IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 90
3098092

	BETWEEN	BRIAN WILSON Applicant
	AND	MANUKAU INSTITUTE OF TECHNOLOGY Respondent

Member of the Authority:	Eleanor Robinson
Representatives:	Jane Balthazar, counsel for the Applicant Mere King, counsel for the Respondent
Costs Submissions	29 January and 17 February 2021 from Applicant 12 February 2021 from Respondent
Determination:	05 March 2021

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination dated 21 December 2020 ([2020] NZERA 523), I determined quantum in relation to the claims of the Applicant Mr Brian Wilson, that he had been unjustifiably dismissed (which was conceded by the Respondent prior to the Investigation Meeting) and owed wage arrears by the Respondent, Manukau Institute of Technology Limited (MIT).

[2] Costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and both parties have filed submissions in respect of costs.

[3] The matter involved a one day investigation meeting on 20 October 2020.

[4] Ms Balthazar, on behalf of Mr Wilson, is seeking a costs award consisting of the daily tariff rate of $4500.00 plus the filing fee of $71.56 and disbursements in the sum of $190.93. Ms Balthazar further claims that an upward adjustment in the level of costs awarded to Mr Wilson is justified based upon the Respondent's conduct.

[5] Ms King, on behalf of MIT is seeking a contribution to costs of $34,269.00 on the basis that MIT was partially successful in that it was determined on the basis of the facts that Mr Wilson was not entitled to lost wages. In addition that Mr Wilson failed to accept reasonable *Calderbank* Offers made by MIT in June 2020.

[6] If the Authority does not accept that Mr Wilson should pay MIT's costs, MIT submits that costs should lie where they fall.

Calderbank Offers

[7] There were a number of *Calderbank*[1] Offers and a counter-offer made prior to the Authority Investigation Meeting which underpin the costs claims in this matter. A summary of these are set out below:

a. By letter dated 6 August 2019 MIT made a *Calderbank* Offer to Mr Wilson. The letter stated that in the event that Mr Wilson did not accept its offer, MIT would seek increased costs or costs on a solicitor/client costs on a full indemnity basis. The *Calderbank* Offer was stated as expiring at 4.00 p.m. on 20 August 2019;

b. By letter dated 5 June 2020 MIT made an increased *Calderbank* Offer in a total sum of $109,577.03 to Mr Wilson. The letter repeated that in the event that Mr Wilson did not accept its offer, MIT would seek increased costs or costs on a solicitor/client costs on a full indemnity basis. The *Calderbank* Offer was stated as expiring at 4.00 p.m. on 19 June 2020;

c. Mr Wilson responded by letter dated 8 June 2020 stating that the timing of the offer in letter dated 5 June 2020 placed him under undue and unfair pressure because the expiry date of 19 June 2020 was the date on which Mr Wilson was to file his witness statements and an electronic bundle of documents with the Authority;

   Mr Wilson stated that he required settlement in full to be completed on Monday 15 June 2020 in order that he would not need to comply with the Authority's timetable. Mr Wilson also advised in the letter that he would seek increased costs or costs on a solicitor/client costs on a full indemnity basis;

d. MIT responded in a letter dated 10 June 2020 that it would, if Mr Wilson required more time to negotiate the *Calderbank* Offer, by agreement seek an extension to

[1] *Calderbank v Calderbank* [1976] Fam 93 (CA).

the Authority's timetable. MIT also offered to draft a record of settlement document and reiterated the statement that it would rely upon the letter dated 5 June 2020 to seek increased costs or costs on a solicitor/client costs on a full indemnity basis should settlement not be reached;

e. By letter dated 12 June 2020 it was indicated that Mr Wilson accepted the *Calderbank* Offer only on the basis that MIT agreed to a final and reasonable settlement date. It was also noted that Mr Wilson would be complying with the Authority's timetable as set in the Authority's Minute dated 5 June 2020;

f. MIT responded on 29 June 2020 increasing the *Calderbank* Offer to settle in the sum of $119,577.03 plus the sum of $20,000.00 for hurt and humiliation. The offer was open for acceptance by Mr Wilson to 4 p.m. on 17 July 2020;

g. On 17 July 2020 Mr Wilson sent a counter-offer to MIT in the total sum of $164,574.32 with settlement in full being made by 28 July 2020.

Principles

[8] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

> **15 Power to award costs**
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> (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.
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> (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] Costs are at the discretion of the Authority[2].

[10] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*[3].

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[2] *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.
[3] *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

[11] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

[12] Of relevance in this instance is the principle that costs will be modest. The Employment Court further observed at para [47]:

> … we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.

Applicant's submissions

[13] Ms Balthazar, on behalf of Mr Wilson, has filed submissions which include *inter alia* that not accepting a *Calderbank* Offer does not meet the threshold of a party behaving badly, very unreasonably, misconduct nor flagrant misconduct.

[14] It is submitted that the Authority must take into account Mr Wilson's advice at the Investigation Meeting that he had been advised before it that lecturers in Trades commenced at Level 11 which represented a large increase in what he could claim; and Mr Wilson's expectation that the Authority would investigate the correct level to determine quantum was not unreasonable.

[15] It is also submitted that the costs should be increased based upon the conduct of the Respondent in making an express threat to seek increased costs or solicitor/client costs. The Applicant submits that the Authority does not have the power to award indemnity costs and its power is limited to adjustment of the daily tariff.

[16] Further grounds for increasing costs based upon the conduct of the Respondent cited included that the Respondent refused to provide Mr Wilson with his employment file despite requests, and this severely disadvantaged him in preparing his case; and that MIT refused to acknowledge Mr Wilson as a full-time permanent lecturer until 17 September 2020 which acknowledgement came late and after the *Calderbank* Offers.

[17] Mr Wilson submits that MIT is proposing not to make any payments to him pending the Authority's costs determination or the outcome of the challenge file, which is unreasonable given that neither the costs determination or a challenge operates as a stay.

Respondent's submissions

[18] Ms King, on behalf of MIT, has filed submissions which include *inter alia* that the Authority has full power to award increased pursuant to s 15 Schedule 2 of the Act up to, and including, indemnity costs if appropriate.

[19] MIT does not deny that Mr Wilson had a right to reject the *Calderbank* offers, however submits that the Authority is entitled in an equity and good conscience jurisdiction to consider the effect of that rejection on the public interest and MIT. It highlights that this was summarised in *Blustar Print Group (NZ) v Mitchell* which stated:

> … 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 consequence as to costs.[4]

[20] MIT denies the claim that it is forcing Mr Wilson to incur further legal fees, submitting that its suggestion to temporarily withhold payments to him is reasonable and appropriate considering his intention to file a challenge which was not served on MIT. It submits it would be illogical in the circumstances to make payments which may be adjusted by the Employment Court and that MIT made the suggestion to avoid time and costs to both parties.

[21] MIT denies that the statement in the *Calderbank* Offer that it would rely on it to seek increased or indemnity costs was a threat, and submits it was a simple comment on the legal effect of a *Calderbank* offer.

[22] MIT submits that it provided Mr Wilson with all documents requested save for those it was unable to locate or which no longer existed, noting that Mr Wilson filed extensive documentation and detailed submissions which indicated he had not been disadvantaged.

[23] MIT submits that the Authority did not accept all of Mr Wilson's claims. It submits that Mr Wilson continuously refused to accept MITs reasonable *Calderbank* Offers which exceeded the amounts ultimately awarded to him. The *Calderbank* Offers if accepted, would not only have meant Mr Wilson would be financially better off, but would have provided him with the recognition he sought. As a result, rejection of the *Calderbank* offers unnecessarily and unreasonably increased costs.

[24] MIT submits that it is not liable to pay for Mr Wilson's costs on the basis that liability would be unjust given that attendance at the Investigation Meeting and at least part of the costs submission could reasonably have been avoided given MIT's admissions as to substantive

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[4] *Blustar Print Group (NZ) v Mitchell* [2010] NZCA 385; 7 NZELR 494 at [18].

liability. Accordingly MIT submits that Mr Wilson should bear some of its costs to reflect unnecessary expense it incurred in attending an investigation meeting.

Applicant's further submissions

[25] Ms Balthazar on behalf of Mr Wilson, takes exception to some of the claims made by MIT in its submissions and submits that these constitute false allegations against her and an attack on her reputation without good cause.

[26] As such Ms Balthazar claims that the submissions by Ms King are a breach of the rules of the Lawyers and conveyancers Act (Lawyers Conduct and client Care) Rules 2008.

Costs Award

[27] In this matter both parties had some degree of success. In *Coomer v J H McCallum and Son Ltd* the Employment Court observed that in these cases of mixed success, the Authority must: "stand back and look at things in the round".[5]

[28] In this case, I accept that the Authority was determining quantum and Mr Wilson was awarded appropriate sums in determination ([2020] NZERA 523). As such he was the successful party and costs normally follow the event.

[29] I consider that the *Calderbank* Offers should be taken into consideration in determining the appropriate level of costs.

[30] In this case, Mr Wilson was awarded significantly less by the Authority in its determination than he was offered by MIT in the *Calderbank* Offers set out in the letters dated 5 and 29 June 2020.

[31] The *Calderbank* Offer set out in the letter dated 5 June 2020 provided Mr Wilson with two weeks in which to consider it. I consider this was a reasonable time frame, allowing time for consideration and for seeking legal advice on the settlement offer.

[32] Following the concern noted by Mr Wilson that the expiry date of 19 June 2020 was the date by which he needed to comply with the Authority's timetable, MIT offered to contact the Authority seeking an extension to the time frames.

[33] The increased offer made by MIT and contained in the *Calderbank* letter dated 29 June 2020 was open for acceptance until 17 July 2020. The Investigation Meeting took place on 20

[5] *Coomer v J H McCallum and Son Ltd* [2017] NZ EmpC 156 at [43].

October 2020. There was therefore ample time for Mr Wilson to fully consider the offer to settle before participating in an investigation meeting.

[34] Whilst taking note of the comments made by Judge Inglis as regards the ameliorating of the '*steely*' approach noted in the judgment in *Stevens v Hapag-Lloyd (NZ) Ltd*[6] which referred to: "significant costs awards", I consider that *Calderbank* Offers may still be taken into consideration in the matter of costs in the Authority on the basis that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted[7].

[35] I have given full consideration to the submissions of the parties as regards the effect of the conduct on the part of each, but after deliberation do not accept that the conduct of either of the parties impacted significantly upon the conduct of the investigation meeting.

[36] I note the claim by Ms Balthazar that counsel for MIT committed breaches of the Lawyers and Conveyancers Act (Lawyers Conduct & Client Care) Rules by making false allegations against her.

[37] At this stage I am not aware of any complaint being made to the Law Society which has the remit for addressing such conduct, and without anything further I therefore do not take this claim into account for the purposes of this costs determination.

[38] Taking all these considerations into account, I make a costs award in favour of Mr Wilson.

[39] **I order MIT to pay Mr Wilson a contribution to costs in the sum of $3,250.00, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000. MIT is also ordered to pay Mr Wilson the disbursements incurred of $190.93 and the Authority filing fee of $71.56.**

Eleanor Robinson
Member of the Employment Relations Authority

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[6] [2015] NZEmpC 137 at para [95].
[7] *Aoraki Corporation Ltd v McGavin*[7] [2004] 1 ERNZ 172 (CA) at [53].