



# New Zealand Employment Relations Authority Decisions

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## Wealleans v A Feminine Finish Limited (Christchurch) [2016] NZERA 566; [2016] NZERA Christchurch 205 (16 November 2016)

Last Updated: 2 December 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 205  
5605965

BETWEEN DIANE WEALLEANS Applicant

A N D A FEMININE FINISH LIMITED

Respondent

Member of Authority: T G Tetitaha

Representatives: J Goldstein, Counsel for Applicant

P Zwart, Counsel for Respondent

Submissions Received: 10 October and 15 November 2016 from Applicant

21 October and 4 November 2016 from Respondent

Date of Determination: 16 November 2016

**COSTS DETERMINATION OF THE AUTHORITY**

**A. A Feminine Finish Limited is ordered to pay Diane Wealleans the sum of \$6,125 towards her legal costs.**

**B. Given the respondents financial position, payment of this costs order is stayed for 16 months from the date of this determination. Payment by instalments is then to occur at \$1,000 per calendar month.**

### **Employment Relationship problem**

[1] The Authority in its oral determination dated 29 September 2016<sup>1</sup> held that

Diane Wealleans was unjustifiably dismissed by A Feminine Finish Limited.

[2] There was an order for payment by A Feminine Finish to Diane Wealleans in the sum of \$15,000 compensation for hurt and humiliation. Costs were reserved.

<sup>1</sup> *Diane Wealleans v. A Feminine Finish Limited*[2016] NZERA Christchurch 178

[3] The parties have been unable to agree payment of costs. Ms Wealleans now applies for costs. Her actual costs were \$9,667.50 plus GST exclusive of mediation.

### **What is the starting point for assessing costs?**

[4] The correct approach in assessing costs in this matter is for the Authority to adopt its usual notional daily tariff. The daily notional tariff applicable to this matter is \$3,500. The starting point for assessing costs is \$3,500.

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

[5] The applicant refers to a *Calderbank* offer for lost remuneration of \$5,000, compensation of \$6,000 and \$3,500 plus GST towards costs. The offer was open for acceptance until 15 April 2016. The respondent did not respond to this offer. The applicant subsequently incurred the sum of \$9,667.50 plus GST in costs. The applicant seeks an uplift of \$3,500 to the notional daily tariff, or \$7,000 plus disbursements in total as a contribution towards her costs.

[6] The respondent submits the Authority is not required to consider the *Calderbank* offer. The offer was made on 6 April 2016 when the respondent was unaware of the circumstances of the applicant's absence in 2015. It was not until the applicant had filed the statement of problem on 28 April 2016 that the respondent was fully aware of the applicant's case. By then the applicant's offer of settlement had been withdrawn on 15 April 2016. It says the timing of the offer and its withdrawal significantly affected the respondent's ability to respond to the offer and properly consider its reasonableness. It also made an offer of reinstatement. In its view, this negates the relevance of the applicant's *Calderbank* offer. The *Calderbank* offer included a claim for lost wages for which the applicant was unsuccessful.

### Determination

[7] There is a public interest in the fair and expeditious resolution of disputes that requires consideration of the impact of settlement offers or *Calderbank* offers upon costs.<sup>2</sup> There is a need for a steely approach to costs where reasonable settlement proposals have been rejected.<sup>3</sup>

<sup>2</sup> *Aoraki Corporation Ltd v. McGavin* [1998] 1ERNZ 601

<sup>3</sup> *Health Waikato Ltd v. Elmsley* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) at [53]

[8] The reasonableness of a party's rejection of a *Calderbank* must be assessed at the time of rejection, not against the subsequent result. It will depend on the size and timing of the offer, the reasonable expectations of the party refusing the offer and on the party's ability at the time of the offer to assess the merits of the case.<sup>4</sup>

[9] The overall settlement offer here was less than what the respondent was ordered to pay. Although the respondent was not fully aware of the exact reasons for the applicant's absence from work, this was irrelevant to the substantive and procedural defects in the process leading to her termination. It may have assisted the respondent to accept the offer in hindsight but does not prevent consideration of the offer in terms of costs.

[10] The offer of reinstatement did not remedy the applicant's grievances. At best it addressed her lost wages claim from April 2016 only. Given the lost wages claim was unsuccessful due to lack of mitigation the offer of reinstatement did not affect the outcome. I set it to one side.

[11] I do accept there was some basis to dispute the lost wages claim and therefore the settlement offer may have been less attractive. Ms Wealleans was seeking 8 months lost wages. The settlement offer included payment for 3 months lost wages. Even though the settlement offer included a claim that was unsuccessful, overall the settlement offer equated to less than what the respondent had to pay.

[12] Although at hearing the lost wages claim was dismissed because of a failure to mitigate losses that would not have been known to the parties at the time the offer lapsed in April 2016. A reduction in costs by a least a third would have been appropriate to recognise the costs of defending that part of the claim at hearing.

[13] Balancing these factors I am prepared to increase the notional daily tariff by

2/3rds only to \$6,125.

[14] There is an application for payment of instalments of the compensation order. Given the evidence of the financial impecuniosity of the respondent and the order for

payment by instalments of the compensation award, the payment of this costs order is

<sup>4</sup> *New Zealand Sports Merchandising Ltd v. DSL Logistics Ltd* HC Auckland, CIV-2009-404-5548, 19

August 2010 at [36]; *Samson v. Mourant* [2016] NZHC 1119 at [44]; *Weaver v. HML Nominees Ltd*

[2016] NZHC 473 at [30]

stayed for 16 months to allow the compensation order to be paid. Payment by instalments can then occur at \$1,000 per calendar month.

[15] The following orders are now made:

A. A Feminine Finish Limited is ordered to pay Diane Wealleans the sum of

\$6,125 towards her legal costs.

B. Given the respondents financial position, payment of this costs order is stayed for 16 months from the date of this determination. Payment by instalments is then to occur at \$1,000 per calendar month.

**TG Tetitaha**

**Member of the Employment Relations Authority**

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