

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 83  
5371752  
5385261

BETWEEN GRANT BOSHER  
Applicant (file 5371752)  
Respondent (file 5385261)

AND WELLINGTON COMBINED  
TAXIS LIMITED  
Respondent (file 5371752)  
Applicant (file 5385261)

Member of Authority: Michele Ryan

Representatives: Charles McGuinness, Counsel for the Applicant  
Susan-Jane Davies, Counsel for the Respondent

Submissions received From the applicant on 13 February and 30 April 2014  
From the respondent on 3 March 2014

Determination: 12 August 2014

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**COSTS DETERMINATION**

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**Employment relationship problem**

[1] In a determination issued on 6 November 2013<sup>1</sup> I found Mr Boshier had been unjustifiably dismissed by his employer, Wellington Combined Taxis Limited (WCT). He was awarded \$18,065 in total, comprising \$12,065 (gross) as reimbursement for lost wages and \$6,000 as compensation.

[2] Submissions from both parties on the issue of costs have now been received.

[3] Mr Boshier seeks full client/solicitor “indemnity” costs. WCT contests Mr Boshier’s application.

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<sup>1</sup> *Boshier v Wellington Combined Taxis Ltd* [2013] NZERA Wellington 139

## Issues

[4] The Authority is required to assess and determine what, if any, costs should be ordered. In order to do so, the following issues need to be determined:

- i. Should the *Calderbank* offer result in an award of indemnity costs or, alternatively, and increase to an award of costs?
- ii. If indemnity costs are not appropriate, are there any other factors present which should allow for an uplift or scaling back of costs?

## Principles

[5] The principles which guide the Authority's approach in an assessment as to costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*<sup>2</sup>. Those principles are now so well established it is not necessary to restate these in full in this determination.

[6] Cost awards generally follow the event. In the Authority's jurisdiction these are typically modest. The Authority's usual approach when making an assessment of costs is to use a notional daily tariff, currently set at \$3,500 per day of investigation, as a starting point. The tariff, however, should not be applied slavishly. Depending on the circumstances of each matter the rate may be adjusted up or down. Relevant to this matter, *Calderbank* offers are a factor that may be considered, but costs should not be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.

### ***Should the Calderbank offer result in an award of indemnity costs or, alternatively, an increase to an award of costs***

[7] Mr Boshier relies on a *Calderbank* offer made on his behalf to WCT on 31 July 2012 to obtain full indemnification of costs totalling \$34,532.14 including disbursements and GST. He produced an invoice reflecting that sum as the cost for the provision of legal services in this matter<sup>3</sup>.

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<sup>2</sup> [2005] ERNZ 808

<sup>3</sup> As well as an additional document furnished to the Authority particularising the cost of services provided.

[8] Although a *Calderbank* offer is normally made by the party sought to be held liable, it can also be made by the claimant offering to settle for a sum<sup>4</sup>. Mr Bosher's *Calderbank* offer proposed a contribution of \$6,000 (plus GST) to his then costs, compensation of \$8,000, and 3 months' wages. The offer, if accepted, totalled \$25,400 (GST inclusive).

[9] Mr Bosher was awarded \$18,065; comprising three months' wages (less earnings made) and \$6,000 in compensation.

[10] Counsel for Mr Bosher submits that given the investigation lasted "*the best part of three days*" and applying the daily tariff approach, an award of \$10,500<sup>5</sup> could be anticipated by the successful party. I understand his submission to say that the sum of the award made by the Authority plus the tariff associated with a three day investigation results in an overall award of \$28,565. Using this methodology it is suggested that the *Calderbank* offer was an offer to settle at a sum lower than achieved from the Authority and therefore the *Calderbank* offer should be a significant consideration in a costs assessment. Counsel further referred to *Watson v New Zealand Electrical Traders Ltd t/a Bray Switchgear* (2006) 4 NZELR 59 whereby the Employment Court found, in circumstances where an award fell short of a previously made *Calderbank* offer by \$150, that the "*offer to settle...was so close to the outcome of the Authority's investigation*" that the offer to settle was a significant consideration [for costs].

[11] I am unwilling to ascribe the level of significance to Mr Bosher's *Calderbank* offer as counsel requests. A fundamental benefit of settlement prior to proceeding with litigation in circumstances where a *Calderbank* offer has been made is so both parties can avoid costs associated with the proceedings and an outcome similar to that ordered by the Authority or Court may be achieved.

[12] I do not accept that the factual matrix of *Watson*<sup>6</sup> is sufficiently analogous to the current circumstances. The sum awarded to Mr Bosher by the Authority was less than  $\frac{3}{4}$  of the sum proposed in his *Calderbank* offer. Put another way, the offer to

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<sup>4</sup> *Watson v New Zealand Electrical Trades Ltd t/a Bray Switchgear* (2006) 4 NZELR 59

<sup>5</sup> Submissions for Mr Bosher calculated the usual daily tariff of 3,500 x 3 days of investigation as \$11,500 but I have assumed this was a genuine mathematical error.

<sup>6</sup> *ibid*

settle exceeded the outcome of the Authority's award by \$7,335. I do not regard the difference between Mr Boshers offer to settle and the orders contained in the substantive determination as "so close" that the offer should be given significant weight.

[13] Where an offer to settle is made by one party and rejected by the other and where the offeror obtains greater success than that sought in the *Calderbank* offer, then s/he is likely to have those material events beneficially considered in a costs assessment. In this matter the amount awarded to Mr Boshers following a determination of his claims did not exceed the amount he proposed to settle his claims. In this regard I am unwilling to assess the now anticipated costs order of \$10,500 together with the sum awarded to Mr Boshers for his substantive claims so as to find that the sum for which Mr Boshers was willing to settle his claims has been exceeded such that indemnity costs should be ordered. In this regard I agree with the respondent's reference that the methodology does not compare "apples with apples".

[14] Mr Boshers offer to settle was premised on a successful finding of his substantive claims (as opposed to an additional determination on costs). While I accept that offers to settle frequently contain a sum inclusive of an estimation of possible costs, this did not occur in the circumstances<sup>7</sup>. There is no indication in the *Calderbank* offer that Mr Boshers offer was also founded on an entitlement to a particular sum or award of costs should his substantive claim(s) find success following a future investigation by the Authority. It needs to be noted that the Authority's power to award costs is discretionary and is usually a matter of assessment after a substantive determination has been made.

[15] I consider an award of indemnity costs in the sum of \$34,532.14 is unreasonable in the circumstances of this a matter and would be punitive. I note also the following observation made by Judge Couch in *Metallic Sweeping (1998) Ltd v Ford* [2010] NZEmpC 129 at [142]: "...it is not automatic that a party who makes an offer of settlement which is unreasonably rejected is entitled to be indemnified for all subsequent costs."<sup>8</sup>

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<sup>7</sup> The proposal of payment for costs in the instance of Mr Boshers was for a sum already accrued at the time the offer was made

<sup>8</sup> [2010] NZEmpC 129 at [42]

[16] Further, in the circumstances of this matter I do not consider the *Calderbank* offer should enhance an award of costs beyond the principle that costs should follow the event.

### ***Duration of the Authority's investigation***

[17] There is a dispute between the parties as to the duration of the Authority's investigation. The matter was initially set down for two whole days. Each of the scheduled days was interrupted by events largely outside the control of the parties. A third full day of investigation was undertaken 6 months later.

[18] Having reviewed the time taken by the Authority to investigate the claims I consider the duration of the investigation equals two full days. On this basis I consider the starting point for costs based on the notional daily tariff is \$7,000.

### ***The claims***

[19] Separate to the claim as to the justifiability of Mr Boshers dismissal, each of the parties lodged additional claims against the other.

[20] Mr Boshers alleged he had been unjustifiably disadvantaged in several ways. I found that the actions of which Mr Boshers complained formed part of the factual matrix which ultimately led to his dismissal. Remedies for these claims were therefore not awarded in addition to those made to compensate for his dismissal. Further claims for breach of contract, breach of the Wages Protection Act, and reinstatement were withdrawn either at the commencement of the investigation meeting or during the course of it. I found that WCT had not acted in good faith when it failed to provide Mr Boshers with relevant information but concluded the omission was based on an honestly held but mistaken belief and was not wilful. In these circumstances I declined to order penalties against WCT.

[21] WCT lodged a separate statement of problem (file number 5385261) citing Mr Boshers personally and TeWhata Ruru Transport Ltd (TWR) - a company of which he is sole director, as first and second respondents respectively. All causes of action against TWR by WCT were withdrawn prior to the investigation meeting, but its application for special and exemplary damages against Mr Boshers were not retracted until after the investigation meeting commenced. WCT persisted with claims that Mr

Bosher had breached various express and implied terms of employment including a claim for breach of good faith.

[22] It was clear from the outset that each party made claims over a wide range of matters. Equally, both parties were required to account for his or its actions and entitled to expend resources defending those matters.

[23] With the exception of my finding that Mr Bosher was unjustifiably dismissed all other claims were not upheld. I consider each party increased its own costs (as well as the others), and in these circumstances I am unwilling to uplift or scale back the tariff.

### ***Conduct of the parties***

[24] Counsel for Mr Bosher submits that the Authority, in its assessment, should also take into account correspondence sent by WCT's Chairman to shareholders criticizing Mr Bosher despite the findings of the Authority.

[25] I accept the submission on behalf of WCT that the correspondence in question occurred after the Authority's investigation had concluded and is not relevant to my assessment of costs.

### **Determination**

[26] I have not been persuaded that there are any other factors to warrant an increase or decrease to the Authority's daily tariff approach and have found no justification for departing from an award that reflects the standard notional daily rate. I consider an award for costs of \$7,000 in Mr Bosher's favour is appropriate.

### **Summary of Order**

[27] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act I order Wellington Combined Taxis Limited to pay Mr Bosher the sum of \$7,000 as a contribution to his costs.

Michele Ryan  
**Member of the Employment Relations Authority**