IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2016] NZERA Wellington 21
5548699

	BETWEEN	JOHN GEMMELL Applicant
	AND	QUALITY ROADING & SERVICES (WAIROA) LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Paul Harman, Counsel for Applicant Jim Ferguson, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions received:	2 February 2016 from the Applicant 17 December 2015 and 9 February 2016 from the Respondent
Determination:	12 February 2016

COSTS DETERMINATION OF THE AUTHORITY

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[1] In my determination of 22 October 2015[1] I upheld John Gemmell's claim to have been unjustifiably disadvantaged by being suspended from his employment with Quality Roading & Services (Wairoa) Limited (QRS), but dismissed his claim to have been unjustifiably dismissed. In an earlier determination I had declined Mr Gemmell's application for interim reinstatement to his position as Site Supervisor with QRS.[2] Costs in respect of both applications were reserved.

[2] QRS has now applied for costs against Mr Gemmell. It seeks the application of the Authority's notional daily tariff in respect of Mr Gemmell's unsuccessful application for interim reinstatement which was the subject of an investigation on 24 April 2015. It also seeks an award in excess of the daily tariff in respect of the

[1] [2015] NZERA Wellington 102.
[2] [2015] NZERA Wellington 43.

substantive proceedings for unjustifiable dismissal and submits that no award should be made in respect of Mr Gemmell's successful application to have been disadvantaged by his unjustifiable suspension.

[3] QRS relies on a Calderbank offer for its submissions in respect of an uplift to the daily tariff in respect of the unjustifiable dismissal claim. It acknowledges a number of the principles that usually apply to costs awards in the Authority[3] but submits there are several reasons for not applying those principles in this instance. The most relevant of these is the Calderbank offer made to Mr Gemmell, through his legal representative, on 1 June 2015.

[4] The offer was for three months' wages and $9,000 compensation less a 20% contribution for his actions, and a contribution of $600 towards Mr Gemmell's legal expenses. In total, the sum offered in settlement was $18,061.82 (less tax on the wages portion), to be paid within 48 hours of the execution of a Record of Settlement made under the auspices of the Mediation Service. The offer was open for acceptance until 4p.m. on 12 June 2015, after which time it was withdrawn. It was not accepted by Mr Gemmell.

[5] On behalf of QRS Mr Ferguson submits that, if Mr Gemmell had accepted that offer, it would have brought the proceedings to an end without the need for further cost or expense to determine the disadvantage claim. In his view the offer was reasonable and transparent, and gave Mr Gemmell adequate time (11 days) in which to consider and respond to it.

[6] With respect to the unjustifiable dismissal and reinstatement claims, Mr Ferguson focuses on the success of QRS in the interim and substantive hearings. He submits the respondent was put to unnecessary expense in defending the claim for permanent reinstatement, noting the late timing of this claim's withdrawal. This was done by way of email sent to counsel and the Authority at 6.43a.m. on the day of the substantive hearing. Mr Ferguson submits QRS had focused much of its preparation on the claim for reinstatement and had not known, until arriving at the hearing that the claim had been withdrawn early that morning.

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[3] As identified in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808 and reconfirmed by the Full Court of the Employment Court in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

[7] Mr Ferguson also submits the late notification (on the first day of the substantive hearing) that five of Mr Gemmell's witnesses would not be attending and that two of the respondent's witnesses would not be required to present rebuttal evidence, incurred additional and unnecessary preparation time and expense for QRS. Further, he refers to the manner in which Mr Gemmell's evidence was presented as being unusually complicated and therefore more time consuming.

[8] Mr Ferguson also submits that the respondent was open in its acknowledgement of not having effected Mr Gemmell's suspension in a procedurally fair manner. That was obvious from the submissions for QRS which were filed some three weeks before the 15 July 2015 Authority investigation. The concession was also made orally at the Authority's investigation.

[9] Evidence was provided to the Authority of the legal costs invoiced to QRS following the expiry of the Calderbank offer. These totalled $17,750 (exclusive of GST). An additional schedule of disbursements, including travel and office expenses, was provided, totalling $452.56. Mr Ferguson submits that an uplift to the daily tariff to enable it to recover one half of the legal costs incurred by QRS since 12 June 2015 plus the scheduled disbursements would be appropriate.

[10] Mr Harman, on behalf of Mr Gemmell, submits that costs should lie where they fall. He too refers to the usual principles applicable to an award of costs in the Authority, citing in particular the principles that costs awards are to be modest, and that costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct.

[11] Mr Harman notes the discretion of the Authority in awarding costs. He cites the Full Court's approval in *Fagotti*[4] of Judge Inglis' costs judgment in *Booth v Big Kahuna Holdings Limited*[5] where she stated that parties who elected to incur costs that were likely to exceed the Authority's notional daily rate were entitled to do so but could not confidently expect to recoup any additional sums.

[12] In his submission it would have a "*chilling effect*" on workers if they were expected to reimburse a successful party at Authority level at a rate greater than the notional daily tariff. It would add another barrier to access to justice for employees

[4] n3.
[5] [2015] NZEmpC 4.

with genuine grievances if the Authority were to sanction such costs awards. In Mr Harman's submission a reasonable contribution at first blush would be an award of $3,500 against Mr Gemmell for his failure in the interim reinstatement application; and part of $3,500 for his partial success and partial failure at the substantive hearing on 15 July 2015.

[13] However, he submits there are factors which make it more appropriate for the Authority to exercise its discretion by not awarding costs, but letting them lie where they fall. Mr Harman submits the concession made by QRS regarding the unlawful nature of Mr Gemmell's suspension was made too late to be taken into account. He says the integrity of the Calderbank offer of 1 June 2015 must be viewed in light of that concession not having been made at that time. When the 1 June letter from QRS is viewed from that perspective, Mr Harman submits, it does not constitute an effective Calderbank offer and should not be taken into account by the Authority when it exercises its discretion over costs in this matter.

[14] He cites an article by a law firm in Australia analysing the Australian Capital Territory case of *Kemp v Ryan*[6] as authority for six criteria being necessary for there to be an effective Calderbank letter. In Mr Harman's submission, the QRS letter of offer of 1 June 2015 met only two of the six criteria.

[15] Having considered the submissions of both parties, I am not persuaded by Mr Harman's submissions in respect of the 1 June 2015 letter of offer. I find that letter was a valid and reasonable Calderbank offer which was clearly headed in bold type "Without Prejudice Except as to Costs". The letter was carefully crafted to reflect the likely outcome if Mr Gemmell were to succeed in his claims. The offer remained open for acceptance for a reasonable time and, in the compensation offer alone, exceeded by several thousand dollars the amount awarded to Mr Gemmell for his unlawful suspension claim.

[16] I find that offer is relevant, and should be considered, in an award of costs. I do not accept Mr Harman's submission that the integrity of the offer was somehow undermined by QRS's failure to concede the disadvantage claim at the time it made the Calderbank offer.

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[6] [2012] ACTCA 12.

[17] Nor am I persuaded by Mr Harman's submission that costs should lie where they fall. QRS has been put to the expense of defending an interim reinstatement application which failed, and a substantive investigation into personal grievances, one of which was successful and one of which was not. The expense of the latter investigation would have been avoided if Mr Gemmell had accepted the fair and reasonable settlement offer made to him on 1 June 2015.

[18] In the circumstances I find it appropriate to award costs in accordance with the Authority's usual daily tariff of $3,500 in respect of the interim reinstatement investigation.

[19] With regard to the 15 July 2015 investigation, I take into account Mr Gemmell's success in his claim to have been disadvantaged by his employer's unjustifiable action in suspending him. Offsetting that success is the concession made by the respondent in advance of the investigation regarding the failure of its process in effecting the suspension. Further offsetting the success of that claim is the failure of Mr Gemmell's claim to have been unjustifiably dismissed. A further relevant consideration is the Calderbank offer which I have found to be both timely and reasonable and which, if it had been accepted, would have averted the need for the substantive Authority investigation.

[20] Overall, and balancing the factors referred to above, I find a fair result to be an award of costs of $5,000 to QRS for the one-day substantive investigation. This represents an uplift to the daily tariff of $1,500. I do not consider Mr Gemmell should pay in full the disbursements sought by QRS, which consist of photocopying, courier and phone toll charges as well as counsel's travel to Wairoa. The first three items are office expenses which form part of the normal overheads of a solicitor's practice and are disallowed.[7]

[21] However, the claim for travel expenses incurred by Mr Ferguson in the briefing of witnesses whose attendance at the investigation was deemed unnecessary on the day by Mr Gemmell is allowed. As noted by counsel for Mr Gemmell, in the course of the interim reinstatement proceedings, it is difficult to obtain employment law advice and representation in Wairoa. It is therefore reasonable that QRS would obtain legal representation in Hastings. The claim for travel expenses was calculated

[7] *Wilson v ABC Developmental Learning Centres (NZ) Ltd* [2011] NZEmpC 86.

using the IRD mileage rate and totalled $212.54. I find it appropriate that Mr Gemmell pay that amount which represents one return trip by car from Hastings to Wairoa.

Determination

[22] John Gemmell is ordered to pay the sum of $8,500 to Quality Roading Services (Wairoa) Limited as a contribution to its costs plus $212.54 for the travel costs it incurred.

Trish MacKinnon
Member of the Employment Relations Authority