

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Anna Andrews (Applicant)
AND Blue Sky Wireless Limited (Respondent)
REPRESENTATIVES Trish MacKinnon for Applicant
Paul May for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION Costs submissions received by 23 August 2005
MEETING
DATE OF 13 September 2005
DETERMINATION

COSTS DETERMINATION OF THE AUTHORITY

1. In my substantive determination I dismissed Ms Andrew's claim for constructive dismissal, but ordered that she be paid \$3,059.59 gross in arrears of wages, including commissions, holiday pay and sick leave.
2. On behalf of Ms Andrews Ms MacKinnon seeks a reasonable contribution towards costs of \$7,865 plus GST and disbursements of \$157.19. On behalf of the respondent, Blue Sky Wireless Limited ("Blue Sky"), Mr May seeks a contribution of \$5,000 towards its costs of \$9,900 in reliance on a *Calderbank* offer issued on 15 March 2005. That offer stated that:

"Our client is prepared to make a payment of \$6,000 as compensation for stress and humiliation etc.

This offer is made in full and final settlement of your client's claim and is to include the usual conditions of confidentiality, no admission of liability etc."
3. This offer was rejected by Ms Andrews. Mr May also noted that the majority of the time at the investigation meeting related to the claim for constructive dismissal.

4. In response Ms MacKinnon noted that the offer:

“which was couched as compensation for stress and humiliation etc contained no reference to the issue of the outstanding wages, sick and holiday pay”

5. She therefore submitted that the offer should not be taken into account by the Authority. Ms MacKinnon also noted that Ms Andrews would lose the benefit of the wages claim that she was successful in if she was not awarded costs and that a costs award against Ms Andrews would impose severe hardship on her. She noted that Ms Andrews was on an income of approximately \$400 per week.

6. In response Mr May noted that the form of proffered payment was irrelevant as all negotiated settlements are couched in this way in his experience.

7. *Health Waikato Ltd v. Elmsly* (unreported, Court of Appeal CA 69/03, 25 March 2004) is a case of some relevance here. At Para.[53] the Court of Appeal held:

“Access to justice and reputational considerations mean that a costs benefit analysis of litigation of this sort cannot be consigned solely to economic considerations. None the less, we think that a more sensible approach by defendants to the making of Calderbank offers and steely response by the Courts where plaintiffs do not meet Calderbank offers would be in the broader public interest. In addition to that it is clear that all factors need to be taken into the mix when considering the discretion involved in fixing costs.”

8. As I stated in my substantive determination, mediation services can be of great assistance in cases like this, particularly as at the time of dispute the mediation service could also have dealt with the wages claims of Ms Andrews at a lesser cost to the parties.

9. I am not prepared to accept that simply because the *Calderbank* offer was made in terms of payment of compensation for stress and humiliation rather than specifically for wages that it should not be given any weight. That would be subjecting such offers to far too pedantic scrutiny. In essence the offer would have meant, if it had been accepted, that Ms Andrews would have been more than \$3,000 better off than the result in the Authority.

10. Given that there is no other reason for claiming that the *Calderbank* offer is ineffective, I determine that it is a relevant factor to take into account in costs. Given

that the vast majority of the investigation meeting was about the constructive dismissal claim, which failed, Ms Andrews ought to meet a reasonable proportion of Blue Sky's costs, I determine. On the other hand, I accept that Ms Andrews is not financially secure and does not earn a high income. However, she should be able to meet payments over time and that is a relevant factor.

11. In all the circumstances in this case, I consider it appropriate that Ms Andrews should contribute \$1,500 towards of the costs of Blue Sky.
12. I therefore order the applicant, Ms Anna Andrews, to pay to the respondent, Blue Sky Wireless Limited, the sum of \$1,500 in costs.

G J Wood
Member of Employment Relations Authority