

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 276
5557045

BETWEEN KEVIN ANTHONY
 LENAGHAN
 Applicant

A N D HYDROVAC LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: C English, Counsel for the Applicant
 J Douglas, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 28 July 2016 from Applicant
 20 July 2016 from Respondent

Date of Determination: 15 August 2016

COSTS DETERMINATION OF THE AUTHORITY

A. Kevin Anthony Lenaghan is ordered to pay \$3,500 towards Hydrovac Limited's costs.

Employment relationship problem

[1] The Authority in its substantive determination dated 6 July 2016¹ found that Mr Lenaghan was unjustifiably disadvantaged and unjustifiably dismissed by Hydrovac Limited. I declined to order any remedies under s.124 of the Employment Relations Act 2000 (the Act) because Mr Lenaghan's behaviour was causative and blameworthy to the extent that 100% reduction in remedies was appropriate.

[2] Both parties now seek an award of costs. Mr Lenaghan seeks an award of \$3,500. His actual costs were \$10,665. Hydrovac seeks a reversal of the onus of

¹ *K Lenaghan v. Hydrovac Ltd* [2016] NZERA Auckland 230

costs based upon its *Calderbank* offer. Its actual costs, including mediation, were \$19,237.20 plus GST and disbursements of \$345.50.

What is the starting point for assessing costs?

[3] Both parties agree the correct approach to assessing costs in this matter is for the Authority to adopt its usual notional daily tariff based approach to costs. The current notional daily tariff is \$3,500. This matter involved a one day investigation meeting. The starting point for assessing costs is therefore \$3,500.

Are there any factors that warrant adjusting the notional daily tariff?

[4] The respondent submits the principle “costs follow the event” ought to be reversed due to a *Calderbank* offer on 25 November 2015. The terms of the *Calderbank* offer were the payment of \$5,000 compensation under s.123(1)(c)(i) of the Act and a contribution towards Mr Lenaghan’s costs of \$3,000 plus GST. It submits this was unreasonably rejected. It also submits that the daily notional tariff ought to be increased to \$10,000 due to the *Calderbank offer*. The respondent also prepared the bundle of documents resulting in the disbursement of \$345.50.

[5] The applicant submits that although he did not achieve any monetary award, he did achieve the declarations sought. He also refers to increased costs through the respondent’s conduct pre-hearing. The applicant seeks an award of costs of \$3,500 as a consequence.

What is the effect of the Calderbank offer upon costs?

[6] The purpose of *Calderbank* offers are to persuade the Authority to exercise its discretion against granting an applicant costs if it has recovered less by proceeding with the case than it could have by accepting the *Calderbank* offer.² There is a public interest in the fair and expeditious resolution of disputes. Parties cannot be permitted to ignore *Calderbank* offers without costs being impacted.³

[7] In order for a *Calderbank* offer to be effective it ought to be clear as to its terms and the recipient should be allowed a reasonable time to consider the offer.⁴

² *Ogilvie & Mather v. Darroch* [1993] 2 ERNZ 943

³ *Aoraki Corporation Ltd v. McGavern* [1998] 1ERNZ 601

⁴ See n2 above.

[8] Where a proceeding is found to be motivated by reputational factors and the need for vindication, an issue arises whether the *Calderbank* offer is effective unless it adequately addresses those elements. There may be cases where vindication through seeking a statement of principle may be relevant to the Authority's cost fixing discretion and the relevance of reputational factors means that costs assessments are not confined solely to economic considerations. But equally, an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the employee⁵.

[9] The *Calderbank* offer was clear as to its terms and provided sufficient opportunity for acceptance prior to hearing. It offered more than what the applicant achieved in monetary terms.

[10] In my view, proceeding to hearing did not provide vindication for Mr Lenaghan. Rather, it resulted in a publicised credibility finding against him. The defects were procedural. His reputation would have been better protected by acceptance of the *Calderbank* at the earlier stage. Proceeding to hearing did not provide Mr Lenaghan with any vindication other than an pyrrhic victory.

[11] In my view, there is a basis to reverse costs in favour of Hydrovac as a consequence.

[12] There are no other factors that require increasing the tariff beyond the usual daily tariff. The *Calderbank* offer has operated to reverse the onus of costs – it did not in and of itself justify any increase. Costs are intended to be modest in this jurisdiction. Full recovery of legal costs incurred from the point of the *Calderbank* is not justified in this jurisdiction.

[13] There is no order for disbursements. These are intended to be included as part of the daily tariff. Accordingly, Kevin Anthony Lenaghan is ordered to pay \$3,500 towards Hydrovac Limited's costs.

TG Tetitaha
Member of the Employment Relations Authority

⁵ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385; [2010] ERNZ 446 at [19].