

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 255
5315319

BETWEEN DELAWER KUMANDAN
 Applicant

AND EASTZONE REALTY
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: D Kumandan in person
 C Chilwell, counsel for respondent

Memoranda received: 16 May 2011 from applicant
 3 May 2011 from respondent

Determination: 16 June 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 6 April 2011 I found that Mr Kumandan and Eastzone Realty Limited (ERL) were not in an employment relationship. Costs were reserved and the parties have filed memoranda on the matter.

[2] Ms Chilwell sought a contribution to ERL's costs calculated at the notional daily rate of \$3,000 - \$3,500 applied in the Authority, plus an amount to reflect costs incurred after the date of expiry of a Calderbank offer. She said actual costs from the date of expiry of the offer were \$6,272 (incl GST), and said a reasonable contribution to that sum would be \$4,181. The final overall figure sought was rounded to \$7,500.

[3] In support Ms Chilwell cited the principles in *PBO Limited (formerly Rush Security Limited) v da Cruz*.¹

¹ [2005] ERNZ 808

[4] Mr Kumandan also cited these principles, and sought an order that costs lie where they fall. He said, in effect, that ERL did not act in good faith when it raised an allegedly written and signed contractor's agreement in response to his personal grievance and made insinuations about his involvement in its inability to locate the document. He pointed out that since the Authority had found in his favour on these points, he had achieved a degree of success that should be reflected in the order he sought. He also referred to ERL's signature on documents prepared for the NZIS and which portrayed him as an employee.

[5] Regarding the Calderbank offer, at the time Mr Kumandan did not say why he did not accept the offer but he said in submissions that ERL's conduct in respect of the alleged contractor's agreement meant it was reasonable for him to refuse. To do otherwise would suggest he accepted ERL's word on the existence of the agreement. He referred in further support to the cases on the relevance of an individual's wish for vindication when assessing the weight to be given to a Calderbank offer.²

[6] Regarding the quantum of ERL's claim, Mr Kumandan questioned the reasonableness of or necessity for some of the charges identified in the invoices from ERL's solicitors.

[7] Last, Mr Kumandan said his financial position means he is not able to pay any award of costs. In support, he provided some information regarding his income.

Determination

[8] ERL was successful on the matter of whether Mr Kumandan was an employee or contractor, and is entitled to a contribution to its costs. Overall I would assess Mr Kumandan's contribution to ERL's costs at a notional daily rate, and would award \$3,500.

[9] I now turn to whether this amount should be adjusted.

² *T & L Harvey Limited v Duncan* [2010] NZEMPC 36 was cited, but the matter is also dealt with in the more frequently-cited decisions of the Court of Appeal in *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 and *Health Waikato Limited v Elmsly* [2004] 1 ERNZ 172 which are relevant on this point.

1. The parties' respective degrees of success

[10] Mr Kumandan's argument that he was partly successful concerns a disputed area of evidence on which I found in his favour. I do not consider that a success of that kind means there should be a full or partial reduction in the amount that would otherwise have been awarded to ERL.

[11] Regarding the associated allegation that ERL failed to act in good faith, while I consider ERL's insistence that a signed contractor's agreement existed was poorly founded it believed what it said and did not act in bad faith.

2. The Calderbank offer

[12] Mr Kumandan's present exposure to liability for costs means that as far as this employment relationship problem is concerned he would have been better off had the offer been accepted.

[13] Mr Kumandan's submissions were, first, the effect of the offer was that costs should lie where they fall, hence his overall stance in this application. While acceptance of the offer at the time would probably have had the effect contended, the offer was not accepted and the need to proceed to an investigation means further considerations now apply.

[14] I do not accept Mr Kumandan's submission that accepting the offer would have meant he accepted there was a written contractor's agreement between the parties. The offer was an offer of settlement, and nothing in it contained any suggestion that Mr Kumandan agreed there was no written contractor's agreement. Moreover the letter of offer contained an explanation of ERL's position and the basis of its offer in terms which did not rely solely on a likely finding by the Authority that the parties were parties to a written contractor's agreement.

[15] Nor do I accept Mr Kumandan's submission on the matter of vindication because, again, it concerns a disputed area of the evidence in a matter in which he was unsuccessful overall. Moreover, the vindication cases concern substantive allegations relating to disciplinary or associated action taken against an employee which may be

damaging to an employee's reputation, and which the employee seeks to have redressed in the form of a judgment in his or her favour. The substantive matter here was unrelated to the dispute about whether there was a written contractor's agreement.

[16] Regarding the detail of why ERL considered the Authority would find there was an agreement that Mr Kumandan be engaged as a contractor even in the absence of a written agreement, a number of the factors mentioned would not have been relevant in the light of the legislative background to employment and contractor's relationships in the real estate industry, as explained in the decision in *Challenge Realty Limited v Commissioner of Inland Revenue*.³ At the time the offer was made there remained a litigation risk which the offer did not reflect.

[17] Finally, I take into account that the offer not to seek costs in return for the withdrawal of Mr Kumandan's claim suggests a view on ERL's part that its position was stronger than was really the case. ERL's overall actions in respect of Mr Kumandan's engagement at the time, including in particular its attitude to the existence of a written contractor's agreement and its actions in respect of Mr Kumandan's work permit, left it open to a greater litigation risk than was reflected in the terms of the offer.

[18] For these reasons I do not make an adjustment in respect of the Calderbank offer.

3. Reasonableness of professional fees incurred by ERL

[19] I do not accept Mr Kumandan's challenges to the reasonableness of the fees identified in the solicitors' invoices to ERL, but it is not necessary to pursue the issue of reasonableness in the light of my application of a notional daily rate.

4. Ability to pay

[20] There was no information about Mr Kumandan's assets or liabilities beyond his statement that he has a debt to the IRD. The information about income given in the submissions and at the investigation meeting indicates Mr Kumandan was in

³ [1990] 3 NZLR 58

receipt of a relatively high income until recent months, when he says the level dropped considerably.

[21] Accordingly I do not accept that the information Mr Kumandan disclosed indicates that he is not in a position to pay an award of costs.

5. Order for payment

[22] None of the above factors has supported an adjustment in either direction.

[23] Mr Kumandan is therefore ordered to contribute to ERL's costs in the sum of \$3,500.

R A Monaghan

Member of the Employment Relations Authority