

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 111  
5434361

BETWEEN                      MURRAY MCGRANNACHAN  
Applicant

A N D                              FARMLANDS CO-OPERATIVE  
SOCIETY LIMITED  
Respondent

Member of Authority:        Helen Doyle

Representatives:             Janet Copeland and Rebecca Laney, Counsel for  
Applicant  
Fiona McMillan, Counsel for Respondent

Submissions received:       26 June 2014 on behalf of the Applicant  
16 July 2014 on behalf of the Respondent

Date of Determination:      28 July 2014

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**LOST WAGES AND COSTS DETERMINATION OF THE AUTHORITY**

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- A.    Farmlands Co-operative Society Limited is to pay to Murray McGrannachan the sum of \$708.42 gross being lost wages.**
- B.    Farmlands Co-operative Society Limited is to pay to Murray McGrannachan the sum of \$5,000 costs and \$378.22 disbursements.**

[1]    In my determination dated 14 May 2014 I found in favour of the applicant that he had a personal grievance that he had been unjustifiably dismissed.

[2]    The applicant was awarded remedies including reimbursement of six months lost wages less one month's notice paid and 20% contribution. Details of earnings were provided but were not broken down to make it clear what income was received

by the applicant during the six months after dismissal. Counsel was asked in the determination to see if agreement could be reached about the income received with leave to return to the Authority if required. The applicant was also awarded \$8,000 humiliation compensation after contribution.

[3] I reserve the issue of costs and set a timetable for submissions. Submissions have now been received as to both the lost wages and costs from both parties.

### **Lost wages**

[4] Ms McMillan accepted in her submissions the applicant's calculation of lost wages set out in Ms Copeland's submissions was correct.

[5] The Authority can therefore make an order for reimbursement of lost wages on the following basis:

6 months wages from the respondent less one month paid	\$ 23,269.24
Less actual earnings	\$ 22,383.72
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	\$ 885.54
Less 20% contribution	\$177.11
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Lost wages	<u>\$ 708.42</u>

[6] I order Farmlands Co-operative Society Limited to pay to Murray McGrannachan the sum of \$708.42 gross being reimbursement of lost wages under s.123 (1) (b) of the Employment Relations Act 2000 (the Act).

### **Costs**

#### **The applicant's submission**

[7] Ms Copeland refers to principles held to be appropriate to the Authority when considering costs in the Employment Court judgment of the full Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

[8] Ms Copeland said the respondent's offers in the nature of Calderbank offers should not be taken into account in the exercise of the discretion as to costs. Firstly

she submits there was only one relevant *Calderbank* offer made on 11 November 2013 and that cannot be relied on in regard to transparency and reasonableness. Further Ms Copeland says that the remedies awarded exceed the offer made and it should have no further bearing.

[9] Ms Copeland says that a fair and reasonable award in the circumstances based on the daily tariff approach would be costs assessed on a daily tariff for a two day meeting in the sum of \$7,000 together with reimbursement of the filing fee of \$71.56.

### **The respondent's submissions**

[10] Ms McMillan submits that the special circumstances in this case justify a departure from the daily tariff and that costs should lie where they fall. She relies on a series of settlement offers made to the applicant on a without prejudice except as to costs basis which she submits would have led to Mr McGrannachan being in a better position than he obtained by proceeding to the Authority.

[11] Further, Ms McMillan says that the investigation meeting concluded at about 2pm on the second day of hearing so a two day tariff would not be justified and that the hearing was extended unnecessarily by the applicant's unscheduled statement of evidence in reply filed at midday the day before the hearing. She submits that much of the evidence in the statement was either inconsistent with evidence previously provided or was evidence not previously raised.

[12] Another factor Ms McMillan submits was the unnecessarily wide scope of the applicant's claims including allegations about another employee's appointment whose evidence was not challenged at the hearing.

[13] Finally, Ms McMillan says that the applicant's wife withdrew much of the contents of the statement of evidence at the start of the hearing. Ms McMillan submits that if the Authority does not accept that costs should lie where they fall, then an award of \$1,750 should be made which is half of the usual daily tariff for what should have been a one day hearing and would be appropriate in this case.

### **Determination**

[14] Investigation of this matter took place over two days in Invercargill. I have checked my minute book for the times of sitting each day. On the first day the

meeting commenced just after 10am and concluded just after 5pm. On the second day the meeting commenced just before 9am and concluded at 2.19 pm. The second day included submissions. There was no lunch adjournment taken on the second day.

[15] The second sitting day, although not strictly, a full day was just over five hours duration. Costs usually follow the event and the applicant was successful. In the Authority costs are often assessed on a daily tariff basis which in this case I find would be for two days at \$3,500 per day to be adjusted upwards or downwards as required.

[16] There were four settlement offers by the respondent before Mr McGrannachan lodged proceedings. The first three were similar in nature and offered to settle the matter on, Ms Copeland submits, a different basis to the employment relationship problem before the Authority. Even if that was not the case the awards made by the Authority clearly exceeded these three offers. Whilst it was sensible for offers to be made I do not consider they have bearing on the exercise of my discretion and do not take them into account.

[17] The fourth offer in the nature of a *Calderbank* offer made by the respondent was contained in a letter dated 11 November 2013. The letter was headed *without prejudice except as to costs*. The offer in the letter was for the respondent to pay to the applicant a one-off payment of \$8,000 in full and final settlement of his grievance. This was reflected to be made up of \$3,200 in claimed lost wages and \$4,800 in compensation under s.123 (1) (c) (i) of the Act. It was expressed that the breakdown was flexible. The offer provided that the applicant's departure would be recorded as a resignation rather than a dismissal and was expressed to remain open until 22 November 2013.

[18] The offer was rejected by the applicant and Ms Copeland attended to the lodging of a statement of problem. Mr McGrannachan sought reinstatement as an additional remedy, that claim was not successful.

[19] The reasonableness of a *Calderbank* offer should be assessed at the time it was made not simply against the final result – *Baker v St John Regional Trust Board* [2013] NZEmpC 109 at [30].

[20] The offer was made within six months of dismissal and before proceedings had been lodged with the Authority. As the applicant at that time had been successful in mitigating his lost wages to a significant degree the offer was reasonable for lost wages. Ms Copeland submits that there was no mention of costs. I accept that although I do not place much weight on that in the circumstances where no proceedings had been lodged and costs incurred therefore would be quite limited.

[21] Looking at the offer in the round while the awards ultimately made by the Authority exceeded it by a small measure the applicant would have been better off if he had accepted it at the time it was made. It was made at a time when no preparation had commenced for the Authority investigation and was reasonable and provided a reasonable time for acceptance.

[22] I intend in the exercise of my discretion as to costs to take the Calderbank offer into account.

[23] Ms McMillan raised in her submission other factors that she submits justified no award for costs or reduction of any cost award. The first was that the time of the hearing was extended by the lodging of the applicant's unscheduled statement of evident in reply the day before the investigation meeting. I accept there should be some reduction for that matter as it did increase time for investigation although not to the extent that a second day would not have still been necessary.

[24] The second matter was that the applicant wanted evidence relating to another employee's appointment which was provided but went unchallenged. Further records were requested about the appointment and had to be provided. I find that the applicant was entitled to details about that employee's appointment in circumstances where there were some issues not immediately apparent about the timing of his appointment. Ms Copeland did not require the attendance of the witness for examination which saved some time. I am not minded to reduce costs in that regard.

[25] The final point was that some of the contents of the brief of the applicant's wife were withdrawn at the start of her evidence. I consider any increase in costs would be minimal and do not make any reduction.

[26] I find that the applicant is entitled to costs but that there should be a reduction to the daily tariff assessed at \$7,000 for two days of \$2,000 to reflect the realistic

settlement offer made by the respondent and the unscheduled lodging of a statement of evidence in reply that did raise new matters and/or changed existing evidence which increased the time taken for investigation.

[27] The applicant is entitled to costs in the sum of \$5,000 together with reimbursement of the filing fee of \$71.56 and the hearing fee of \$306.66 being for the \$153.33 for each half day of the second day.

[28] I order Farmlands Co-operative Society Limited to pay to Murray McGrannachan the sum of \$5,000 costs and \$378.22 disbursements.

Helen Doyle

Member of the Employment Relations Authority