

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 148
5396092

BETWEEN WAYNE ROGER GREEN
Applicant

A N D PHIL ANDERSON CARRIERS
1986 LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: C Mateer, Advocate for Applicant
 J Riddle, Counsel for Respondent

Submissions Received: 27 February 2014 from Respondent
 14 March 2014 from Applicant

Date of Determination: 16 April 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] By a determination issued on 30 January 2014¹, the Authority found that Mr Green's claims were unsuccessful. The parties were requested to resolve the matter of costs but this has not occurred. The Authority has now received submissions in anticipation of the matter costs being determined.

[2] The submissions for the respondent inform that costs of \$8,178.72 (inclusive of GST) were incurred in defending the claims advanced by Mr Green. The respondent also incurred further costs in regard to its costs submissions in the sum of \$1,138.50, making a total of \$9,317.22. This is the sum that is sought from Mr Green.

[3] The respondent acknowledges the principles established by the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*² and the daily tariff

¹ [2014] NZERA Auckland 31

² [2005] ERNZ 808

approach of the Authority (currently \$3,500 for each day of an investigation meeting) and says that were it not for other factors that warrant an increase, \$3,500 would be an appropriate award of costs. However, the notes of the Authority show that the investigation meeting only occupied half a day (finishing at 1:10p.m.). Therefore, without any other factors, an appropriate award of costs would be \$1,750.

[4] The submissions for the respondent refer to three factors that it says should be considered by the Authority in regard to increasing the amount that would otherwise be awarded. Firstly, it is said that the applicant failed to provide adequate particulars of his claims with the outcome being that the Authority required an amended statement of problem to be filed. The consequence, in a costs setting, being that counsel for the respondent was required to further consider the claims and file an amended statement in reply accordingly. But it seems to me that it would not have been necessary to expend much time on doing this.

[5] The second factor that the respondent says warrants an increase in the costs that would otherwise be awarded is that a *Calderbank*³ offer was made to Mr Green on 30 October 2012, a considerable period before the investigation meeting held on 18 September 2013. It is said that if Mr Green had accepted this, the respondent would not have incurred the costs that eventuated. The respondent does not seek indemnity costs but rather, asks the Authority to exercise its discretion and increase any award of costs that might have otherwise been considered to be appropriate.

[6] Finally, the respondent says that the Authority should take into account that because Mr Green refused to engage in discussing the matter of costs, consistent with the request of the Authority that the parties should seek to resolve the matter, further costs were incurred by the respondent in preparing the submissions that are now under consideration.

[7] The submissions for Mr Green acknowledge that costs follow the event, and the daily tariff approach of the Authority.

[8] In regard to the *Calderbank* offer made by the respondent, Mr Green says that he was “insulted” by the offer of \$1,000 and in his view; it was not a “genuine attempt” to resolve the dispute.

³ *Calderbank v Calderbank* [1975] 2 All ER 333

[9] The submissions for Mr Green attempt to re-litigate a claim for wage arrears that was unsuccessful at the substantive hearing, due to insufficient evidence. This is not acceptable and rather than comment further, it is enough to say that the submissions on this matter can be given no consideration.

Determination

[10] As indicated (above) the starting point for an award of costs is \$1,750 for a half day investigation meeting. A reasonable *Calderbank* offer, made within an acceptable time frame, prior to the parties preparing for the substantive proceedings, is certainly a matter that the Authority can take into consideration when deciding if the usual tariff should be increased. However, while it has been found that Mr Green's claims lacked merit, it is easy to reach this conclusion in the light of the determination of the Authority and I conclude that Mr Green's case was not so hopeless that the sum of \$1,000 could be considered to be a reasonable offer. It follows that in the circumstances, the *Calderbank* offer cannot be given such weight that the basic tariff should be increased.

[11] However, I do accept that the respondent has been put to unnecessary expense in regard to having to prepare costs submissions. Sometimes it is the case that upon being invited to do so, the parties end up being unable to reach an agreement on the matter of costs, but the Authority does expect the parties to engage in a meaningful attempt to reach a resolution. While the respondent put a reasonable written proposal to Mr Green to settle the matter of costs, there is no evidence of any response to this; such as a counter-offer or even a rejection given with reasons. As the applicant has made no attempt to resolve the matter of costs it is appropriate that this is reflected in an award to the respondent.

[12] I am aware that Mr Green is a person of limited means and I am bound to take this into account. Pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000, Mr Green is ordered to pay to Phil Anderson Carriers 1986 Limited the sum of \$2,000.00 as a contribution towards the costs incurred by the company.

K J Anderson
Member of the Employment Relations Authority

