

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 362
5552241

BETWEEN RAEWYN REED and ROSS
 REED
 Applicants

AND TANIWHA FARMS LIMITED
 Respondent

Member of Authority: Vicki Campbell

Submissions received: No submissions were received from the Applicants
 8 October 2015 from Respondent

Determination: 19 November 2015

COSTS DETERMINATION OF THE AUTHORITY

A. Mr and Mrs Reed are ordered to pay to Taniwha Farms Limited the sum of \$2,500.00 within 14 days of the date of this determination.

[1] In a determination dated 9 September 2015¹ I found Mr and Mrs Reed were independent contractors and not employees of Taniwha Farms Limited. I reserved costs, indicating that if the parties were unable to resolve that issue, both parties would have the opportunity to file cost memoranda and evidence.

[2] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority applies a starting point of a notional daily tariff for quantifying costs and may uplift where there is conduct which increases costs unnecessarily.

[3] The Employment Court has held that the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs

¹ [2015] NZERA Auckland 273.

to that used by the Employment Court.² As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*³ 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.⁴

Calderbank offers

[4] 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 Appeal⁵:

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.⁶

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

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.⁸

[6] On 20 July 2015 Mr and Mrs Reed, through their advocate, wrote to Taniwha Farms offering to resolve matters by the payment of \$60,000.00. The offer remained open for acceptance until Thursday, 30 July 2015. The offer was withdrawn on 31 July 2015.

[7] Taniwha Farms Limited seeks an up-lift in the daily tariff on the basis that the Calderbank offer was totally inappropriate given that the issue as to whether an employment relationship existed was in dispute and submits that the applicants should be penalised for this.

² *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

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

⁴ *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2 at [9].

⁵ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385.

⁶ *Ibid* at [18].

⁷ [\[2014\] NZEmpC 15](#); [\[2014\] ERNZ 1](#).

⁸ *Ibid* at [27].

[8] Further Taniwha Farms claims Mr and Mrs Reed's representative has exhibited insulting and threatening behaviour towards Taniwha Farms and its Farm Consultant, Mr Roy Johnson.

[9] As a matter of principle costs are not to punish or to show any disapproval of any party, but to compensate a party that has been put to expense. Conduct unnecessarily increasing costs may be taken into account.

[10] The Calderbank offer made on 20 July 2015 recognised that the sole issue for determination by the Authority was the correct nature of the relationship. The Reeds could not have realistically considered Taniwha Farms would agree to paying \$60,000.00 before that question had been resolved. I am satisfied the rejection of the Calderbank offer was reasonable.

[11] The investigation meeting took less than one day and that included the delivery of an oral determination. The Reeds were not successful in their claim that they were employees.

[12] Applying the daily tariff would see the award of a contribution in the order of \$2,500.00 (taking into account that the investigation ended at about 3.15pm). Taniwha Farms, however, seeks more and asks for 90% of its costs in the sum of \$13,259.82. Taniwha Farms incurred costs in the total sum of \$14,733.14.

[13] In *Stevens v Hapag Lloyd*⁹ the Employment Court reiterated that proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical.¹⁰

[14] While Taniwha Farms is critical of Mr Burdon's conduct during the time leading up to the investigation meeting, there is nothing to indicate that his conduct increased Taniwha Farms costs unnecessarily.

⁹ [2015] NZEmpC 28.

¹⁰ Ibid at [94].

[15] I consider it appropriate that Mr and Mrs Reed contribute to the costs incurred by Taniwha Farms and they are ordered to pay to Taniwha Farms Limited the sum of \$2,500.00 within 14 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority