IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 190
5434956

	BETWEEN	GILES TIMOTHY SERGANT Applicant
	A N D	WESTERN MAILING LIMITED Respondent
Member of Authority:	TG Tetitaha	
Representatives:	Applicant in person A C Schimack/S J Kopu, Counsel for Respondent	
Investigation Meeting:	On the papers	
Submissions:	6 and 20 March 2014 from Applicant 7 and 28 March 2014 from Respondent	
Date of Determination:	15 May 2014	

COSTS DETERMINATION OF THE AUTHORITY

A. Western Mailing Limited is ordered to pay $5,837.96 to Giles Sergant as a contribution towards his actual legal costs.

Employment relationship problem

[1] The Authority in its substantive determination[1] held the applicant had been unjustifiably dismissed by the respondent. The respondent was ordered to pay the applicant damages under s.123(c)(i) of the Employment Relations Act 2000 (the Act) including a reduction of 50% for contributing behaviour, totalling $3,500. It declined reinstatement and any damages under s.123(b) of the Act because the applicant had not proven to the required standard that he had lost remuneration.

[2] Both parties now seek a contribution towards their costs. The applicant seeks indemnity costs of $20,572.96 comprising $19,985 legal fees and disbursements of

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$587.96. The respondent seeks a contribution to their legal fees of $40,900 and disbursements of $1,076.95.

Issues

[3] The following issues are to be determined:

a. Should the applicant be awarded indemnity costs?

b. If not, what is the starting point for assessing costs?

c. Are there any factors that warrant adjusting the notional daily tariff?

Should the applicant/respondent be awarded indemnity costs?

[4] The leading case on an indemnity costs is the Court of Appeal decision in *Bradbury & Ors v. Westpac Banking Corporation*[2]. Indemnity costs are exceptional so require "*exceptionally bad behaviour"* or may be awarded where a party has behaved either badly or very unreasonably.[3]

[5] This matter does not meet the very high threshold required before indemnity costs may be imposed.

What is the starting point for assessing costs?

[6] The correct approach to assessing costs in this matter is for the Authority to adopt its usual notional daily tariff based approach to costs.[4] The current notional daily tariff is $3,500. This matter involved two days investigation meeting. Therefore the starting point for assessing costs is $7,000.

Are there any factors that warrant adjusting the notional daily tariff?

Factors which warrant a reduction in the notional daily tariff

[7] The respondent seeks a reversal of the costs position and a contribution to its costs. This is because it made a *Calderbank* offer for more than the result achieved, its partial success in defending the application and conduct by the applicant's counsel which unnecessarily extended the investigation meeting.

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2 [2009] NZCA 234

3 Supra

4 *Mattingly v Strata Title Managment Ltd* [2014] NZEMPC 15 at [16]

[8] The applicant denies the *Calderbank* offer was clear as to its terms. There was an ongoing dispute regarding *ex gratia* payments which still needed to be established by further inquiries. The *Calderbank* included a five year restrictive covenant to be placed upon the applicant. This additional condition would have significantly impacted upon the applicant's future employment options. The offer was also made at a period when the applicant had already incurred significant legal costs in preparing and filing his affidavit. He further submits the conduct of his counsel did not significantly add to the time required for the hearing. He also disputes that the respondent was a successful party.

[9] A "steely" approach to settlement offers is required. The scarce resources of the Authority should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling and countervailing factors.[5]

[10] The principal issue is whether the *Calderbank* offer made on 25 October 2013 was reasonable. The *Calderbank* offer included a New Zealand wide, non-solicit and non-competition 5 year restrictive covenant. The consideration was payment of $20,000. The restrictive covenant would have affected the applicant's ability to secure future employment within New Zealand. A necessity for such a large restrictive covenant is unknown. It does not appear aimed at meeting the concerns of the applicant. Rather this covenant is designed purely to give the respondent the benefit of a far wider and more restrictive covenant than it would otherwise have been entitled to under the employment agreement. The remaining terms offer payments of approximately $43,875, including a $10,000 contribution towards legal costs.

[11] It cannot be reasonable for part of a settlement offer to include a restrictive covenant of far wider effect than he would otherwise have been subject to under his employment contract. His then salary was worth more than ten times the sum offered of $20,000. If he was unable to secure similar work as a result of the restrictive covenant, he would have lost far more than $20,000 or the $63,875 offered in total. His ability to continue working without restriction was worth substantially more than the settlement offer made.

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5 *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [19] and [20]

[12] In the circumstances, the Authority determines the *Calderbank* offer was not reasonable and would not have exceeded the outcome achieved by the applicant. It declines to give weight to the *Calderbank* offer as a consequence.

[13] The applicant was successful, but due to contributory conduct and lack of evidence about mitigation of losses, he was not awarded significant remedies. The respondent was not successful because the application was granted. This is not conduct for which a reduction in costs should be made.

[14] The applicant's counsel's conduct did increase the hearing time. Both parties had indicated the hearing could be completed in one day. Despite sitting very late on the first day of hearing, the applicant's counsel was unable to be complete cross-examination of witnesses within the one day estimated time. A significant proportion of the applicant's counsel's questioning was repetitive and did not greatly assist the Authority. Applicant counsel was asked several times to move on from points but refused to do so. A second day's hearing time was then required.

[15] Conduct by a party which elongates a hearing may be taken into account in determining costs.[6] The conduct of applicant counsel is conduct which may reduce an award of costs in these circumstances. I estimate the costs of a half days hearing time was unnecessarily incurred. In the circumstances costs are reduced by $1,750 accordingly.

Factors which warrant an increase in costs

[16] The applicant seeks recovery of disbursements of $587.96. The disbursements appear reasonable. The applicant's disbursements to be recovered.

[17] Accordingly, Western Mailing Limited is ordered to pay $5,837.96 to Giles Sergant as a contribution towards his actual legal costs.

TG Tetitaha
Member of the Employment Relations Authority

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6 *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808, 819 at [44]