

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 277
5298891**

BETWEEN DENISE BUTLER
Applicant

AND PROFESSIONAL PUBLIC
RELATIONS NZ LTD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Kerry Single, Advocate for Applicant
Elizabeth Coates, Counsel for Respondent

Costs Submissions 3 and 27 June 2011

Determination: 28 June 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2011] NZERA Auckland 189 the Authority found that Ms Butler had not been unjustifiably disadvantaged or unjustifiably constructively dismissed by Professional Public Relations NZ Limited (“PPRNZ”).

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

[3] Ms Coates submits that the Applicant made a Calderbank¹ offer, that is a without prejudice save as to costs offer, to Ms Butler. This offer was made in an email dated 4 February 2011 (“the Offer”), which is before the Authority.

[4] Ms Coates refers in her submission to *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² and submits that the principles on which an award of costs are made are well settled. These well established principles are that costs generally follow the event, without prejudice

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

² [2005] 1 ERNZ 808

offers can be taken into account, and costs are modest. I have relied upon the principles as set out in *Da Cruz* in determining this matter.

Determination

[5] The amount proposed for settlement contained in the Offer was \$10,000.00.

[6] Ms Butler rejected PPRNZ's offer on 7 February 2011, and counter-offered in the sum of \$35,000.00.

[7] The Authority Investigation Meeting was held on 21 March 2011. The Offer was made well in advance of the Investigation Meeting and consequently before preparation costs had been incurred. There was ample time for Ms Butler to consider the Offer prior to the Investigation Meeting.

[8] It is necessary to consider what effect the Offer should have upon the award of costs in this matter. The Court of Appeal in *Health Waikato Limited v Van Der Sluis*³ observed that: "*the Calderbank letter field is fully discretionary*". The nature of this wide discretion is that if the Authority awarded a lesser amount than the amount offered in the Calderbank letter, there would be no absolute protection to the party which had made the offer in terms of costs. Equally, the Authority may take into consideration a Calderbank letter when more has been awarded than was offered.

[9] The Court of Appeal in *Aoraki Corporation Ltd v McGavin*⁴ in commenting on the exercise of this discretion, noted that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore these Calderbank offers without costs being impacted:

The discretion as to costs is a judicial one to be exercised according to what is reasonable and just to both parties and the public interest in the fair and expeditious resolution of disputes requires that full weight be given to the extent to which costs were properly incurred subsequent to the non-acceptance of an offer of settlement at a figure above the amount eventually awarded in the litigation.

[10] The need for a "*more steely*" approach to costs where reasonable settlement proposals have been rejected was noted by the Court of Appeal in *Health Waikato Limited v Elmsley*.⁵

³ [1997] 10 PRNZ 514

⁴ [1998] 1 ERNZ 601

⁵ [2004] 1 ERNZ 172 (CA) at [53]

[11] Ms Butler did not succeed in either of her claims before the Authority, and consequently Ms Butler received no award in respect of her claim. The settlement offer of \$10,000.00 and the counter offer of settlement in the sum of \$35,000.00 made by Ms Butler must be viewed in this context.

[12] Ms Coates, on behalf of PPRNZ, citing actual costs of \$27,000.00 in legal fees submitted that \$21,000.00, or approximately 80% of these legal fees, were incurred after Ms Butler rejected the PPRNZ Calderbank offer.

[13] Ms Coates submits that PPRNZ also incurred disbursements of AS\$4,279.04 (approximately NZ\$5,594.00 at the current exchange rate). These costs included airfares, accommodation and transport costs for the three witnesses required to travel from Sydney to Auckland to attend the Investigation Meeting. The disbursement claim is supported by invoice evidence and I am satisfied it has been properly incurred.

[14] Ms Coates submits that the Authority should exercise its discretion to award costs to PPRNZ in the sum of \$10,000.00 plus a contribution to PPRNZ's disbursements of \$4,000.00.

[15] Mr Single on behalf of Ms Butler submits that an award of costs at the level claimed by PPRNZ would have the effect of punishing Ms Butler who has experienced difficulty in obtaining full-time work since leaving her employment with PPRNZ.

[16] Mr Single also submits that the cost of flying the three witnesses from Australia could have been avoided by having their evidence taken by alternative means such as Skype.

[17] The principles governing an award of costs as set out by the Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* include:⁶

Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.

It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

[18] The Offer was a genuine attempt to resolve the matter without further expenditure on litigation made at an early stage in the proceedings. I accept Ms Coates submission that 80%

⁶ 2005] 1 ERNZ 808 at para [44]

of PPRNZ's legal fees were incurred following the Offer. I have concluded that taking all these circumstances into account, the Offer should be given full weight.

[19] I have considered whether it was necessary for the three witnesses to travel from Sydney to Auckland to attend the Investigation Meeting. I accept that examination of key witnesses by both the Authority and by opposing counsel or advocate is best accomplished by means of a face to face meeting. The three witnesses gave detailed and valuable evidence which was able to be fully tested in the circumstances of their physical attendance, and this was of assistance to the Authority in determining the matter.

[20] I further accept that the submission as to the level of costs sought by PPRNZ is reasonable in all the circumstances.

[21] Accordingly, Ms Butler is ordered to pay PPRNZ \$10,000.00 costs, plus a contribution towards disbursements in the sum of \$4,000.00, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority