

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 318
3024218

BETWEEN

BELINDA LEE
Applicant

A N D

THE BOARD OF TRUSTEES
OTAMATEA HIGH SCHOOL
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
C T Child, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 5, 27 and 29 September 2018 from Applicant
17 September 2018 from Respondent

Date of Determination: 12 October 2018

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

A. I decline to award any costs.

Employment relationship problem

[1] The respondent was wholly successful in having the applicant's claims dismissed¹ and now seeks costs. It seeks indemnity costs of \$11,063.28. This is because they have made Calderbank offers that Ms Lee unreasonably refused.

[2] Ms Lee resists any award of costs because she believed she had been unjustifiably dismissed and disadvantaged. She suffers from anxiety and depression, had no legal representation to properly consider the Calderbank offers and raises issues about the very short term dates for expiry.

Indemnity Costs

[3] Indemnity costs are the full amount of costs incurred by a party to a proceeding. The leading cases provide that indemnity costs may be awarded where a

¹ *Lee v The Board of Trustees of Otamatea High School* [2018] NZERA Auckland 270.

party has behaved either badly or very unreasonably.² Indemnity costs have been ordered in the situation where there are allegations which ought never to have been made, or the case is prolonged by groundless contentions, summarised in what has been referred to as the “hopeless case” test.³

[4] Ms Lee’s grievance was not a “hopeless case”. There was uncontested evidence of a failure to properly notify Ms Lee about the removal of asbestos in her work area. She was also allowed to enter the area where asbestos removal was taking place before an asbestos clearance certificate had been issued. There was a need to examine her employer’s actions.

[5] In these circumstances I decline to award indemnity costs.

What is the starting point for assessing costs?

[6] The starting point for costs in the Authority is its daily notional tariff. In this case the applicable daily notional tariff is \$4,500.

Are there any factors that warrant adjusting the costs?

[7] The respondent submits the fact that its Calderbank offers should increase costs. In order to be effective a Calderbank offer ought to be clear as to its terms, and the recipient should be allowed a reasonable time to consider the offer.⁴

[8] There are two Calderbank offers made 10 and 20 July 2018. The first offer dated 10 July 2018 was to settle for \$5,000. The second offer made on 20 July 2018 was to settle on the basis each party met their own costs taking into account my oral indication at the time. Both offers are clear about their terms.

[9] However the 10 July offer only gave Ms Lee one day to accept. The second offer was made on a Friday 20 July and gave Ms Lee until Sunday 22 July to accept.

[10] Ms Lee was self-represented. She wished, at least in respect of the second offer, to seek legal advice. She lives in a rural community. She had little or no access to legal advice within one day or over a weekend. These offers were not part of any

² *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 at [27].

³ *Bracewell v Richmond Services Limited* [2014] NZEmpC 171 at [12] citing *Ben Nevis Forestry Ventures Limited v Commissioner of Inland Revenue* [2014] NZCA 348 at [17].

⁴ *Ogilvy & Mather (NZ) Ltd v Darroch* [1993] 2 ERNZ 943 (EmpC).

ongoing negotiation where it would be expected Ms Lee had had adequate time to seek legal assistance. In these circumstances the time for her to consider the offer was unreasonable.

[11] There were also issues of vindication given the alleged risks she faced as a consequence of her employers (admitted) failure to notify. At hearing she demonstrated her honestly held belief about what she sought to achieve from these proceedings. She also believed other parents with children at the school like herself had a right to know about the failure to notify.

[12] I accept a “steely” approach to settlement offers is required. However an offer with a condition of confidentiality may undermine the effectiveness of a Calderbank offer where the applicant is intent on achieving public vindication.⁵ These Calderbank offers required confidentiality. This would not have met Ms Lee’s concerns about the schools failure to notify about asbestos removal. She wished to shed some light on this to ensure it never happened again. This appeared to be due to her view of the alleged risks to school pupils one of whom was her son. The terms of the Calderbank offer did not provide the vindication she sought. For the above reasons I set the Calderbank offers aside.

[13] Ms Lee has raised issues about financial hardship. She receives \$654.92 from her benefit and child support and has outgoings of \$658.83. Her child is unwell and requires specialist medical assistance. Any award of costs will be a severe financial hardship to Ms Lee.

[14] Where an unsuccessful party’s financial hardship means that the successful party would be unlikely to be able to recover any award made which would render it nugatory was a basis for awarding no costs.⁶ Given those circumstances exist here I decline to award any costs.

TG Tetitaha
Member of the Employment Relations Authority

⁵ *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [30]–[33].

⁶ *IHC New Zealand Inc v Fitzgerald EmpC* Wellington WC7/07, 28 February 2007 at [11].