

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 31
5356237

BETWEEN K
 Applicant

AND J
 Respondent

Member of Authority: M B Loftus

Representatives: David Beck, Counsel for Applicant
 Ralph Webster, Advocate for Respondent

Submissions Received 28 January 2013 from the Applicant
 7 February 2013 from the Respondent

Date of Determination: 11 February 2013

DETERMINATION OF THE AUTHORITY

[1] On 21 December 2012 I issued a determination concluding K had a personal grievance in that she was sexually harassed and unjustifiably dismissed. Costs were reserved.

[2] K incurred costs of \$7,260.80 and now seeks reimbursement in full. The amount sought includes the cost of attending mediation.

[3] Normally the Authority will use a daily tariff approach when addressing such a claim (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[4] The hearing took a day which, applying the above formula, would mean an award in the order of \$3,500. However, and as already said, K seeks a greater amount.

[5] She supports her position by referring to *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 before submitting J's behaviour justifies an award of indemnity costs. The behaviour cited is that which led to the finding J had a personal grievance. There is also a claim for the cost of attending mediation on the grounds it should not have been incurred as the exercise was pointless given K had no intention of settling. Finally it is claimed K should be penalised for a *failure to communicate*, with the failure confirmed by its tabling of detailed documentation during the investigation which, it is suggested, belied an earlier representatives' assertion there was little documentary material available.

[6] Finally it is said K explored *what would have amounted to a Calderbank offer* via an exchange of e-mails and J failed to table a counter.

[7] J argues against the approach promoted by K and suggests I award an amount consistent with the daily tariff approach.

[8] K's argument leaves me far from convinced I should consider an award of indemnity costs. First, an increased costs award is normally the result of a poorly conducted hearing and not the conduct that led to the outcome as is being argued here. Exceptions arise where the case is hopeless from inception yet pursued with an improper and ulterior motive. There is not, in this instance, any evidence of an improper motive and there were sufficient factual disagreement to mitigate against a conclusion J's position was hopeless in the sense contemplated by the Court of Appeal in *Bradbury*.

[9] There is then the fact the invoice attached to the application is not itemised, yet includes the cost of mediation. The Authority does not make an award for costs incurred in mediation, especially where there is no evidence of improper conduct other than an unsubstantiated allegation by counsel in a submission.

[10] Turning to the alleged Calderbank. The attached correspondence does not come close to fulfilling the required criteria. To be considered a Calderbank, the relevant communication must be clearly identified as being *without prejudice except as to costs* and even the term *without prejudice* is deemed inadequate (refer – *Pauanui Publishing Ltd v Loh* EmpC Wellington WC43B/01, 20 December 2001.) Furthermore the terms of the offer should be clear (*Ogilvy & Mather (NZ) Ltd v Darroch* [1993]. This isn't clear – it was simply a three line musing by counsel as to

an appropriate amount which would require both instruction from, and approval by, K. Furthermore the e-mail was sent prior to mediation and its content may well have been discussed there given J's indication that would be appropriate.

[11] Finally there is the alleged lack of communication. That argument also fails to convince me as it was very obvious during the investigation that J's representatives, who were officers of the company conducting the hearing on their own behalf, had little knowledge of the import of the documents in their possession. In any event their late production did nothing to increase the hearing time and did not, I conclude, affect the conduct of the hearing or lead to increased costs justifying an increased award.

[12] For the above reasons I conclude an award in accordance with the normal daily tariff approach is appropriate. I therefore order the respondent, J, to pay the applicant, K, the sum of \$3,500.00 (three thousand, five hundred dollars) as a contribution toward the costs K incurred in pursuing her claim.

M B Loftus
Member of the Employment Relations Authority