

This determination is subject to orders prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 388
5542775
3005851

BETWEEN HIJ
 Applicant

AND OJT
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in person
 Jo Douglas for Respondent

Submissions received: 11 April, 25 May and 18 July 2017 from Applicant
 28 March and 4 July 2017 from Respondent

Further information
received: 19 July and 8 December 2017 from Applicant
 5 December 2017 from Respondent

Determination: 15 December 2017

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS
AUTHORITY**

- A. The applicant is ordered to pay the respondent costs in the sum of \$2,200 in instalments of \$30.00 per week beginning on 8 January 2018 and continuing until such time as the sum is paid off.**
- B. The respondent is ordered to reimburse the applicant the filing fee of \$71.56 for the substantive matter by 8 January 2018.**

Procedural history

[1] The parties have been involved in two separate proceedings in the Authority. In both sets of proceedings a written determination was issued which reserved the

question of costs.¹ In the second of the two determinations the parties were advised that costs for both the substantive matter and the second determination would be dealt with together. This determination deals with that issue of costs.

[2] The applicant has challenged both determinations on a de novo basis to the Employment Court.

[3] The costs relating to both proceedings have not been addressed before today due to confusion about what applications were before the Court. In particular the applicant advised the Authority on 19 July 2017 that he was seeking a stay on the Authority's determination on costs.

[4] Since 19 July the Court has issued two interlocutory judgments.² Neither of these judgments dealt with an application for stay on the Authority's costs. On 1 December the Authority asked the parties to confirm the status of the application for stay and whether this was a barrier to determining costs for the two matters in the Authority.

[5] The Authority has received confirmation from the respondent that there is currently no application for stay before the Court and the issue of costs should now be determined. The applicant has invited the Authority to leave the matter of costs to be dealt with by the Court after it has dealt with his two challenges.

Determination of costs

[6] The discretion to award costs, while broad, is to be exercised in a principled way. The principles applying to costs are well settled and do not require repeating.³ As is well established a challenge does not operate as a stay unless the Court so orders.⁴

[7] An assessment of costs will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.⁵

¹ [2017] NZERA Auckland 55; [2017] NZERA Auckland 176.

² *P v A* [2017] NZEmpC 92; *P v A* NZEmpC 149.

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].

⁴ Employment Relations Act 2000, s 180.

⁵ Practice Note 2, Costs in the Employment Relations Authority.

The substantive determinations

[8] In the substantive determination dated 1 March 2017, the Authority determined:⁶

- (a) The applicant was disadvantaged by an unjustified action by the respondent. The unjustified action was the respondent's failure to pass on to the applicant, a complaint received about the applicant during placement on assignment;
- (b) The respondent was to pay the applicant the sum of \$500 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for that personal grievance;
- (c) The respondent was to pay the applicant the sum of \$67.50 gross as wages for the remainder of the shift on 7 September 2014 and \$1.35 gross as the employer's KiwiSaver contribution on that sum;
- (d) The respondent was to pay the applicant the sum of \$72.00 gross in wages as notice of the termination of a work assignment and \$1.44 gross as the employer's KiwiSaver contribution on that sum;
- (e) Leave was granted to the parties to return to the Authority in the event that they were unable to resolve the issue of holiday pay; and
- (f) The applicant was not successful in the other claims against the respondent.

[9] The applicant subsequently applied for a reopening of the Authority's investigation and for non-publication orders. Both applications were declined however, the Authority ordered non-publication on an interim basis to give the applicant time to challenge the determination if he wished to do so.⁷

Non-publication orders

[10] On 19 July 2017 the Court issued a Minute extending the non-publication orders on an interim basis to protect the position of the parties until an interlocutory

⁶ Above n 1.

⁷ Ibid.

hearing in respect of the applicant's application for an order extending the interim prohibition on publication could be held.

[11] In a judgment dated 27 November 2017 the Court ordered that the interim non-publication orders should continue until the applicant's challenges had been heard.

Costs application and submissions

[12] In the substantive determination the Authority stated:

[The applicant] has had some success in this case, although a number of his claims were not established. [The respondent] has been ordered to pay some sums to [the applicant]. It is anticipated that any costs award reflects these outcomes. As [the applicant] was not represented in this proceeding, it is unlikely that any costs would be awarded in his favour, other than for the filing fee.

[13] The respondent has applied for costs for both matters. It incurred total costs of \$17,169.20 including GST and disbursements for the substantive matter and \$4,315.50 plus GST in relation to the second matter.

[14] The respondent submits that although the applicant had some success in the substantive matter, a number of the claims were not established. In total the respondent was ordered to pay the applicant \$642.29 (which includes gross wages). The respondent submits that the applicant was not successful in the claims of discrimination and unjustified dismissal.

[15] The applicant was unsuccessful in both claims relating to the second matter.

[16] The respondent relies on a *Calderbank* offer it made to the applicant as discussed below. The respondent seeks an uplift to the notional daily tariff on the basis of the *Calderbank* offer and also added costs of \$1,855 (excluding GST) incurred in responding to additional material (not requested or directed by the Authority) after the investigation meeting. A total costs award of \$10,000 is sought.

[17] The applicant has raised a question about the fact that invoices from two different firms were filed on behalf of the respondent. I am satisfied the respondent's representative, who was previously a barrister and solicitor sole, is now a partner in a law firm and this explains the different invoices.

[18] The applicant objects to any suggestion that he may have to pay a GST component on the fees. The applicant also opposes having to contribute to parts of

the respondent's legal fees which he says were incurred as a result of the respondent's own actions.

[19] The applicant seeks to have the Authority exercise its discretion not to uplift the costs award on the basis of the *Calderbank* offer.

[20] The applicant also emphasised that he had sought an apology from the respondent since his meeting with it in September 2014. The applicant asks that costs awarded against him be reduced to compensate for the efforts taken to bring the case to the Authority.

[21] The applicant seeks an allowance over and above the reimbursement of the filing fee due to reflect the partial success of the claims in the substantive matter. Alternatively the applicant seeks to have costs lie where they fall. The applicant is on a sickness benefit and has had very little work. The applicant seeks to have any orders for costs to be paid by way of instalment due to the applicant's financial position. The applicant has had to leave the applicant's current residence and relocate to another rental property.

Calderbank offer

[22] By way of letter dated 18 April 2016, the respondent made an offer to resolve the substantive issues which was stated to be without prejudice save as to costs. The offer included a payment to the applicant of \$8,000, an amount which is substantially greater than that which was achieved from the substantive determination of the Authority.

[23] The Authority will take into account any offers made by the parties to settle matters. As stated by the Court of Appeal:⁸

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.

[24] As was held by the Employment Court in *Mattingly v Strata Title Management Limited*:⁹

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is

⁸ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

⁹ [2014] NZEmpC 15; [2014] ERNZ 1 at [27].

because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a “steely approach” ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court’s observation in *Da Cruz* that Authority awards will be “modest”. What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a *de novo* challenge, having regard to the circumstances of the particular case.

[25] The offer was unreasonably rejected by the applicant. The offer provided time for the applicant to take calm reflection and advice and was transparent.

Determination

[26] In assessing who should pay costs and how much, I am required to assess which of the parties succeeded. Standing back and looking at things “in the round” there has been a mixed measure of success.

[27] The applicant was successful to the extent that the Authority upheld one of his six personal grievance claims, awarded arrears of wages and left the parties to resolve the matter of holiday pay.

[28] The notional daily tariff applicable at the time the substantive claim was lodged was \$3,500 per day. The daily tariff increased and by the time the second claim was lodged the daily tariff was \$4,500 for the first day and \$3,500 for each subsequent day.

[29] I have considered whether the applicant’s financial position means that what would otherwise be an appropriate contribution to the respondent’s costs would cause the applicant excessive or disproportionate hardship¹⁰.

[30] The information lodged by the applicant in support of the submissions on costs did not provide a full financial picture but does demonstrate from WINZ correspondence that the applicant personally had no income other than a benefit and is living in rental accommodation. Certainly an award in the range sought by the respondent is likely to cause the applicant excessive hardship.

[31] Although the parties each had some degree of success in the substantive matter with arguing their positions, the applicant’s success related to a relatively small

¹⁰ *Leota v Chief Executive of the Ministry of Social Development* [2017] NZEmpC 18 at [11] EC

number of the claims and resulted in a modest amount of money being awarded in comparison to what was claimed.

[32] However, it is important that two of the claims that were upheld related to unpaid wages, for the remainder of a shift when the applicant was sent home and a notice period. Without consideration of the *Calderbank* offer I may have been satisfied that costs should lie where they fall.

[33] However, the applicant was made a *Calderbank* offer that was for considerably more than he was ultimately awarded. I have found the offer was unreasonably rejected by the applicant.

[34] The second application was dealt with on the papers and required the respondent to make submissions only. It is appropriate that a small contribution to costs should be made for the second matter.

[35] Considering all the factors outlined, the applicant is ordered to pay the respondent the sum of \$2,200. This is to be paid in instalments of \$30.00 per week beginning on 8 January 2018 and continuing until such time as the sum is paid off.

[36] I order the respondent to reimburse the applicant the filing fee of \$71.56 for the substantive matter given the applicant's partial success. The applicant incurred the filing fee before the *Calderbank* offer was made.

Vicki Campbell
Member of the Employment Relations Authority