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Brinkman v Versatile Buildings Ltd AA 164A/07 (Auckland) [2007] NZERA 683 (13 September 2007)

Last Updated: 19 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 164A/07

5038528

BETWEEN PAUL BRINKMAN

Applicant

AND VERSATILE BUILDINGS LIMITED

Respondent

Member of Authority: Leon Robinson Submissions received: 20 June 2007

7 September 2007

Determination: 13 September 2007

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] By a Determination dated 5 June 2007, the Authority determined the employment relationship problem between these parties.

[2] Versatile Buildings Limited ("Versatile") by its counsel asks the Authority to make an order that the applicant Mr Paul Brinkman ("Mr Brinkman") pay a reasonable contribution to its costs. Versatile's actual costs are advised in the total sum of \$30,903.57. However counsel submits the most relevant factor in this application is a "without prejudice save as to costs" (lawyers call a "Calderbank" offer) offer of payment to Mr Brinkman of \$15,000.00 made on 11 July 2006. Versatile seeks on a Calderbank basis costs in the sum of \$19,215.92. That sum is principally the costs incurred after the without prejudice offer was made to Mr Brinkman. Mr Brinkman did not accept the offer.

[3] Mr Pa'u submits that costs should be left to lie where they fall. He points out Mr Brinkman was awarded a sum of compensation in respect of his suspension. It is also submitted that Versatile's costs are extraordinarily high and that costs in the Authority are modest. He submits that to award what is sought would be to punish Mr Brinkman and consequentially deter other applicants from bringing claims. Counsel says Mr Brinkman's claim was not so untenable that it should not have been brought.

[4] As concerns the Calderbank offer, it is submitted that there remain equity and good conscience considerations. The Authority is advised Mr Brinkman refused the Calderbank offer because *"he felt there was a chance he may succeed in all his claims"*. It is also submitted in this regard that Mr Brinkman was seeking reinstatement.

[5] Although not prescribed, the Authority has adopted the principles established by courts when dealing with

Calderbank offers. One pertinent and recent principle is that the public interest in fair and expeditious resolution of disputes requires full weight be given to the extent to which costs were properly incurred following non-acceptance of offers of settlement at figures above any amount eventually awarded in litigation¹.

[6] I regard this statement by the High Court in *McDonald v FAI (NZ) General Insurance Co Ltd*², as the appropriate statement of principle³:-

... the effect of Calderbank offers on an award of costs is fully discretionary. They do not grant automatic protection in the event of lesser recovery or result in full exposure to costs if a greater sum is recovered. A Calderbank offer does not stand alone. All surrounding circumstances must be considered.

[7] In *Heath and Auckland City Council*⁴, I said this at paragraph [23] of my Determination there:-

Calderbank letters are not in themselves any interference with the Court's or this Authority's discretion and principled approach on costs. The fact of Calderbank letters do not of themselves establish a rebuttable case for indemnity costs. They are a factor in the mix in the exercise of the discretion. A discretion which in this jurisdiction is fashioned significantly by an equity and good conscience jurisdiction.

[8] I take that approach in this matter too. The exercise of my discretion calls for a determination of what is a fair and reasonable contribution as between the parties. The Authority adopts a principled approach taking into account relevant matters and having no regard for irrelevant ones.

[9] I accept that Mr Brinkman genuinely sought reinstatement and vindication. He sought interim reinstatement and the parties reached an accommodation between them in that respect. Because I accept his quest for reinstatement and vindication was genuine, I consider that he ought not be

¹ *Watson v New Zealand Electrical Traders Limited t/a Bray Switchgear* AC64/06, 24 November 2006, Colgan CJ

² [\(2002\) 16 PRNZ 298](#)

³ Hansen J at para 17. *Diver v Geo Boyes & Co Ltd* 20/5/98, Penlington J, HC Hamilton CP58/93 is to the same effect

⁴ AA49A/07, 30 March 2007, L Robinson

liable to Versatile for costs on an indemnity basis because of the Calderbank offer. I prefer instead to consider the Calderbank offer as an additional consideration.

[10] Particularly relevant too, is Mr Brinkman's personal circumstances. I am advised that Mr Brinkman is his family's sole income earner on his salary of \$60,000.00 per annum. He supports his wife and two children. I understand he lives in rented accommodation. He has no other earnings and has limited only means to meet an award of costs after his living expenses.

[11] The investigation meeting proceeded over two full days. I consider Versatile successfully resisted all but one of Mr Brinkman's claims and is therefore to be regarded as the successful party. It is entitled to a contribution to its costs but because of Mr Brinkman's personal situation and what I find was his genuine quest for reinstatement and vindication, I decline to award costs on an indemnity basis arising out of the Calderbank offer. This is equity and good conscience jurisdiction and I take into account all these matters in deciding what it is fair and reasonable to do.

[12] For each day of the investigation meeting I award \$1,500.00 as well as a further component in recognition of the Calderbank offer. I conclude a total contribution of \$5,000.00 is appropriate. **I order Paul Brinkman to pay to Versatile Buildings Limited the sum of \$5,000.00 as a contribution to costs.**

[13] Finally, I record that while I have noted multiple instances of unsatisfactory aspects of the presentation of Mr Brinkman's claim in this investigation, I have in no way held him personally responsible for them in determining this application.

Leon Robinson

Member of Employment Relations Authority

