radius’ submission that the investigation meeting did not occupy two hearing days but I do not accept that the reduction it applies accurately reflects the position.

[11] It is true to say that the Authority cannot take into account matters which caused the successful party to incur additional cost after the determination issued. That is the antithesis of the Authority's obligation.

[12] However, it is appropriate for the Authority, in a costs setting environment, to consider further attendances that are required of the successful party, and are occasioned by the Authority's own actions in the conduct of its investigation. Radius accepts the principle just enunciated but seeks to minimise the time that Ms Hammond's representative would have spent in dealing with further matters raised by the Authority after the investigation meeting had formally concluded.

[13] I accept that the memoranda, which Radius refers to and which responded to my further inquiries, were brief but they would have required attendances by Ms Hammond's advocate and are properly part of the Authority's investigation. Certainly, they predate the Authority's issue of its determination, for obvious reasons.

[14] Taking that matter particularly into account, but accepting that the total time of the investigation meeting itself amounted to a day and a half's hearing time, I am satisfied that the correct starting point, before the consideration of the purported *Calderbank* offer is \$6,000 rather than the figure suggested by Radius of \$5,250.

[15] I turn now to consider the purported *Calderbank* offer. If the offer were indeed an operative *Calderbank* offer, it would plainly need to have been considered in a costs setting environment as it proposed a quantum of settlement which was greatly exceeded by the effect of the Authority's determination of the matter.

[16] However, that position does not apply because I am satisfied that the letter in question is not a *Calderbank* offer at all. It neither refers to itself as a *Calderbank* letter, a term of art, nor uses the nomenclature "*without prejudice save as to costs*".

[17] It is in truth no more and no less than a without prejudice communication between the parties and on that footing, it can only be put before me if both parties agree and Radius explicitly does not. The law on the point is clear and the letter simply does not qualify for the label that Ms Hammond seeks to apply to it.

## **Determination**

[18] Accordingly, I am satisfied that Radius should contribute to Ms Hammond's costs the sum of \$6,000. I note that Radius has drawn my attention to various disbursements that it takes exception to Ms Hammond including in her claim for costs. The effect of my decision is that Radius is to contribute to the costs incurred by Ms Hammond in the professional services of her advocate. The Authority is told that the time expended was over \$10,500 and the disbursements (which Radius challenges in part) are on top of that.

James Crichton  
Member of the Employment Relations Authority