

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 450
5390047**

BETWEEN STACEY LARNACH
 Applicant

AND GIPSY LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Warwick Reid, Advocate for Applicant
 Sarah O'Brien, Counsel for Respondent

Submissions received: 16 September 2013 from Applicant
 4 September 2013 from Respondent

Determination: 1 October 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2013] NZERA Auckland 347 the Authority found that the Applicant, Ms Stacey Larnach, had not been unjustifiably constructively dismissed by the Respondent, Gipsy Limited (Gipsy), and that Ms Larnach was not entitled to any monies in respect of a performance bonus.

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and the parties have filed submissions in respect of costs.

[3] This matter involved two days of an investigation meeting. Ms O'Brien, on behalf of Gipsy, citing actual costs of \$57,596.23 (inclusive of GST and disbursements), is seeking a contribution towards costs of \$20,660.00 on the following basis:

- A serious allegation of misconduct (First Allegation) made against the Respondent by the Applicant which was withdrawn prior to the Investigation Meeting necessitated submissions and affidavits in support, in addition to a case management conference, which increased costs to the Respondent;

- Additional allegations (Additional allegations) made by the Applicant were not pursued at the Investigation Meeting but required addressing by the Respondent in evidence and submissions;
- Counsel for the Applicant increased costs by unnecessarily extending cross-examination of one of the Respondent witnesses thereby requiring an extra hearing day;
- Rejection of two Calderbank¹, that is without prejudice save as to costs, offers
The Calderbank offers were made on 4 April 2013 (the First Offer), and on 21 May 2013 (the Second Offer).

[4] Mr Reid, for the Applicant, claims that the case for an uplift in costs above the daily tariff rate is misconceived, and asserts that there are circumstances that justify an award of less than the daily tariff rate of \$7,000.00 in respect of a two day Investigation Meeting.

[5] Mr Reid in support of the Applicant's position submits that:

- The claim of \$8,280.00 in respect of an interlocutory application to strike out the First Allegation in a paragraph of the Statement of Problem has no precedent in costs determinations in the Authority in which the principle of costs is based on a notional daily rate for time taken for the investigation meeting. Mr Reid further submits that:
 - Whilst an award may be made in respect of time taken in relation to interlocutory matters prior to an investigation meeting, the amount claimed is contrary to the well-established principles² that costs in the Authority are modest and not to be used as a punishment or as an expression of disapproval of the unsuccessful parties' conduct.
 - The obligation on an employee in framing a grievance is expressed simply to "state its general nature"³ thus that the notion of "striking out" is inappropriate in an Authority setting.
- The reason the case went to a second day of hearing was due to the failure of the Respondents and counsel to provide proper particulars of the allegations of

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA)

² *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

³ Cf. Chief Judge Goddard in *Rolls v Wellington Gas Company* [1998] 3 ERNZ 116

serious misconduct to the Applicant's representative and a failure to respond to the detailed evidence provided by the Applicant on 10 April 2013. In addition the second day of the hearing was mainly devoted to closing submissions, which on the part of the Respondent's counsel, were very lengthy.

- Ms Larnach is facing financial hardship and a costs award would leave her in adverse financial circumstances. In support of this claim Ms Larnach has filed personal financial documentation with the Authority, and I accept that at this time Ms Larnach is facing significant financial difficulty.
- Non acceptance of the Calderbank offers was reasonable in the circumstances:
 - The First Offer was made after the Applicant's statements for the Investigation Meeting had been prepared and filed in the Authority, by which time her costs were considerable, and the offer must be viewed in this light. This First Offer did not deal with the Applicant's costs, nor did it accord the Applicant reasonable time to consider it.
 - The Second Offer was made after the first day of hearing, it did not deal with the Applicant's costs and it was not unreasonable for the Applicant to decline it as it would have left her with little or nothing by way of benefit after payment of her legal fees.

Principles

[6] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[7] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*⁴.

[8] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁵.

[9] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁶ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁷ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

Determination

[10] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a 1 day investigation meeting this would normally equate to \$3,500.00, and therefore for 2 days of investigation meeting, this would normally equate to an award of \$7,000.00.

The Calderbank offers

[11] It is necessary for me to consider the effect the First and Second Offers should have on costs. The Court of Appeal in *Health Waikato Limited v Van Der Sluis*⁸ observed that: “the Calderbank letter field is fully discretionary”. The nature of this wide discretion is that if the Authority awarded a lesser amount than the amount offered in the Calderbank letter, there would be no absolute protection to the party which had made the offer in terms of costs. Equally, the Authority may take into consideration a Calderbank letter when more has been awarded than was offered.

[12] As noted by Chief Judge Goddard in a passage from *Oglivy & Mather v Darroch*⁹ *I the purpose of a Calderbank offer is:*

... to induce the Court by this means to exercise its discretion against granting the plaintiff any costs if it has recovered less by proceeding with the case than it could have by accepting the offer ...It is intended

⁴ [1996] 2 ERNZ 622

⁵ [2005] 1 ERNZ 808

⁶ [2005] 1 ERNZ 808

⁷ [2001] ERNZ 305

⁸ [1997] 10 PRNZ 514

⁹ [1993] 2 ERNZ 943

to put pressure on plaintiffs and discourage them from proceeding with litigation that may turn out to be unproductive simply for the sake of a cathartic day in court.

[13] The First Offer was made on 4 April 2013, one week prior to the Investigation Meeting which was held on 11 April 2013. The amount proposed for settlement contained in the First Offer was \$6,000.00.

[14] The Second Offer was made on 21 May 2013, eight weeks prior to the first day of the Investigation Meeting held on 11 April 2013 and after the first day of the Investigation Meeting held on 11 April 2013. . The amount proposed for settlement contained in the Second Offer was \$7,000.00.

[15] The First Offer was made one week prior to the first day of Investigation Meeting. I consider that this gave Ms Larnach time to consider it, albeit somewhat brief, and I accept that by this time Ms Larnach had already incurred more than initial preparation costs.

[16] The Second Offer was made eight weeks prior to the second day of the Investigation Meeting, I consider that this gave Ms Larnach ample time to consider it prior to the Investigation Meeting, and although costs had increased to the extent that she would have had little or nothing by way of benefit after payment of her legal costs, she would have avoided the accumulation of legal costs attendant on the second day of the Investigation Meeting.

[17] The Court of Appeal in *Aoraki Corporation Ltd v McGavin*¹⁰ in commenting on the exercise of this discretion in respect of costs, noted that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore these Calderbank offers without costs being impacted:

The discretion as to costs is a judicial one to be exercised according to what is reasonable and just to both parties and the public interest in the fair and expeditious resolution of disputes requires that full weight be given to the extent to which costs were properly incurred subsequent to the non-acceptance of an offer of settlement at a figure above the amount eventually awarded in the litigation.

[18] The need for a “*more steely*” approach to costs where reasonable settlement proposals have been rejected was noted by the Court of Appeal in *Health Waikato Limited v Elmsley*.¹¹

¹⁰ [1998] 1 ERNZ 601

¹¹ [2004] 1 ERNZ 172 (CA) at [53]

[19] In the present case I take the notional daily rate of \$3,500.00 as the starting point for costs which should be awarded to Gipsy. The following factors suggest that rate should be adjusted upward:

- a. Ms Larnach rejected the First Offer which was made one week prior to the first day of the Investigation Meeting;
- b. Ms Larnach rejected the Second Offer which was made eight weeks prior to the second day of the Investigation Meeting;
- c. The First and Second Offers put Ms Larnach on notice that the letters might be tendered to the Authority in support of an application for costs on an indemnity basis;
- d. Allegations which were made but not pursued by the Applicant unnecessarily increased costs to the Respondent; and
- e. Ms Larnach was wholly unsuccessful in her claims before the Authority

[20] Factors suggesting that the rate should be reduced or remain the same are:

- a. The principle that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct; and
- b. The principle that costs awards are to be modest and reflect what is reasonably required in preparing an Authority investigation.
- c. Ms Larnach's adverse financial situation.

[21] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings and this is a case in which it is appropriate for the Authority to use its discretion by lowering the tariff. As observed by Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*:¹² "...even an award of costs based on a low daily rate may not be feasible where the liable party does not have the means to pay..."

¹² Ibid at para [46]

[22] Weighing this consideration together with the factors identified by the parties in their submissions in the discretionary exercise of awarding costs, I consider that the notional daily rate should be decreased by \$1,000.00 per day.

[23] Accordingly I believe that a contribution towards costs of \$5,000.00 is a reasonable contribution. Ms Larnach is ordered to pay Gipsy the sum of \$5,000.00 pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority