IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 413
5388234

	BETWEEN	GLEN MACMILLAN Applicant
	AND	SEATING TO GO LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	G MacMillan in person E Burke, counsel for respondent
Memoranda received:	3 September 2013 from applicant 20 August 2013 from respondent
Determination:	12 September 2013

COSTS DETERMINATION OF THE AUTHORITY

A. Glen MacMillan is ordered to contribute to the costs of Seating To Go Ltd in the sum of $3,500.

B. Seating To Go Limited may deduct this amount when it makes payment on the order in favour of MacMillan contained in the substantive determination.

[1] In a determination dated 12 August 2013 I found that a suspension and a warning imposed on Mr MacMillan were unjustified, but that Mr MacMillan was not constructively dismissed.

[2] Costs were reserved. The parties have been unable to resolve the matter.

[3] Counsel for Seating To Go Limited (STGL) sought a contribution to costs in the sum of $7,000, plus $500 in respect of the further application for costs. She cited

the principles in *PBO Limited (formerly Rush Security Limited) v da Cruz*[1] and noted that both parties achieved a degree of success. More significantly, she also relied on two offers made without prejudice save as to costs. Both offers were made several months before the employment relationship problem was lodged in the Authority.

[4] Mr MacMillan sought a contribution to his costs in the sum of $3,500. He found acceptable the notional daily rate applied in the Authority for an investigation meeting of one day, as that amount is close to the actual costs of representation he said he incurred up to mediation. He said further that for the award of compensation in his favour to be true compensation - rather than doing no more than reimbursing him for the costs of obtaining the award - his costs should be paid by STGL.

Offers made without prejudice save as to costs

[5] Two offers were made without prejudice save as to costs.

[6] The first was dated 3 August 2012. It was superseded by an offer dated 7 September 2012. The offer contained the same terms but with an increased offer of compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

[7] The terms included:

- a payment of $7,500 under s 123(1)(c)(i);
- his employment terminated by his resignation with effect on 30 July 2012;
- all outstanding pay and annual leave would be paid to him as at that date;
- the written warning would be withdrawn;
- a reference would be provided;
- copies of performance reviews would be provided; and
- staff would be informed that Mr MacMillan left of his own accord.

[8] Mr MacMillan did not accept the offer because he believed he should receive more in his hand once his costs incurred up to mediation were deducted. However I find the offer dated 7 September 2012 was reasonable and should have been accepted. Not only was it for an amount greater than the amount ordered by the Authority, but, importantly, it offered to withdraw the warning subsequently found to be unjustified.

[1] [2005] 1 ERNZ 808

Order for costs

[9] Orders for costs reflect the costs of representation incurred in bringing or defending a claim. Orders for the reimbursement for the full amount of costs incurred are rare, and instead the Authority commonly addresses the matter with reference to the notional daily rate. Although the amount may then be adjusted upwards or downwards in suitable circumstances, the costs regime cannot be used as a form of top-up for any orders resulting from the substantive claim.

[10] A starting point in deciding where and how to apply the rate lies in the degree of success achieved by the parties. If one party can be said to be the successful party, the notional daily rate is likely to be applied in favour of that party. Here a number of claims were made and both parties achieved a degree of success. In the absence of the offers made without prejudice save as to costs I would have found costs should lie where they fall.

[11] However the circumstances here are affected to a significant extent by the existence of the offers to settle. I have found the 7 September offer should have been accepted. The rejection of the offer caused STGL to incur costs it should not have incurred. The law urges a steely approach when offers to settle in an amount higher than the amount eventually awarded are rejected.[2] For these reasons I conclude Mr MacMillan should not have the benefit in a costs setting of the claims in which he was successful, and should contribute to STGL's costs in the sum of $3,500.

[12] I order accordingly.

[13] I further order that STGL is permitted to deduct that amount when making the payment it was ordered to make to Mr MacMillan in the substantive determination.

R A Monaghan
Member of the Employment Relations Authority

[2] *Bluestar Print Group (NZ) Ltd* v *Mitchell* [2010] NZCA 385 at [20]; *Health Waikato Ltd* v *Elmsly* [2004] 1 ERNZ 172, at [53].