

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 217  
5456117

BETWEEN

CATHERINE STALKER  
Applicant

A N D

GRAEME'S SERVICE CENTRE  
LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: David Beck and Danielle Mills-Godinet, Counsel for Applicant  
Robert Thompson, Advocate for Respondent

Submissions Received: 4 December 2014 from the Applicant  
19 December 2014 from the Respondent

Date of Determination: 23 December 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A. Graeme's Service Centre Limited is ordered to pay to Catherine Stalker the sum of \$4000 towards costs.**

[1] In its determination dated 20 November 2014 the Authority found the applicant was unjustifiably dismissed and made awards for lost wages in the sum of \$3,939.58 gross and compensation of \$5,950.00.

[2] Costs were reserved.

[3] The parties were unable to agree to costs and in accordance with the timetable set in the determination, submissions were lodged and served.

### The applicant's submissions

[4] Mr Beck refers to the leading Employment Court judgment on costs in the Authority in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>1</sup> and submits that the usual daily tariff awarded in the Authority of \$3,500 should be increased in this case. Mr Beck relies on the following principles in *PBO* in making that submission, conduct that unnecessarily increases costs can be taken into consideration in increasing or decreasing an award of costs and *without prejudice save as to costs* offers can be taken into consideration. The principle that equity and good conscience is to be considered on a case by case basis is also relied on.

[5] On 21 May 2014 an offer contained in a letter marked *without prejudice except as to costs* in the nature of a *Calderbank* offer was made to the respondent offering to settle for the following terms:

- (a) \$8,000 compensation;
- (b) Payment for holidays;
- (c) \$3,000 plus GST for costs;
- (d) Mutual non-disparaging clause; and
- (e) Record of settlement.

There was one week for a response.

[6] The *Calderbank* offer was not accepted by the respondent.

[7] A further offer in the nature of a *Calderbank* offer was made on 13 August 2014 for:

- (a) \$6,000 compensation;
- (b) \$3,000 plus GST for costs;
- (c) A positive reference; and
- (d) A mutual non-disparaging clause

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<sup>1</sup> [2005] 1 ERNZ 808

The respondent was given until close of business 18 August 2014 to respond.

[8] The second *Calderbank* offer was not accepted by the respondent.

[9] The applicant submits that the offers were reasonable and were less than what was ultimately awarded. The applicant submits that full costs incurred by her are \$8,462.26 including GST and a cost award in the sum of \$5641.50 is sought which equates to two-thirds of the overall costs.

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

[10] The respondent agrees that the Authority should consider the principles set out in *PBO*.

[11] Mr Thompson submits that it is difficult for the respondent to determine from the invoices supplied whether the costs are reasonable and necessary.

[12] Mr Thompson refers to the three invoices attached to the applicant's submission for costs dated 25 June, 15 August and 4 December 2014 and submits that the invoice of 15 August 2014 and 4 December 2014 have the same tax invoice number and appear to be for the same services provided. In any event Mr Thompson submits that the matter was a relatively straightforward one.

[13] Mr Thompson submits that the invoice dated 25 June 2014 for \$2,207.13 includes attendance at mediation for which it would be unreasonable for the applicant to obtain a contribution towards costs.

[14] Mr Thompson submits that the *Calderbank* offer should not be considered by the Authority. He refers to the High Court judgment in *Sanson v. Parval Marketing Limited*.<sup>2</sup> In that judgment at [30] Justice Asher commented on *Calderbank* offers by plaintiffs as follows:

*... A plaintiff cannot generally improve its costs position by sending a letter labelled a Calderbank offer seeking more or less the full amount claimed, and by then seeking to justify an increased amount of costs because it was not accepted. What the letter effectively sought was capitulation on the part of the defendant. While the defendants have failed in the proceeding they were entitled to have their day in Court, and whether or not a Calderbank offer is sent the*

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<sup>2</sup> HC Auckland CIV-2006-404-7231, 7 July 2008

*option to capitulate is obviously always before a defendant whether or not offered by the plaintiff. A refusal to exceed to a request in writing to so capitulate should not make a defendant's costs position ultimately worse.*

[15] Mr Thompson submits that the respondent has endeavoured to negotiate with the applicant to find a resolution to costs but that the applicant was obstructive in refusing to provide invoices to support the sums sought. The respondent put forward an offer of \$2,900 consistent with the daily tariff approach.

[16] Mr Thompson submits that the total costs less any claim for attendance at mediation should be \$6,255.13. He submits that \$250 per hour is reasonable and on that basis the amount sought is 25 hours for preparation of one witness statement, attendance of six hours at an investigation meeting and submissions seems excessive.

[17] Mr Thompson submits a fair award towards costs should be \$3,000 including any increase in the daily rate.

### **Determination**

[18] The usual daily tariff for a one day investigation in the Authority is \$3,500. The investigation meeting was from 9.30am to 3.30pm and the luncheon adjournment was not for a full hour. I am not minded to reduce the daily tariff from \$3,500. The sole issue is whether it should be increased because of the *Calderbank* offer.

[19] Mr Thompson refers to *Sanson* and the statement therein that a plaintiff cannot generally improve its costs position by sending a letter labelled a *Calderbank* offer seeking more or less the full amount claimed and then seeking to justify an increased award of costs. In the Employment Court judgment of *Watson v New Zealand Electrical Traders Limited t/a Bray Switchgear*<sup>3</sup> the pre-investigation offer by an employee to settle was so close to the actual award that it was held it should have been a significant consideration in the Authority's exercise as to its costs discretion.

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<sup>3</sup> (2006) 4 NZELR 59

[20] I find that the pre-investigation offers in the nature of *Calderbank* offers can be considered in the exercise of the Authority discretion as to costs.

[21] I find that both offers were reasonable and made before significant preparation had been undertaken for the investigation meeting on 23 October 2014. Had they been accepted then additional costs in the sum of about \$5,850.63, taking into account some suggestion of a double up in the third invoice, would not have been incurred. I accept Mr Thompson's submission that this is not a matter where the Authority would make an order for a contribution towards the cost of mediation. I agree with Mr Thompson that this was a relatively straightforward matter.

[22] In all the circumstances I have regard to the two *Calderbank* offers in the exercise of my discretion. I do though take into account that the awards made by the Authority were higher than the offers to settle by the applicant so whilst I give them some consideration it is not as significant as that in *Watson* where the offer to settle was very close to the actual award. I increase the daily tariff by \$500.

[23] In all the circumstances a fair and reasonable award towards costs is the sum of \$4,000.

[24] I order Graeme's Service Centre Limited to pay to Catherine Stalker the sum of \$4,000 towards costs.

Helen Doyle  
Member of the Employment Relations Authority