

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 136
5387504

BETWEEN BRENDAN KELLERMAN
 Applicant

AND STONEWARE 91 LIMITED t/a
 SWITCHED ON GARDENER
 Respondent

Member of Authority: Michele Ryan

Representatives: Applicant in person
 Mark Nutsford, Advocate for the Respondent

Submissions 12 September 2013 for the Applicant
 29 August and 18 September 2013 for the Respondent

Determination: 29 October 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 1 July 2013¹ the Authority found that the applicant did not have a personal grievance and his dismissal from employment with the respondent was justified. Costs were reserved.

[2] The respondent seeks indemnity costs of \$11,100.36. on grounds that the applicant's claims were "*entirely without merit*" and were "*vexatious in the extreme*". The respondent provided copies of detailed invoices to evidence actual costs incurred.

[3] The applicant submits that costs should lie where they fall and states he had limited funds.

¹ *Kellerman v Stoneware 91 Ltd t/a Switched On Gardener* [2013] NZERA Wellington 74

Principles

[4] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Employment Relations Act.

[5] The principles which guide the Authority's approach to costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*². In that case the Court referred to a number of principles which give guidance to the Authority when it considers costs.

[6] Following *Da Cruz* the usual approach of the Authority is to assess costs using a notional daily tariff. At present that tariff is \$3,500 per day of investigation. Of note, costs are discretionary although an award of costs usually follows the event. Costs should not to be used as a punishment or as an expression of disapproval however if a party's conduct has increased costs unnecessarily then this is a factor that can be taken into account by increasing or decreasing an award. The Authority is also able to consider offers made on a without prejudice basis save as to costs (a 'Calderbank' offer).

Should indemnity costs be awarded?

[7] The respondent acknowledges that it is unusual for the Authority to order indemnity costs but submits that the applicant's conduct in progressing his claims and the nature of those claims should result in an order for full costs. The respondent referred to para. [29] of the Court of Appeal's judgment in *Bradbury v Wespac Banking Corp*³ which sets out the following non-exhaustive categories of circumstances in which indemnity costs have been ordered:

- (a) *the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;*
- (b) *particular misconduct that causes loss of time to the court and to other parties;*
- (c) *commencing or continuing proceedings with some ulterior motive;*
- (d) *doing so in wilful disregard of known facts or clearly established law;*
- (e) *making allegations which ought never to have been made or unduly prolonging a case by groundless contentions...*

² [2005] ERNZ 808

³ [2009] NZCA 234

[8] The respondent says that the applicant made unsubstantiated claims of fraud against it including that it had engaged in forgery and was in breach of its tax obligations. The respondent says the applicant's baseless allegations caused loss of time to it and the Authority. It further says that the applicant's claims unduly prolonged the investigation and ought never to have been made.

[9] *Bradbury* involved an appeal against an award of costs made in the High Court and was a departure from the cost regime applicable to that court. The methodology used for assessing costs in the High Court is entirely different from the approach of the Authority. Further, indemnity costs are exceptional and require “*exceptionally bad behaviour*.”⁴

[10] A claim for indemnity costs in the Authority needs to be considered in terms of the Authority's role to establish the facts in the employment relationship problem and make a determination according to the substantial merits of the matter without regard to technicalities.

[11] The Authority frequently has parties before it who are not legally represented as is the case with the applicant in this matter. Unrepresented parties are often unfamiliar with the law in terms of assessing the merits of their claims including what matters should appropriately be put to the Authority. I accept that some of the categories referred to in *Bradford* could be said to apply in this matter and that many of the applicant's claims unduly prolonged the investigation and were groundless. Although finely balanced, in all the circumstances and where the applicant was not represented I am of the view that this is not a matter where indemnity costs should be awarded. I do however accept that a significant number of applicant's claims were without any supporting evidence, resulting in an unnecessary prolonging of the investigation and is a factor which the Authority is able to consider pursuant to the principles enunciated in *Da Cruz*.

Should the Calderbank offer be considered?

[12] Mr Nutsford seeks an increase to the daily tariff on the basis that the respondent sought to settle the matter prior to an investigation meeting in the Authority. Mr Nutsford produced a copy of a Calderbank offer sent to the applicant's stated address for service six months' prior to the investigation meeting. He submits

⁴ *ibid*

the offer was made at an early stage of the proceedings, was a genuine attempt to resolve the matter and says the applicant's refusal to accept a reasonable offer created substantial costs for the respondent. The letter reflects a modest offer by the respondent to resolve the issues and advises that the offer will be put before the Authority if not accepted.

[13] There is some doubt cast as to whether the applicant received the Calderbank offer. The applicant says he did not receive the offer and was unaware of it until the respondent applied for costs.

[14] The respondent submits the applicant has displayed an on-going pattern of behaviour whereby he has obstructed effective service of documents and/or denied receipt of documents. The respondent referred to events leading to the applicant's dismissal⁵ which formed part of the factual matrix examined during the investigation meeting. It says it sent the offer to the applicant's post office box⁶ and that the correspondence was not reverted back to it despite a return address.

[15] Having had the benefit of hearing and testing the applicant's evidence fully during the investigation meeting I consider it more likely than not that the applicant was aware of the Calderbank offer and is therefore a factor the Authority is entitled to consider in an assessment.

The applicant's claims

[16] The investigation lasted a full day, concluding in or around 7pm.

[17] The applicant made extensive and various claims which were frequently amended in the lead up to the investigation meeting and which were not particularised clearly⁷ despite repeated requests by the respondent. The applicant placed a large quantity of information before the Authority although the vast majority of the documentation was irrelevant to his claims against the respondent and were related to matters with a previous employer and other organisations.

⁵ The applicant denied receiving a number of documents that the respondent states were sent to his residential address during the course of his employment.

⁶ The recorded address for service

⁷ Including but not limited to claims that the respondent acted unlawfully as regards KiwiSaver, claims that the respondent forged a document forgery and claims about the management of the respondent's business practices and clientele. .

[18] The uncertainty as to what exactly was being claimed undoubtedly required the respondent to defend its actions over a wide number of matters. I conclude that the applicant's vast range of claims led to an increase to the respondent's costs as regards preparation.

[19] During the Authority's telephone conference on 16 October 2012 the applicant acknowledged the possibility of liability for costs if he was unsuccessful with his claims.

[20] The applicant submits he is currently unemployed and is in receipt of an associated benefit, the inference being that he has limited resources to meet an award of costs. I am not satisfied that the applicant is impecunious and there is evidence that he has alternative financial resources in property that he owns.

The respondent's costs

[21] With the exception of costs associated with mediation which I consider the respondent should bear, I find the costs incurred by the respondent are reasonable

Determination

[22] There are risks in litigation including an order requiring an unsuccessful party to contribute to the successful parties' costs and it follows that the applicant must bear the consequences in an assessment of costs.

[23] Taking into account the costs reasonably incurred by the respondent, the calderbank offer, the nature of the applicant's claims and the principle that an unsuccessful party should contribute to the costs of the successful party I consider an increase to the notional daily tariff is appropriate.

[24] Pursuant to Section 15 of Schedule 2 of the Employment Relations Act I order the applicant to pay the respondent the sum of \$6,000. as contribution towards the respondent's costs.

Michele Ryan
Member of the Employment Relations Authority