

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 37
3027732

BETWEEN XCT
 Applicant

AND UHG
 Respondent

Member of Authority: Andrew Dallas

Representatives: Anna Oberndorfer, advocate for Applicant
 David Traylor, counsel for the Respondent

Determination: 29 January 2019

COSTS DETERMINATION OF THE AUTHORITY

Introduction

[1] By determination issued on 28 November 2018¹, the Authority made findings about XCT's employment relationship problem with UHG. The Authority found that XCT was unjustifiably dismissed by UHG. That determination is now under challenge to the Court.

[2] The determination reserved costs but encouraged the parties to resolve that issue themselves. It included an indication that, if asked to determine costs, the Authority's assessment would be the applicable daily tariff.

XCT's claim for costs

[3] In a memorandum on costs subsequently lodged, XCT, through a representative, sought an order for a costs award of \$13,991.66 inclusive of Goods and Services Tax (GST) in the amount of \$1,825.00.

¹ [2018] NZERA Christchurch 174

[4] XCT sought an uplift to the Authority's tariff of \$8000 for a two day investigation meeting on two bases. First, she said she was required to make an Official Information Act request because UHG was not forthcoming with information. Evidently, the result of this request saw XCT provided with an "immense amount of documentation", which needed to be reviewed. Second, XCT claimed GST on her costs on the basis that she was not registered for it. Reliance was placed on the decision of the Court in *Stormont v Peddle Thorp Aitken Limited*.²

[5] XCT also said that the fact UHG prepared the common bundle with agreement was relevant to the exercise of the Authority's discretion.

[6] Based on the invoices provided by XCT, excluding work done up to and including mediation, the figure of \$13,991.66 including GST constituted a significant contribution towards total costs. XCT also sought reimbursement of the Authority's filing fee of \$71.56.

[7] Anticipating UHG's submissions about its Calderbank offers, XCT said these offers should not affect her claim for costs. XCT draws, in effect, a distinction between offers containing purely monetary remedies and those containing other remedies including reinstatement.

[8] In support of this proposition, XCT referred to the decision of the Court in *Wellington Racing Club Inc v Welch*³ where it was suggested where cases are not simply about monetary compensation, it may be unreasonable to expect the offer to be favourably considered. XCT also referred to the determination of the Authority in *Heath v Auckland City Council*⁴ which found that proceedings "being about reinstatement particularly, was never susceptible to Calderbank offers".⁵

² [2017] NZEmpC 159

³ [2002] 1 ERNZ 685 at [13]

⁴ ERA Auckland, AA 49A/07, 30 March 2007

⁵ At [30]

UHG

[9] UHG referred to two Calderbank offers. The first was made on 23 April 2018. In pure monetary terms, it contained an offer which was more favourable to XCT than she was ultimately awarded by the Authority. The offer was made up of four components including lost wages, compensation and a contribution to representational costs. However, the offer did not contain an offer of reinstatement. As XCT has consistently maintained throughout the course of these proceedings, reinstatement was her “primary” remedy. Unsurprisingly, she rejected the offer. The second offer was made after the investigation meeting on 12 June 2018. At the end of the meeting, the Authority expressed a preliminary view that XCT had been unjustifiably dismissed by UHG but reinstatement was an unlikely remedy. The offer made by UHG contained the same terms as the offer of 23 April 2018. The offer was again rejected by XCT.

[10] Based on the rejection of the Calderbank offers, UHG sought the reversal of the usual principle that “costs follow the event” for the successful party and sought costs of \$8000 against XCT. UHG said XCT would have been better off had she accepted either of its offers and the parties would not have been put to the expense of continuing the litigation. In support of its submissions about its Calderbank offers, XCT referred to the decision of the Court of Appeal in *Bluestar Print Group (NZ) v Mitchell*.⁶

Response to XCT’s claim for costs

[11] Without prejudice to its position it should be awarded costs, UHG rejected XCT’s arguments for an uplift in the daily tariff. UHG said it was directed by the Authority to prepare the common bundle and XCT was directed to assist in the preparation of the same. It said XCT did not provide any relevant documents. UHG also said some of the documents provided in response to the Official Information Act request ultimately found their way into the bundle and therefore this did not justify an uplift in the tariff. Finally, UHG said the Authority had a different approach to the Court in setting costs, including awarding GST to unregistered parties, and therefore *Stormont* was distinguishable.

⁶ [2010] ERNZ 446 (CA)

Evaluation

Calderbank offers

[12] Dealing with UHG's Calderbank offers first, I accept XCT's submission there is a distinction between offers containing purely monetary remedies and those containing other remedies. In doing so, I am fortified by reasoning in *Wellington Racing, Heath* and other determinations of the Authority.⁷ It was clear from the outset that XCT sought to be reinstated. It was equally clear, as observed in the primary determination, that UHG strongly opposed this outcome.⁸ Indeed, the significant offers made by UHG to settle the proceedings are consistent with the weight of evidence lodged against XCT's reinstatement. Conversely, XCT's rejection of those offers plainly reinforces the palpable strength of her desire for reinstatement. For both parties, this was high-stakes litigation.

[13] On one approach, arguably it was unreasonable for XCT to reject UHG's offer after the Authority had indicated at the end of the investigation meeting that reinstatement was unlikely to be one of the remedies awarded. However, against this four points can be reasonably made. First, this intervention was designed to assist the parties resolve their employment relationship problem, not advantage one party over the other in subsequent arguments about costs. Second, the non-awarding of reinstatement was expressed as a likely outcome and not a final outcome; the parties' submissions were lodged with, and considered by, the Authority after this point. Three, based on a review of the invoices provided by UHG it did not incur significant costs (relative to the balance of the invoices) after the rejection of the offer. Four, regardless, and in any event, the Authority's determination is not the final word on the remedies. XCT has challenged the Authority's determination to the Court and remains determined to achieve reinstatement.

[14] In light of the above, and despite being in equal parts risky and brave, I find it was not unreasonable for XCT to reject UHG's Calderbank offers on the basis they did not afford her the desired primary remedy of reinstatement. Indeed, if reinstated XCT would have exceeded UHG's offer to settle within the first 12 months.

⁷ See, also, for example, *Maddigan v Department of Conservation* [2018] NZERA Christchurch 193

⁸ *XCT v UHG* [2018] NZERA Christchurch 174 at [52]

Grounds for uplift in the Authority's tariff?

[15] Having considered the submissions of the parties, I do not believe XCT has made out grounds for an uplift based on, what can only be described as, general strategic positioning by the parties prior to the investigation meeting. Further, the exercise of the Authority's discretion to award costs under cl 15(1) of the Employment Relations Act 2000 is on the basis that the daily tariff is an all-inclusive, GST neutral figure. Consequently, XCT's claim for GST on her costs is declined.

Outcome

[16] The sum of \$8000 in costs must be paid by UHG to XCT within 14 days of the date of this determination.

Andrew Dallas
Member of the Employment Relations Authority