

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 10  
3074412

BETWEEN            SHELLEY STENHOUSE  
                                 Applicant  
  
A N D                TOMAN TOWING GROUP  
                                 LIMITED  
                                 Respondent

Member of Authority:     Peter van Keulen  
  
Representatives:         Maryline Suchley, advocate for the Applicant  
                                 Peter Cahill, advocate for the Respondent  
  
Investigation Meeting:    On the papers  
  
Submissions Received:    9 December 2020 from the Applicant  
                                 16 November 2020 from the Respondent  
  
Date of Determination:    14 January 2021

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1]     In a determination dated 15 October 2020<sup>1</sup>, I determined that Towman Towing Group Limited had acted in an unjustified manner causing disadvantage to Shelley Stenhouse and as

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<sup>1</sup> *Shelley Stenhouse v Towman Towing Group Limited* [2020] NZERA 426.

a result I ordered Towman to pay \$10,500.00 to Ms Stenhouse for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). I also determined that Towman had failed to provide wage and time records to Ms Stenhouse and I imposed a penalty part of which was payable to Ms Stenhouse - \$1,125.00. I dismissed Ms Stenhouse's claim for unjustified dismissal.

[2] I also reserved costs so that the parties could try to agree costs. The parties have not been able to agree costs and Towman seeks costs.

### **Application for costs**

[3] The advocate for Towman seeks an award of indemnity costs of \$41,708.20 (including GST) being all of the legal costs incurred by Towman in this matter since the personal grievance was lodged by Ms Stenhouse. The advocate says Ms Stenhouse's conduct of this case and the unreasonable rejection of a Calderbank offer<sup>2</sup> justifies a costs award of this amount.

[4] The advocate for Ms Stenhouse says that costs should lie where they fall (i.e. each party should bear its own costs) as:

- (a) Ms Stenhouse was partially successful in her claims;
- (b) There is no basis for the submission that Ms Stenhouse conducted her claim in a way that justifies indemnity costs being awarded against her and in fact it was Towman's conduct of this matter that increased its costs; and
- (c) Ms Stenhouse's rejection of Towman's Calderbank offer was reasonable and followed up with a counter-offer which was not accepted by Towman.

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<sup>2</sup> A Calderbank offer is an offer made by one party, normally a respondent, to settle the claim on terms. The offer is marked "without prejudice save as to costs". The purpose of a Calderbank offer is to not only to attempt to settle a claim but by using the stated words the offering party is reserving the right to bring the offer to the Court's (or in this case the Authority's) attention if the claim is not settled. This is so that the offer can be used for assessing costs once the claim has been determined.

### **Application for costs out of time**

[5] In my determination I set a timetable for the parties to make submissions seeking costs. That timetable required any party seeking costs to lodge and serve a memorandum seeking costs by 29 October 2020. Towman's memorandum seeking costs was lodged on 16 November 2020, 18 days after the timetable date for lodging.

[6] The advocate for Ms Stenhouse objects to me determining Towman's application for costs as it was lodged out of time.

[7] I have considered the relevant case law relating to allowing an application for costs to be considered out of time.<sup>3</sup>

[8] In my view there are three factors relevant to the exercise of my discretion to consider the application for costs out of time, in this case:

- (a) The delay in lodging the memorandum seeking costs is not significant.
- (b) Ms Stenhouse has challenged the determination, so in many respects the claim is not at an end.
- (c) There is no evidence of any prejudice to Ms Stenhouse in the short delay in lodging.

[9] On balance I am prepared to exercise my discretion and allow the late lodging of the memorandum – I will consider Towman's application for costs.

### **Analysis of the application for costs**

[10] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. In *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>4</sup> and other relevant Employment

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<sup>3</sup> *Metallic Sweeping (1998) Limited v Stephen Whitehead* [2010] NZEmpC 23.

<sup>4</sup> *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

Court and Court of Appeal decisions,<sup>5</sup> the Employment Court and the Court of Appeal set out the principles I should apply and the approach I should adopt when exercising my discretion to award costs under clause 15 of Schedule 2 of the Act.

[11] The first principle I should consider is that costs should follow the event, unless there is some accepted reason why this should not happen, such as a successful party only having very limited success or failing to better a Calderbank offer.

[12] In this case, Ms Stenhouse had mixed success, being successful with her unjustified disadvantage claim and her penalty claim. Applying *William Coomer v JA McCallum and Son Limited*<sup>6</sup>, I am satisfied that Ms Stenhouse was sufficiently successful for the purposes of costs. Therefore my starting point is that if Ms Stenhouse had incurred costs in this matter she would be entitled to an award of costs.

[13] So, Towman is not entitled to an award of costs unless the principle of costs following the event should be reversed because of the Calderbank offer. The basic premise here is that if a successful party has rejected a Calderbank offer to settle and then not been awarded an amount that betters the offer then the successful party should not be awarded costs. The rationale for this is that continuing with the claim after rejecting the Calderbank offer was futile and unnecessary because the successful party would have gained more from accepting the offer and also would have avoided ongoing costs for both parties by ending the claim at that time. In essence the successful party was not successful in relative terms (considering the rejected offer) and therefore it should bear its own costs and contribute to the other side's costs.

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<sup>5</sup> *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385; *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4; *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28; *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135; and *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127.

<sup>6</sup> *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.

[14] The key requirements in applying this premise are that the Calderbank offer is a valid Calderbank offer<sup>7</sup> and it was unreasonably rejected by the other side.

[15] The Calderbank offer in this case was an offer made by Towman on 6 March 2020, through its solicitors at the time (the Towman Offer). The Towman Offer was payment of \$15,000.00 pursuant to s 123(1)(c)(i) of the Act, with those payments being made in monthly instalments of \$1,000.00. The Towman Offer did not include any additional amount for costs and it was made in full and final settlement of all claims arising out of Ms Stenhouse's employment with Towman.

[16] The Towman Offer was a valid Calderbank offer.

[17] Ms Stenhouse rejected the Towman Offer on 9 March 2019 and made a counter-offer, offering to accept \$19,000.00 pursuant to s 123(1)(c)(i) of the Act with \$5,000.00 being paid as a lump sum and the balance being paid over 7 months at \$2,000.00 per month. It is clear from this that there were two reasons why Ms Stenhouse rejected the Towman Offer – it was not enough and she was not prepared to accept payments over a 15 month period. Whilst the quantum was not a reasonable basis to reject the Towman Offer (based on what Ms Stenhouse was awarded), in my view not accepting 15 months of payments and wanting at least part paid in a lump sum was a reasonable basis to reject the Towman Offer.

[18] So, the end result is the Towman Offer is not a Calderbank offer that is relevant to the assessment of costs as it was reasonably rejected by Ms Stenhouse. And therefore it cannot displace the first principle that costs should follow the event.

[19] Therefore my conclusion is there is no basis for me to award costs to Towman. However, for completeness I will address the suggestion that Ms Stenhouse's conduct of her claim in some way justifies awarding indemnity costs to Towman. I reject this completely. There is no basis to suggest that Ms Stenhouse's conduct of her claim was problematic causing costs to be increased. In fact her conduct of her claim, entirely without any

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<sup>7</sup> *Ogilvie & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943.

representation, was cooperative and constructive particularly in light of some questionable conduct by Towman, such as the last minute introduction of witness evidence.

[20] The situation is in fact the opposite of what is advanced by the advocate for Towman. Had Ms Stenhouse incurred any costs in progressing her claim she would have been entitled to seek an award of costs. As I have already pointed out she would have been entitled to an award of costs given her success and I add, I would most likely have increased any award to reflect the conduct of Towman in progressing its response.

[21] However, this is not the case as Ms Stenhouse has not sought costs, presumably as she did not engage representation for her claim in the Authority, and I cannot award her costs.

### **Outcome**

[22] In conclusion I decline Towman's application for costs and make no order for costs.

Peter van Keulen  
Member of the Employment Relations Authority