IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 105A/10
5149859

	BETWEEN	NATASHA JAMES, ALLY JAYE-McVEA, JANITA GALBRAITH and SHELLEY PAPWORTH Applicants
	A N D	NEW ZEALAND VINEYARD ESTATES LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	David Beck, Counsel for Applicant Stephen Langton, Counsel for Respondent
Submissions Received:	1 and 18 June 2010 from Applicant 17 June 2010 from Respondent
Determination:	18 August 2010

COSTS DETERMINATION OF THE AUTHORITY

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[1] In my determination dated 30 April 2010, I found that the four applicants were unjustifiably disadvantaged in their employment and awarded compensation to each applicant in the sum of $800 and payment for one day's notice to Ms James. I made that finding on the basis of a personal grievance other than that in the statement of problem lodged with the Authority – s.160 of the Employment Relations Act 2000. I had given both counsel advance notice that this was a possibility together with an opportunity to provide submissions before the matter was finally determined.

[2] I reserved the issue of costs in my determination and I have now received submissions from both counsel. Submissions were not received from the applicants until 1 June 2010 outside of the timeframe the Authority had set for them to be lodged of 14 May 2010 by eleven working days.

[3] Mr Langton noted in his submission that the applicants failed to make any application for the time period to lodge and serve costs submissions to be enlarged and no application for leave to file an application for costs late was made, including in the memorandum of costs. Mr Langton submits that the applicants' failure to make the application for costs before the date on which the respondent would have had to lodge any challenge in the Employment Court, 30 May, ought to count against them. He submits that there was a risk that the respondent would be prejudiced if the applicants' application for costs was now able to be made and considered.

[4] Mr Beck responded to that submission. He conceded in his memorandum that costs were lodged and served outside of the set timeframe and no request for an extension was made. Mr Beck attached some email correspondence between himself and Mr Langton that show early communication regarding costs from 3 May 2010.

[5] Mr Langton advised Mr Beck on 4 May 2010 that time was needed to consider costs and other issues and he further advised that he was in the middle of another matter but would be in a position to revert back to Mr Beck by mid the following week.

[6] It did not appear from the emails provided by Mr Beck that Mr Langton responded until 21 May 2010 after Mr Beck prompted him on that day to do so. The next two emails are important, in my view, in terms of any assessment of prejudice.

[7] On 21 May 2010, Mr Langton told Mr Beck in an email that he was advising the applicants about a challenge. In terms of costs he advised that, on the basis the Authority found for the applicants on a problem other than that advanced by them, the respondent in fact won and it did not seem just that it should then be liable for costs. There was also reference to a *Calderbank* offer and Mr Langton suggested a just outcome would be for costs to lie where they fall. He also indicated that there had been no cost submission within the timeframe set. He wanted Mr Beck to take some instructions on that so that he could discuss with the respondent whether to lodge a challenge or not. That email was sent to Mr Beck at 10:35am.

[8] At 10:49 that same day, Mr Beck responded to Mr Langton and advised that *On equitable grounds we consider our clients' claims were generally made out & we do not concur with the proposal that costs lie where they fall we are likely on course to asking ERA to determine costs on application*.

[9] Mr Langton is correct in his submission that prejudice can be a reason not to increase the time for making a costs submission – *Metallic Sweeping (1998) Ltd v. Stephen Whitehead* [2010] NZEMPC 23, Judge Perkins.

[10] In this case, by 21 May 2010, the respondent knew that the applicants were likely to ask the Authority to determine costs. I do not find there can be said to have been prejudice to the respondent in terms of any decision as to whether or not to challenge the determination in light of that knowledge. It is important that timetables set by the Authority are adhered to. *Metallic Sweeping* makes it clear that a failure to adhere to timetables can mean that there is prejudice to the other side and, notwithstanding that any application may stand a good chance, the Authority or Court may refuse to deal with it.

[11] In this case however and consistent with the role of the Authority being low level and accessible, I am not satisfied that flexibility in terms of the set timeframe for costs submissions to be lodged and served should be denied. I have reached this view in circumstances where there was early discussion between the parties to see if costs could be dealt with, some delay on the part of Mr Langton in terms of that matter because he was committed elsewhere and Mr Beck making it clear that an application for costs was likely within the timeframe for a challenge.

[12] I shall now proceed to determine costs. Mr Langton in his submissions dealt with costs in the event that I proceeded to determine them.

Applicants' submissions

[13] Mr Beck seeks full indemnity of costs in the sum of $4,240.75. He refers to the exchange of *Calderbank* letters marked *without prejudice save as to costs*. The first *Calderbank* offer was made by Mr Langton in a letter dated 6 November 2009. At that stage, as I understand the situation, Mr Beck was only able to obtain instructions from three of the four applicants but the fourth applicant did appear at the Authority's investigation meeting. The offer presented at that stage was to be $500 for each of the three applicants and $1,000 plus GST for costs and there was to be confidentiality.

[14] The offer was expressed to remain open until 12 noon on Monday, 9 November 2009. The investigation meeting was scheduled for 10 November 2009. On 7 November 2009, Mr Beck rejected the offer and counter-offered with $1,000 for

each of the three applicants he was in contact with at the time and $1,500 plus GST towards costs. That offer was open for acceptance until 4pm on 9 November 2009.

[15] Over the course of that day, and on 9 November 2009, there being a weekend in between those dates, Mr Beck inquired as to whether Mr Langton had received a response from the respondent with respect to his counteroffer. In an email sent by Mr Langton on 9 November at 12:03pm, he advised the offer was rejected and the company would proceed to defend the claim at the investigation meeting the following day.

[16] At 12:55pm on the same day, Mr Beck advised Mr Langton that his clients would now accept the offer contained in the letter of 6 November 2009. Mr Langton then emailed Mr Beck on 9 November with a further offer of the same monetary payment to each applicant as that contained in the letter of 6 November 2009 but with a reduced costs contribution of $500 plus GST.

The respondent's submissions

[17] Mr Langton submits that it is well established that costs in the Authority are awarded on the basis of a daily tariff unless there are extraordinary grounds to persuade the Authority otherwise. He set out some examples of what these may be but said they did not arise in this case. Mr Langton said there were no grounds advanced for an assessment of costs other than on that basis.

[18] Mr Langton submitted that *Calderbank* offers were exchanged in relation to the claim that the applicants were permanent and not casual and therefore the desire of the vineyard not to engage them further was an unjustified dismissal and entitled them to lost income and compensation. He said that the claims upheld by the Authority were not the contemplation of the respondent at the time of the *Calderbank* offer or indeed the contemplation of the applicants.

[19] Mr Langton submitted that the case was important to the respondent because the claim of unjustified dismissal could have caused a flood of claims and had far reaching implications for it, given its use of casual employees in the vineyard. Further, he submits that the respondent was wholly successful in the defence of the claim that the applicants were not unjustifiably dismissed. If, Mr Langton submitted, the claims had been framed as upheld by the Authority in terms of disadvantage, then the respondent would likely have taken a different approach to settlement.

Mr Langton submitted that the *Calderbank* offers do not justify departure from the daily tariff approach to costs.

[20] Mr Langton finally submits that the equitable outcome would be to let costs lie where they fall because the respondent's last *Calderbank* offer that was rejected exceeded the outcome of the claims to which the offer related because specifically the applicants lost their claim for unjustified dismissal. Further, he submits the respondent incurred significant costs in defending the unjustified dismissal claim and should be entitled to credit in any costs assessment because it won the claim that the applicants asked the Authority to uphold in their favour.

Determination

[21] Whilst there is no time limit on when *Calderbank* offers are made, the closer they are made to the investigation meeting then the less effective they will be in having any impact on costs. That is because at a late stage preparation will be well under way. In this case, the meeting date had been set well in advance on 31 July 2009. A *Calderbank* offer was made on Friday, 6 November 2009, four days before the investigation meeting on Tuesday, 10 November 2009. That offer was not accepted by the applicants who returned with a higher claim for both compensation and costs. That counteroffer was rejected and then, on behalf of the respondent, a new *Calderbank* offer was advanced the day before the investigation meeting with a lower figure for costs.

[22] In my view, given the proximity of the investigation meeting and the need by that stage for Mr Beck to have been preparing for the investigation meeting and therefore incurring costs, that reduction in the costs figure would clearly have been unacceptable.

[23] As it transpired, Mr Beck requested a telephone conference with the Authority and Mr Langton late in the day on 9 November 2009. Mr Beck wanted the telephone conference because he said the parties were close to resolution of the matter and that to proceed with the hearing did not seem called for. There was no discussion obviously of the offers between the parties. That would have been inappropriate. What was pointed out to the Authority was that there had been a counteroffer that had been rejected and what had taken place was in the nature, I accept, of robust settlement attempts. The Authority arranged for a mediator to talk for about 20

minutes to the parties before the meeting started on 10 November but the matter did not resolve and the investigation meeting proceeded.

[24] There were attempts to resolve the matter but otherwise I do not take the *Calderbank* offers into account. The offers were not made in a timely fashion and they were made so late in the piece that it is difficult to see any costs benefit for either party. The cut-off time for acceptance, whilst appreciating that there had to be one, seemed somewhat arbitrary.

[25] The usual rule is that costs follow the event. The applicants were successful in this case, although the Authority saw the problem as one of disadvantage and not unjustified dismissal. Should that then deprive the applicants of costs? The Authority has an investigative role and will occasionally see a problem as different from that alleged. Before the Authority arrived at that point, however, it still had to determine whether the applicants were permanent or casual employees. The Authority then found there was a different problem on the same evidence it had heard during the investigation meeting. It did have the benefit of submissions from the parties.

[26] I accept that the respondent was put to some additional expense by way of preparation of submissions in terms of the other problem.

[27] I find that the award of costs to the applicants should be on the basis of a daily tariff. Both parties recognise that that is now commonly at $3,000 and whilst this matter did not take a full day it was less than two hours short of that. Mr Beck's costs claimed include mediation but I do not find there are grounds in this case to award costs for participation in mediation.

[28] I start, therefore, with costs in the sum of $3,000 but I make an adjustment to that of $500 in terms of any additional work required by the respondent because the problem was seen as different from that raised by the applicants.

[29] I order New Zealand Vineyards Estates Limited to pay to Natasha James, Ally Jaye-McVea, Janita Galbraith and Shelley Papworth one sum of $2,500 being costs.

Helen Doyle
Member of the Employment Relations Authority