

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 178
5394918

BETWEEN PETER DONALD LEITH
Applicant

A N D HYSLOP BLAIR
TRANSPORT LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Peter Leith, on his own behalf
Rachel Brazil, Counsel for Respondent

Submissions Received: 10 July 2013 from the Respondent
Nil from the Applicant

Date of Determination: 28 August 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] On 9 May 2013 I issued a determination dismissing Mr Leith's claim he had been unjustifiably dismissed by the respondent, Hyslop Blair Transport Limited (HBT).

[2] Costs were reserved and HBT, as the successful party, now seeks an award in respect to those it incurred.

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[4] HBT seeks more. It seeks full recompense of its costs, \$3,650 plus GST. In the alternate, and should I decline the request for full reimbursement, it is suggested HBT receive a *reasonable contribution*.

[5] The application is supported with reference to HBT's complete success, an assertion the matter should not have progressed thus putting HBT to unnecessary expense and what is described as a Calderbank offer.

[6] The Calderbank offer was not monetary. HBT offered to assist Mr Leith secure alternate employment. It is submitted this should be taken into account as *a loss of chance* which had a monetary value had it been accepted. The notion the offer had monetary value was also referred to in the original letter.

[7] Mr Leith has not responded. There was no response to a copy of HBT's application initially sent to him. That led to a telephone conversation with one of the Authority's Support Officers on 30 July 2013. Mr Leith was advised of the application and had his address for service confirmed. He was told he had 14 days to respond and should he fail to do so a decision would be made on HBT's submissions.

[8] There is still no response.

[9] I have no qualms in accepting HBT was wholly successful but cannot accept the letter constitutes a valid Calderbank.

[10] Calderbanks should be offered in a timely manner (which this was), be clear and unequivocal in its terms and offer a result which exceeds that attained through litigation.

[11] I conclude the letter fails in respect to either of the later requirements. It was conditional. Mr Leith had to return a negative drug test yet a reading of the substantive decision would suggest there was no guarantee that would occur and, interestingly, it is suggested the employment would be sourced in the transport industry. HBT had concluded he could not be safely employed in that industry – that was one of the rationales for his dismissal. How then could it convince another employer in the industry it would be safe to employ him therein? I also note the reference to attainable salary is a range.

[12] On the evidence before me I cannot accept HBT could guarantee its proposal would actually be consummated and nor can I accept its terms are unequivocal.

[13] The conclusion this is not a valid Calderbank means the application for full indemnity will fail.

[14] That said the alternate, namely a reasonable contribution be applied, survives. It is well established a successful litigant is, unless there is a strong argument to the contrary, entitled to a contribution toward the costs they incurred. There is no such argument.

[15] In the circumstances and given the arguments tendered, I conclude it appropriate I adopt the usual tariff based approach. The hearing took approximately half a day which would, applying the above formula, mean a contribution in the order of \$1,750.

[16] I consider that appropriate and order payment accordingly.

[17] Therefore, and for the foregoing reasons, I order Mr Peter Leith to pay Hyslop Blair Transport Limited the sum of \$1,750.00 (one thousand, seven hundred and fifty dollars) as a contribution toward the costs HBT incurred in defending the claim.

M B Loftus
Member of the Employment Relations Authority