

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 269
5600793

BETWEEN ROBYN JONES
 Applicant

AND SOLWAY TRUST
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in person
 Margaret Robins for Respondent

Submissions received: 8 August 2016 from Applicant
 13 July 2016 from Respondent

Determination: 9 August 2016

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

A. Ms Jones is ordered to contribute \$1,200 to Solway Trust's costs.

[1] In a determination dated 21 June 2016¹ I held Ms Jones was not unjustifiably dismissed from her employment at Solway Trust.

[2] I reserved costs, indicating that if the parties were unable to resolve that issue, both parties would have the opportunity to file cost memoranda and evidence. These have now been received by the Authority for consideration.

[3] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority applies a starting point of a notional daily tariff for quantifying costs and may uplift where there is conduct which increases costs unnecessarily.

¹ [2016] NZERA Auckland 204.

[4] The Employment Court has held that the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.² As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*³ awards in the Authority will be modest taking into account conduct which increases costs unnecessarily.

Calderbank offers

[5] The Authority will take into account, when dealing with the issue of costs, any offers made by the parties to settle matters. As stated by the Court of Appeal⁴:

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.⁵

[6] As was held by the Employment Court in *Mattingly v Strata Title Management Limited*⁶:

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a “steely approach” ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court’s observation in *Da Cruz* that Authority awards will be “modest”. What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a de novo challenge, having regard to the circumstances of the particular case.⁷

[7] On 17 February 2016 and after the parties had attended mediation, Solway Trust wrote to Ms Jones offering to resolve matters by payment to Ms Jones of \$1,000.00 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000. The offer remained open for acceptance until the day before the case management call which had not been set down but which was held on 30 March 2016.

[8] I have not been provided with any explanations as to the reasons why Ms Jones rejected the offer which I find to be reasonable particularly in light of Solway

² *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

³ (2006) 7 NZELC 98,128; [\[2005\] ERNZ 808](#); (2005) 3 NZELR 1 (EMC).

⁴ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385.

⁵ *Ibid* at [18].

⁶ [\[2014\] NZEmpC 15](#); [\[2014\] ERNZ 1](#).

⁷ *Ibid* at [27].

Trust's success in defending Ms Jones claims in the Authority. The rejection of the offer by Ms Jones was unreasonable and warrants an up-lift in costs.

[9] The investigation meeting took less than half a day with additional time for preparation and delivery of an oral determination. I will not award costs for the time taken by the Authority to prepare and deliver its oral determination.

[10] Applying the daily tariff on a pro-rata basis would see the award of a contribution in the order of \$1,100.00. Solway Trust seeks more but has not stated how much more. Solway Trust incurred costs in the total sum of \$12,168.00 exclusive of GST.

[11] In *Stevens v Hapag Lloyd*⁸ the Employment Court reiterated that proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical.⁹

[12] In setting an appropriate level of contribution to costs in this matter I have taken into account Ms Jones evidence at the investigation meeting that she was unable to work for a significant period of time after her employment relationship ended and was in receipt of a sickness benefit.

[13] Taking into account the unreasonable rejection of the calderbank offer an uplift in costs would be in accordance with principle and I consider it appropriate that Ms Jones pay to Solway Trust the amount of \$1,200 as a contribution to their costs.

[14] Departing from my usual practice I have not directed the time in which costs are to be paid. Instead I will leave it to the parties to discuss and agree on how and when the contribution to costs will be paid. Solway Trust should allow a reasonable time for Ms Jones to pay. If the parties are unable to agree on how and when costs are to be paid I reserve leave for the parties to return to the Authority for further orders.

Vicki Campbell
Member of the Employment Relations Authority\

⁸ [2015] NZEmpC 28.

⁹ Ibid at [94].