

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 137
5422702

BETWEEN HENRY MCCAMBRIDGE
 Applicant

AND VIRIDIAN GLASS LIMITED
 PARTNERSHIP
 Respondent

Member of Authority: Vicki Campbell

Submissions received: 27 March 2015 from Applicant
 11 March 2015 from Respondent

Determination: 13 May 2015

COSTS DETERMINATION OF THE AUTHORITY

A. Mr McCambridge is ordered to pay \$1,500 by way of contribution to the costs incurred by Viridian Glass Limited Partnership.

[1] In a determination dated 30 January 2015¹ I held that Mr McCambridge had been disadvantaged in his employment but had not been unjustifiably dismissed. I also held that Viridian Glass Limited Partnership (Viridian Glass) had breached the terms of the employment agreement between it and Mr McCambridge. Viridian Glass was partially successful in a counter-claim against Mr McCambridge who was ordered to make a payment in reimbursement of wages paid to him but to which he was not entitled.

[2] I reserved costs, indicating that if the parties were unable to resolve that issue, both parties would have the opportunity to lodge cost memoranda and evidence. A timetable was set out for the parties. On 11 March 2015 Viridian Glass lodged submissions seeking a costs contribution from Mr McCambridge of \$10,000.00.

¹ [2015] NZERA Auckland 28.

[3] Mr McCambridge then lodged a memorandum on costs seeking payment of \$6,000.

[4] Both parties have provided documentary evidence supporting their claims.

[5] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event.

Calderbank offers

[6] The Authority will take into account, when dealing with the issue of costs, any offers made by the parties to settle matters. As stated by the Court of Appeal²:

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer with any consequences as to costs.³

[7] As was held by the Employment Court in *Mattingly v Strata Title Management Limited*⁴:

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a “steely approach” ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court’s observation in *Da Cruz* that Authority awards will be “modest”. What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a de novo challenge, having regard to the circumstances of the particular case.⁵ [my emphasis]

[8] On 31 March 2014 and after the parties had attended mediation, Viridian Glass wrote to Mr McCambridge through his representative, offering to resolve matters by payment to Mr McCambridge of \$5,000.00 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000. Viridian Glass also agreed to waive its claims to overpaid salary and commissions. Mr McCambridge declined the offer.

[9] Mr McCambridge was awarded a total of \$4,133.94 in unpaid commission payments and was ordered to pay to Viridian Glass the sum of \$1,524.89 in overpaid wages. The nett effect of that is that Mr McCambridge was successful to the tune of \$2,609.05 which was itself reduced by legal deductions such as income tax.

² As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385.

³ Ibid at [18].

⁴ [\[2014\] NZEmpC 15](#); [\[2014\] ERNZ 1](#).

⁵ Ibid at [27].

[10] Overall Mr McCambridge was not as successful in his applications in the Authority as the offer made to him on 31 March 2014.

[11] I find Mr McCambridge's rejection of the Calderbank offer from Viridian Glass was unreasonable and will affect the exercise of my discretion in determining an appropriate award for costs.

Determination of costs

[12] As held recently by the Employment Court, the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.⁶ As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*⁷ awards in the Authority will be modest taking into account conduct which increases costs unnecessarily. Indemnity costs may be justified in relatively rare cases where a party's conduct is particularly egregious.⁸

[13] The investigation meeting took one day. According to the documents presented to the Authority part of Mr McCambridge's costs relate to mediation which was undertaken prior to the matter being lodged in the Authority. I have discounted the actual costs incurred by Mr McCambridge by \$1,500 to take into account costs incurred prior to the matter being lodged leaving an amount of \$4,500.

[14] Mr McCambridge was not successful in all of his claims and was partially successful in defending the counter-claims against him by Viridian Glass. Viridian Glass was partially successful in defending the claims by Mr McCambridge and was partially successful in its claims against him.

[15] The Authority applies a starting point of a notional daily tariff for quantifying costs. In this case the investigation into the claims by both parties took one day. On a tariff based approach that would be a costs reimbursement of \$3,500.

⁶ *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

⁷ (2006) 7 NZELC 98,128; [\[2005\] ERNZ 808](#); (2005) 3 NZELR 1 (EMC).

⁸ *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2 at [9].

[16] Taking into account the partial success by both parties and the early offer made to Mr McCambridge to settle all matters I consider it appropriate that Mr McCambridge make a contribution to the costs incurred by Viridian Glass in the sum of \$1,500.00.

Vicki Campbell
Member of the Employment Relations Authority