

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 11
5385000

BETWEEN ALAN ROBINSON
 Applicant

AND PACIFIC SEALS (NZ) LIMITED
 Respondent

Member of Authority: Michele Ryan

Submissions Received: 16 November 2015 from the Applicant
 7 December 2015 from the Respondent
 14 December 2015 'In reply' from the Applicant

Determination: 22 January 2016

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination dated 19 August 2013¹ Mr Alan Robinson was found to have been unjustifiably dismissed and unjustifiably disadvantaged. He was unable to establish that his employer, Pacific Seals (NZ) Ltd, was in breach of its obligation to provide a safe workplace. Costs were reserved. The Authority has now received memoranda as to costs from both parties.

[2] Mr Robinson's actual costs amount to \$15,901.68 (excluding GST and disbursements).² As a contribution to costs Ms Kennedy seeks \$10,000 plus GST from the respondent, Pacific Seals (NZ) Ltd. Alternatively, she requests the Authority apply its notional daily tariff rate, currently set at \$3,500 per day, plus costs of \$3,000 associated with this application and \$71.56 for the filing fee.

[3] The respondent accepts that costs follow the event but suggests an award of no more than \$2,000 in the applicant's favour should be made. It refers to a *Calderbank*

¹ *Robinson v Pacific Seals (NZ) Limited* [2013] NZERA Wellington 101

² as evidenced in provided time-sheets

letter made 7 months' prior to the investigation meeting and says the offer exceeded the amount awarded by the Authority but was rejected. In addition, it says the applicant's attempt to establish health and safety breaches unnecessarily prolonged the investigation meeting. For these reasons the respondent considers a downscale to an award of costs as appropriate.

Principles

[4] Both parties referred to *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*³ as providing guidelines which the Authority should consider in this application. Those principles are now so well established I have not restated them in full, however the following are particularly relevant to this matter:

- costs are not to be used as a punishment or as an expression of disapproval in respect to the unsuccessful party's conduct, but conduct which unnecessarily increases costs may be taken into account;
- 'without prejudice save as to costs' offers [also known as *Calderbank* offers] can be taken into account;
- awards in the Authority are modest;
- costs generally follow the event.

Issues

[5] The Authority needs to consider the following issues:

- i. should the Authority apply the notional daily tariff as a starting point in its assessment as to costs;
 - ii. are there any factors present which would warrant an uplift or scale back of costs, in particular:
 - should the *Calderbank* offer be considered;
 - was the investigation unreasonably prolonged;
-

- iii. should costs associated with an application for costs be awarded.

Should the Authority apply the notional daily tariff?

[6] In the recent judgement of *Fagotti v Acme & Co Ltd*⁴ the Full Court reaffirmed the Authority's use of a notional daily tariff and agreed:

*...there is a significant value in a commonly applied and well publicised notional daily rate for costs in the Authority. This enables parties and their representatives to assess more accurately from the outset what may be a very important element of the litigation (costs) when undertaking the regular economic analyses that parties and their representatives should undertake during that process”*⁵

[7] No reason was furnished as to why the Authority should depart from an application of the daily tariff, currently set at \$3,500, as a starting point.

[8] The investigation meeting lasted two full days. An award of \$7,000 is an appropriate starting point against which I will assess whether there are any factors in this particular case which would justify raising or lowering the tariff quantum.

Should the Calderbank offer be considered?

[9] A copy of the Calderbank offer referred to by the respondent was not placed before the Authority. Submissions on behalf of Mr Robinson advise the offer was sent in the mid-to-late afternoon of 21 August 2012 at a time his representative was not present in the office. She says it was open for acceptance until 9am on 23 August 2012 and lapsed before a response to it could be reasonably made.

[10] I have no means by which to assess whether the *Calderbank* offer and attached conditions, if any, were such that it was unreasonable for the applicant to reject it. I cannot therefore take the matter any further. Even if, however, the *Calderbank* letter had been produced, I would have been obliged to consider Ms Kennedy's submission as to when the offer was received and the length of time by which to applicant could accept or decline, (I note that information was not disputed by the respondent⁶). In the absence of any explanation as to why the offer was open for such a narrow period

⁴ [2015] NZEmpC 135

⁵ Ibid at [108]

⁶ Counsel for the respondent sent an email dated 16 December 2015. Issue was taken in regards to an aspect of the applicant's 'In reply' submissions but Ms Kennedy's assertions as to when the *Calderbank* offer was received and the duration of the offer was not disputed.

of time I would have likely found that the offer did not satisfy the requirement that recipients of *Calderbank* offers should be given “*a modicum of time for calm reflection and the taking of advice before a decision [had] to be made whether to accept the offer or reject it*”.⁷

Are there any other factors present which would warrant an uplifting or scaling back of costs?

[11] Whether there was conduct that unnecessarily prolonged the investigation meeting is a factor that may affect the amount of costs awarded.

[12] Mr Robinson sought \$20,000 in general damages for an alleged breach of contractual health and safety obligations. There is force to the respondent’s submission that a considerable portion of the Authority’s investigation was occupied by the applicant’s persistent advance of “*issues of Health and Safety and the applicability of the law concerning ACC*”, despite prior notice⁸ that the Authority has no jurisdiction under the Health and Safety in Employment Act 1992, nor can it compensate⁹ for personal injury. I note Ms Kennedy concedes that the claim was unsuccessful and fees associated with an expert witness are not sought.

[13] I find that the quantum of costs that would normally be awarded should be discounted by \$1,500 to reflect that this aspect of Mr Robinson’s claim prolonged the length of the investigation¹⁰ and was wholly unsuccessful.

Should costs associated with this application?

[14] Ms Kennedy points to *Sai Systems Ltd v Bird*¹¹, a decision of the Court, as authority that additional awards for preparation and time spent on costs submissions are appropriate. She seeks \$3,000 in relation to this application.

[15] The Authority is not bound by the same principles [in a costs setting] as the Court¹² and I am unwilling to make an order of the nature requested where I have no information as to the actual sum expended or whether it is reasonable, and where the issues have not been complex.

⁷ *Ogilvy & Mather (New Zealand) Ltd v Darroch* [1993] 2 ERNZ 943 at p952

⁸ during the case management conference call (and later in the investigation meeting)

⁹ In the absence of a contractual entitlement for personal injury compensation

¹⁰ Including a site visit

¹¹ [2015] NZEmpc 13 at [16]

¹² Above at n.3 at [106]

Order

[16] Pursuant to Section 15 of Schedule 2 of the Employment Relations Act I order Pacific Seals (NZ) Limited to pay Mr Alan Robinson the sum of \$5,500 as a contribution towards his costs and \$71.56 as the cost of the filing fee.

Michele Ryan
Member of the Employment Relations Authority