

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 110
5546020

BETWEEN TAUSANI SIMEI-BARTON
 Applicant

A N D LDJS LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: S Cook/M Piper, Counsel for the Applicant
 D Gelb, Advocate for the Respondent

Investigation Meeting: On the papers

Submissions: 25 January 2016 from the Applicant
 25 January 2016 from the Respondent

Date of Determination: 8 April 2016

COSTS DETERMINATION OF THE AUTHORITY

**A. LDJS Limited is ordered to pay Tausani Simei-Barton \$8,000
 towards his actual legal costs.**

Employment relationship problem

[1] The Authority in its substantive determination dated 23 December 2015¹ held that the applicant was unjustifiably dismissed. The respondent was ordered to pay the applicant two weeks' ordinary pay less PAYE and \$2,000 compensation. Costs were reserved.

[2] The applicant now applies for costs. His actual costs incurred were \$15,817.30. The respondent seeks costs on the basis of a *Calderbank* offer. Its actual

¹ *Tausani Simei-Barton v Aldi LJ Ltd* [2015] NZERA Auckland 473

costs were \$14,146.72. It also seeks a stay of the orders made in the substantive determination.

What is the starting point for assessing costs?

[3] Both parties accept the correct approach to assessing costs is for the Authority to adopt its usual notional daily tariff based approach. The current notional daily tariff is \$3,500. This matter involved a two day investigation meeting. The starting point for assessing costs is therefore \$7,000.

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

Calderbank offers

[4] Both parties exchanged *Calderbank* offers prior to hearing. On 9 July 2015, the applicant sought payment of lost remuneration of \$8,000 gross, compensation of \$15,000 under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act), costs of the examination report of \$450 and a contribution towards the applicant's legal fees of \$7,000 plus GST.

[5] On 18 August 2015, the respondent counter-offered \$5,000 compensation paid under s.123(1)(c)(i) of the Act if the applicant discontinuing his personal grievance.

[6] The applicant rejected this offer and counter-offered on 24 August 2015 to settle for \$15,000 under s.123(1)(c)(i) of the Act and \$8,000 plus GST towards his legal expenses. This was not accepted.

[7] A *Calderbank* offer that is not inclusive of costs ought to propose a specific figure for costs². Parties who make *Calderbank* offers which are silent about pre-offer costs bear the burden of persuading the Authority that the offer is adequate to disentitle a successful plaintiff from recovering costs³.

[8] The applicant achieved approximately \$4,000 in compensation and lost remuneration. This was less than the amount offered by the respondent and gave rise to an argument to reverse or reduce costs.

² *Binnie v. Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [30].

³ *Jackson v. Moyes Motor Group Ltd* [2005] ERNZ 504 at [31].

[9] However the respondent's *Calderbank* offer is silent about pre-offer costs. At the time it was made the applicant had already incurred approximately 50% or \$7,565.50 of his total legal fees including appearing at a prehearing conference, preparing and filing his briefs of evidence and incurred the costs of an expert document examiner.

[10] Taking into account the above the respondent's *Calderbank* was inadequate and it would be unjust for the applicant to have costs awarded against him or reduced in light of his successful grievance claim.

[11] There are a number of factors it points to an increase in costs. These include:

- a. Refusing to attend mediation, requiring a direction to mediation;
- b. An unsuccessful application to strike-out the applicant's claim; and
- c. Filing inadmissible evidence from Mr Mann

[12] These factors can be reflected in an increase to the daily notional tariff to \$4,000 totalling \$8,000 costs.

Outcome

[13] LDJS Limited is ordered to pay Tausani Sime-Barton \$8,000 towards his actual legal costs.

TG Tetitaha
Member of the Employment Relations Authority