

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 187  
5339548

BETWEEN

ASHLEY O'BRIEN  
Applicant

A N D

HOLER NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Heather McKinnon, Counsel for Applicant  
Dean Russ, Counsel for Respondent

Submissions Received: 9 May and 4 July 2012 for Applicant  
3 August 2012 for Respondent

Date of Determination: 30 August 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In a determination dated 11 April 2012 member Phillip Cheyne found that the applicant had a personal grievance that he was unjustifiably dismissed and awarded compensation of \$7,500. Costs were reserved and the Authority is now in receipt of submissions.

[2] As I was not the member who determined the substantive matter, I have had careful regard to the determination and other documents together with the costs submissions.

[3] Mr Cheyne's minutes provide that the investigation meeting commenced at 9.30am and concluded shortly after 1pm.

[4] The applicant was legally aided. Mr Cheyne requested further information regarding the total amount of costs granted for legal aid. Ms McKinnon advised in a memorandum dated 29 June 2012 that the total amount approved for payment was \$7,552.74 (including GST) but that there was an application for reconsideration of an

invoice short paid in the sum of \$1,467.40 and an additional \$367.08 for costs related matters. If those applications were successful then the total amount in costs approved and paid for legal aid would be \$9,387.22.

[5] Ms McKinnon seeks on behalf of the applicant a costs award of \$7,318 plus \$71.56 for the filing fee disbursement. This amount is greater than the usual daily tariff now recognised as \$3,500 for costs. Ms McKinnon says that this is justified for two reasons. The first is that she wrote on behalf of the applicant on 10 May 2011 offering to settle on behalf of the applicant for the sum of \$6,500. Within the body of the letter she described it as without prejudice but reserved the right to refer to the letter when the matters of costs arise.

[6] The other matter which Ms McKinnon says escalated the costs beyond the usual daily tariff was an additional amount for research. She submits that this was necessary because there was no research undertaken before the applicant was dismissed.

[7] Mr Russ, on behalf of the respondent, submits that a reasonable contribution to costs actually and reasonably incurred does not support an award of costs of the level sought by the applicant. He submits that in line with the full Court of the Employment Court judgment in *PBO Limited (formerly Rush Security Limited) v Da Cruz*, costs are modest in the Authority and are to be reasonable.

[8] Mr Russ submits that because the investigation meeting occupied only one half day, the starting point for determination of costs is the sum of \$1,500. He submits that if there is to be any uplift at all from that daily tariff then it should not exceed the sum of \$2,250 plus disbursements. In relation to the *Calderbank* letter, he submits that the offer was made a significant time prior to costs being incurred in the preparation for the investigation meeting and that there was an unrealistic timeframe provided in the letter for acceptance. There is some disagreement between the parties as to the date on the letter. Mr Russ says that due to the letter being incorrectly addressed the letter was not received until after the expiry for accepting the offer. He submits any value of the *Calderbank* offer is therefore lost to the applicant.

[9] I have stood back and considered all matters. The applicant did make an offer of settlement in the nature of a *Calderbank* offer that was very close to what was finally awarded. It was made early before there had been any costs of preparation

and rejected in its entirety by the respondent. It does appear it was received though outside of the time for accepting or rejecting the offer. The respondent did make it clear that it intended to vigorously defend the claim and was not agreeable to making any offer to settle it. Had the offer been accepted then the applicant would not have incurred costs in taking the matter to the Authority. Although I accept there is an issue with the time to accept the offer as a matter of commonsense this is not a case where the parties were on the cusp of an investigation meeting or that the respondent requested more time to consider the offer and the applicant refused. The respondent was not going to settle in any event.

[10] I do not therefore put the offer by the applicant to settle completely to one side. An offer made without prejudice save as to costs does not automatically mean, the applicant, if successful and more is awarded is then entitled to indemnity costs which in short given the uncertainty about the legal aid grant is what the applicant is asking for.

[11] I am not satisfied that the research required to be undertaken by the applicant should increase costs beyond the daily tariff. Any research about that falls within the usual preparation work allowed for in the daily tariff.

[12] Mr Russ has simply halved the usual daily tariff because of the fact that the investigation meeting did not occupy a full day. The fact the meeting only took half a day does not mean the costs should simply be halved. I don't consider in this matter that the preparation required was half that of a meeting taking a full day.

[13] Taking all matters into account, I am of the view that I should start at the usual daily tariff rate now recognised as \$3,500 to take account of the without prejudice save as to costs offer to settle. I then make a \$500 reduction as the meeting did not take a full day. A fair award of costs is \$3000 together with the filing fee of \$71.56.

[14] I order Holer New Zealand Limited to pay to Ashley O'Brien the sum of \$3071.56 being costs and disbursements.

**Helen Doyle**  
**Member of the Employment Relations Authority**