**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2016] NZERA Christchurch 142
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| | BETWEEN | NATALIE SHEPPARD-JOHNSON<br>Applicant |
| | A N D | ZEROES COFFEE LIMITED<br>Respondent |

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| Member of Authority: | David Appleton |
| Representatives: | Michael McDonald, Advocate for Applicant<br>Kathryn Dalziel, Counsel for Respondent |
| Submissions Received: | 17 August 2016 for Applicant<br>17 August 2016 for Respondent |
| Date of Determination: | 24 August 2016 |

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## COSTS DETERMINATION OF THE AUTHORITY

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[1] By way of a determination of the Authority dated 20 July 2016[1], the Authority found that Ms Sheppard-Johnson had been unjustifiably dismissed and had been unjustifiably disadvantaged in her employment. She was awarded lost wages and arrears of pay totalling $1,520.00, but I declined to award her any compensation for humiliation, loss of dignity and injury to her feelings because of doubts about her credibility.

[2] I reserved costs and invited the parties to seek to agree on how costs were to be dealt with. However, they have been unable to do so and submissions have been received from both representatives.

[3] The respondent seeks costs against Ms Sheppard-Johnson on an indemnity basis, in the sum of $11,090.00, consisting of costs of $9,600.00 plus GST and a

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$50.00 (unidentified) disbursement. Indemnity costs are sought in reliance upon a Calderbank offer made to Ms Sheppard-Johnson's representatives in a letter from Ms Dalziel dated 2 February 2016. The Calderbank offer (which Ms Sheppard-Johnson rejected) offered to settle for the sum of $2,500.00 to be paid pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) (presumably, so it could be paid free of tax) as well as a contribution towards Ms Sheppard-Johnson's costs of $1,000.

[4] Mr McDonald argues that the offer was rejected because it did not provide for an acceptance that the treatment of Ms Sheppard-Johnson was wrongful. I assume he is adopting a vindication argument as the basis of rejection of the offer. He also argues that it is a matter of discretion as to whether rejection of a Calderbank offer will result in the award of indemnity costs or not.

[5] Other points made by Mr McDonald are that the respondent failed to disclose the time and wage records until the day before the investigation meeting, which caused Ms Sheppard-Johnson a disadvantage as she had maintained that she had worked double shifts prior to her dismissal, which was not correct. The time and wage records also formed a substantial part of the respondent's cross examination of Ms Sheppard-Johnson.

[6] Mr McDonald also makes the point that the respondent has gained a benefit from the Authority's determination because of the recommendations made by the Authority in respect of the respondent's approach to sick employees.

[7] Mr McDonald argues that costs should be awarded to Ms Sheppard-Johnson in the usual way, by reference to the daily tariff.

**The legal principles**

[8] The Authority's power to award costs is set out in paragraph 15 of Schedule 2 of the Employment Relations Act 2000 (the Act), which provides as follows:

> **15 Power to award costs**
> (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
> (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[9] When determining how legal costs and expenses should be dealt with, the Authority must take into account the principles set out in *PBO Ltd v. Da Cruz*[2]. These principles include the following:

a. There is discretion as to whether costs would be awarded and in what amount.

b. The discretion is to be exercised in accordance with principle and not arbitrarily.

c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

d. Equity and good conscience are to be considered on a case by case basis.

e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

g. That costs generally follow the event.

h. That without prejudice offers can be taken into account.

i. That awards will be modest.

j. That frequently costs are judged against a notional daily rate.

k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[10] *Ogilvie & Mather (NZ) Ltd v. Darroch*[3] sets out the two principal criteria that must be satisfied when a *Calderbank* offer is made so as to not prejudice unfairly the recipient of the offer by exerting undue pressure. These safeguards are as follows:

[2] [2005] 1 ERNZ 808

(a) A modicum of time for calm reflection and the taking of advice before a decision has to be made to accept the offer or reject it; and

(b) The offer must be transparent if the offeror is later to be given the protection the *Calderbank* offer furnishes.

[11] In *Bluestar Print Group (NZ) Ltd v Mitchell*[4] the Court of Appeal stated, at paragraph [18]:

> In the employment context it has also recognised … that 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.

[12] It was in *Bluestar Print Group* that the Court of Appeal advocated its famous "steely approach" in respect of Calderbank offers. The Employment Court confirmed in *Davide Fagotti v Acme & Co Limited*[5] that the "steely approach" applies equally to the Authority as it does to the Employment Court[6].

**Discussion**

[13] First, I accept that the Calderbank offer that was sent on behalf of the respondent fulfilled the requirements of *Ogilvie & Mather*, in that sufficient time was given to consider the offer (as no time limit was set) and that it was transparent. Although it did not spell out what the effects of rejection would be, it had been sent to competent and experienced employment advocates who would have no doubt as to the meaning of a letter headed up "without prejudice save as to costs". They can be expected to have advised their client as to its meaning.

[14] The key issue to determine, therefore, is whether it was unreasonable for Ms Sheppard-Johnson to have rejected the Calderbank offer. I do not believe it was. First, I believe that it would have been reasonable for Ms Sheppard-Johnson and her advisers to have concluded that she was more likely than not to succeed in her claim.

[15] Second, whilst Ms Sheppard-Johnson knew that the lost wages element of her expected remedies would be low, she could not have reasonably expected not to recover any compensation under s123(1)(c)(i) of the Act. Ms Sheppard-Johnson

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[3] [1993] 2 ERNZ 943
[4] [2010] NZCA 385, [2010] ERNZ 446
[5] [2015] NZEmpC 135
[6] At [109]

failed to beat the Calderbank offer by only $980.00 (ignoring the costs element). She would reasonably have expected to have recovered more than that.

[16] Of course, I found that Ms Sheppard-Johnson had attempted to mislead the Authority in respect of aspects of her evidence, and so I was unable to be confident that her evidence on the effects of her disadvantage and dismissal was truthful. As I could not guess what the likely effects were, I was unable to award her anything. However, at the time when Ms Sheppard-Johnson rejected the Calderbank offer, it could not have reasonably been in her contemplation that this was likely to be the outcome.

[17] For this reason, I do not believe that it was unreasonable for Ms Sheppard-Johnson to have rejected the offer.

[18] Should costs be awarded to Ms Sheppard-Johnson? Following the principle that costs follow the event, I believe they should. Mr McDonald has not indicated what cost have been incurred by Ms Sheppard-Johnson, but I am prepared to infer that they would reasonably be in excess of $3,500.00, the Authority's daily tariff at the material time.

[19] As the investigation meeting lasted almost a full day, I award the sum of $3,500.00 to Ms Sheppard-Johnson as a contribution towards her legal costs. I see no reason to uplift or reduce this amount.

**Order**

[20] I order the respondent to pay to Ms Sheppard-Johnson the sum of $3,500.00 as a contribution towards her costs.

David Appleton
Member of the Employment Relations Authority