IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2023] NZERA 12
3163541

	BETWEEN	LAUREN SHANNON Applicant
	AND	FREDA WILEY LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Kirsten Westwood, advocate for the Applicant Gary Tayler, advocate for the Respondent
Submissions Received:	5 December 2022 from the Applicant 19 December 2022 from the Respondent
Date of Determination:	12 January 2023

COSTS DETERMINATION OF THE AUTHORITY

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[1] On 24 November 2022 I issued a determination in which I concluded Ms Shannon had a personal grievance having been unjustifiably dismissed.[1] I also concluded she was due unpaid wages and should be reimbursed for money she spent to cover costs incurred by the employer.

[2] Costs were reserved and as the successful party Ms Shannon now seeks a contribution toward those she incurred pursuing her claims.

[3] The Authority's jurisdiction to order a contribution toward a party's costs is exercised by applying well-established principles.[2] Those principles recognise that:

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[1] *Shannon v Freda Wiley Limited* [2022] NZERA 617
[2] *Employment Relations Act 2000, Schedule 2, clause 15, Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 and **www.era.govt.nz/assets/Uploads/practice-note-2.pdf**

(a) a successful party should receive a contribution toward reasonably incurred costs and expenses;

(b) costs should generally be modest and may not be used to punish the substantive conduct of the unsuccessful party;

(c) the nature of a case may allow for an order that costs lie where they fall; and

(d) the Authority may use a notional daily tariff as its starting point. From there adjustment may occur either up or down depending on the circumstances of the case. Such adjustment may be to take account of settlement offers, particularly "calderbanks," the financial means of the liable party and whether or not a party unnecessarily increased the costs incurred by the other.

[4] The tariff is currently $4,500 for the first day and this is recognised by Ms Shannon's reference to the fact the investigation only took a quarter day which would in the normal course of events see a contribution of $1,250. That said, she seeks an uplift to $3,500 and in doing so notes her costs exceeded that amount by some margin.

[5] She justifies her claim for an uplift by saying the work required was increased as a result of the respondent's failure to engage meaningfully in the Authority's process and, more importantly, there was a calderbank offer under which she would have accepted somewhat less than was ultimately ordered.

[6] On Freda Wiley's behalf it is submitted that *"The proposition that an undefended hearing which allegedly took two hours, somehow increased the applicant's costs to more than 3 times the daily tariff is disingenuous".*

[7] Criticism is also directed at the Calderbank as:

(a) The substantive determination cannot be considered final given a right of challenge;

(b) It contained non-monetary elements which were not addressed by the Authority; and

(c) "The only measurable and relevant term in the offer is the monetary request for $10,000. Therefore the applicant was only 20% successful in terms of the Calderbank offer".

[8] Finally, and stated to be for completeness, Freda Wiley says *"Just as the non-trading respondent cannot meet the determination orders through its insolvent position, neither will it meet any costs orders".*

[9] With respect to the time taken I note three points. The first is that while the time actually taken was, for a matter of this nature, relatively short that was due to the respondent's non-attendance. In the normal course of events the matter would have taken longer and had to be prepared for accordingly. That raises the second point which was that Freda Wiley's absence was advised prior to the investigation which raises a potential argument the matter need not have been prepared for as a defended hearing. That said I think not as Freda Wiley had participated in the Authority's process to the extent there was a Statement in Reply which meant it remained free to change its mind and defend the matter.

[10] The third point is that notwithstanding the issue of whether or not the claims would be defended Freda Wiley had, in writing, conceded it could not successfully defend the unjustified dismissal claim. That must have had the effect of reducing the level of preparation required.

[11] Having considered these issues I conclude that notwithstanding the time actually taken I should proceed on the basis a half day should form an appropriate base from which to consider whether or not an increase is justified. That would not be an unusual assuming a defended investigation in which each party produced a witness.

[12] The possibility of a challenge is irrelevant to the question of costs other than to suggest the matter should actually be determined.[3]

[13] While there is no argument for a reduction of the tariff, there is a strong one for considering an increase which is the calderbank. The underlying principle of a calderbank is that a rejected offer would have led to a more beneficial outcome for the party against whom costs are sought, thus putting the other party to costs that, albeit with the benefit of hindsight, could have been avoided.

[14] Taking Freda Wiley's approach that there was only one measurable and operative term in the calderbank the answer is obviously yes – acceptance by Freda Wiley would have seen Ms Shannon receive less than she finally achieved. Her offer was therefore reasonable and it is well established rejection of what proved to be a reasonable offer should be reflected later in

[3] *Swales v AFFCO New Zealand Limited* [2001] NZEmpC 38 at [3]

a costs award – indeed the Courts have previously held a steely approach should be taken in this regard.[4]

[15] This must, in my view, be especially so in a situation where the employer, by its own admission, knew it had no chance of success. It should have adopted a reasonable approach and frankly $10,000 was a generous offer given the level of awards currently ordered by the Authority. To that I add the fact Ms Shannon should not have been required to pursue the wage arrears element of her claims yet was willing to subsume the value of those within the single sum which effectively reduced her offer to levels well below those she could have expected to obtain for the dismissal. She was put to costs she should not have had to incur.

[16] In other words I conclude this is a situation in which the tariff should be increased from the $2,250 a half day would see awarded. In the circumstances I do not consider the $3,500 sought unreasonable and to engage in an exercise seeking to identify a number between it and $2,250 almost reeks of an attempt to penalise Ms Shannon for being reasonable.

[17] The question of whether or not this order is futile need not be addressed as enforcement is a separate and possibly subsequent event. Suffice to say I do not accept the impecuniosity argument because, as said in the substantive determination, there are indications Ms Hammond and her interests might be vulnerable to attempts to lift the corporate veil. That, however, remains something that need not currently be addressed.

Conclusion and Orders

[18] As a result I order Freda Wiley Limited pay Ms Shannon $3,500.00 (three thousand, five hundred dollars) as a contribution toward the costs Ms Shannon incurred pursuing her claims.

Michael Loftus
Member of the Employment Relations Authority

[4] *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20]