

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 203
3066812

BETWEEN KATIE HERON
 Applicant

AND SFIZIO LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Charles McGuinness, counsel for the Applicant
 Cassandra Kenworthy, counsel for the Respondent

Submissions Received: 27 January 2021 from the Applicant
 9 February 2021 from the Respondent
 2 March 2021 “In reply” from the Applicant

Date of Determination: 12 May 2021

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 20 October 2020 Ms Katie Heron’s claims for sick pay and wages and an unjustified dismissal were largely successful, and she was awarded over \$17,000 in remedies.¹

[2] Ms Heron now applies for full reimbursement of costs amounting to \$14,210 (plus GST) from the date on which she says the respondent unreasonably rejected a second Calderbank offer, until the date of the Authority’s determination.²

[3] Sfizio does not challenge Ms Heron’s application for costs but disputes the sum sought. It says Ms Heron is effectively seeking indemnity costs which is not inappropriate to the circumstances of the case.

¹ *Heron v Sfizio Limited* [2020] NZERA 434

² Applicant’s Submission in Reply Regarding Costs, dated 2 March 2021 at para.11.

Discussion

[4] It is understood by both parties that the usual starting point in an assessment by the Authority as to costs by the Authority begins by the application of the Authority's notional daily tariff, currently set at \$4,500.

[5] The Authority must then give consideration to a range of factors which may lead to an adjustment (up or down) to the tariff depending on the particular circumstances of the case.

[6] Relevant to this application, offers made on a "*without prejudice basis save as to costs*" (Calderbank offers) are an accepted matter that may be taken into account by the Authority when setting costs.³ And as foreshadowed, it is the extent to which Ms Heron's two Calderbank offers should increase the quantum of a costs order that is at issue between the parties.

[7] The first offer occurred in 12 March 2019, 6 days before the parties attended mediation. Ms Heron offered to settle her grievance in return for a total payment of \$14,993.92 inclusive of legal costs.

[8] The second offer was made on 17 April 2019 (and well in advance of the Authority's investigation meeting) advising she would accept \$5,000 in compensation and \$3,500 plus GST towards costs to resolve her matter and avoid litigation and its associated costs.

[9] Counsel for Ms Heron refers to the timeliness and reasonableness of the both offers. He submits the effect of Sfizio's unreasonable rejection of both offers resulted in greater costs for the Applicant.

[10] I understand Sfizio did not respond to either offer, but now accepts both were reasonable. The concession is appropriate.

[11] I agree the circumstances warrant an increase to Ms Heron's costs. However I am not persuaded these are such that it is appropriate to make an award that indemnifies the applicant in full. In *Stevens v Hapag-Lloyd (NZ) Ltd* Judge Inglis (as she was then) observed orders for indemnity costs following an unreasonable refusal of a Calderbank offer are rare and generally reserved for cases where a

³ See *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

parties conduct has been especially egregious.⁴ The Court gave regard to the Calderbank and uplifted the rate it would have otherwise applied. The Court noted this approach had the advantage of addressing conduct that unnecessarily increased costs whilst affirming “ ... costs in the Authority should generally be modest and bear a degree of proportionality, including to the notional rate”.⁵

[12] Sfizio submits \$8,000 is a suitable award in this matter and echoes the award made in *Stevens*. Sfizio’s appraisal is both a reasonable and proportionate response to the conduct that ultimately impacted on Ms Heron’s costs. Sfizio is ordered to pay Ms Heron \$8,000 in costs.

[13] Two additional matters are raised on Ms Heron’s behalf. Firstly, interest is sought on orders made in the substantive determination regarding unpaid wages and sick leave, and lost wages. A claim for interest on those matters was not referred to in the Statement of Problem nor sought during the Authority’s investigation. Having already determined Ms Heron’s substantive claims I am not persuaded there is a reasonable basis on which the Authority may revisit remedies provided in that matter.

[14] Next Ms Heron seeks costs of \$885.50 plus GST in relation to this application. It is not the practice of the Authority to order costs on costs where the Authority’s tariff approach encompasses work of this nature, unless there is principled reason for doing so. No grounds have been furnished to support this aspect of Ms Heron’s application, and this claim is denied.

Order

[15] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act, Sfizio Limited is ordered to pay Ms Heron a contribution of \$8,000 towards costs incurred to have her claims determined by Authority, plus \$71.56 for the Authority’s filing fee.

Michele Ryan
Member of the Employment Relations Authority

⁴ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [97].

⁵ Above, at [98].