

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Ruth Sullivan (Applicant)

**AND** Navigant New Zealand Limited trading as TQ3 Navigant  
(Respondent)

**REPRESENTATIVES** Scott G Wilson, Counsel for Applicant  
Andrew Flexman, Counsel for Respondent

**MEMBER OF AUTHORITY** Helen Doyle

**SUBMISSIONS RECEIVED** 1 September 2006  
7 September 2006

**DATE OF DETERMINATION** 21 September 2006

**COSTS DETERMINATION OF THE AUTHORITY**

***The application for costs***

[1] In my determination dated 14 July 2006, I found that the applicant had been unjustifiably dismissed by the respondent and awarded her remedies.

[2] Costs were reserved.

***The claim for costs***

[3] The applicant seeks an award of costs *in the region of \$5,000.00*. The applicant incurred costs totalling \$20,592.50 exclusive of GST.

[4] The respondent submits that this is a case where the costs should lie where they fall because it is contended both parties were partially successful and the effect of a *calderbank* offer made by TQ3 to Ms Sullivan on 27 June 2005 would have placed Ms Sullivan in a better position than she was in following the Authority's determination of the employment problem.

***The legal principles***

[5] The recent decision of the full bench of the Employment Court in *PBO Limited v Da Cruz* AC 2A/05 sets out the relevant principles for determining costs.

[6] The judgment identifies the basic tenets which the Authority has applied to costs decisions since its inception and Shaw J makes clear that those principles are *appropriate ... and consistent with [the Authority's] functions and powers*.

[7] One particularly relevant consideration is the movement in average costs with the passage of time. In one of the earlier decisions of the Employment Court frequently relied upon in the Authority, *Harwood v Next Homes Ltd* [2003] 2 ERNZ 433, the Court refers to average awards of costs for a one day investigation in the Authority as being between \$1,000 and \$1,500. However, in *Da Cruz Shaw J* states that the figures for costs awards maintained by the Department of Labour for the six months ending 30 June 2005, show the majority of costs awards for one day investigation meetings are in a range between \$2,000 and \$2,500.

[8] The principles enunciated by the Employment Court in *Da Cruz* include the following matters:

- The Authority has a discretion on whether to award costs and on quantum.
- That discretion has to be exercised in a principled way and not arbitrarily.
- The Authority may enquire into and determine the reasonableness of a party's costs.
- Costs will generally follow the event.
- Without prejudice offers can be taken into account.
- Costs will generally be modest in the Authority.
- Costs are frequently judged in the Authority against a notional daily rate.

### ***Discussion***

[9] The Authority has a discretion to award costs or not. This was a personal grievance case which was very important to both parties. There is nothing to suggest that the applicant's costs were not reasonably incurred.

[10] The investigation meeting took a full day.

[11] The respondent submits that Ms Sullivan was successful in her claim of an unjustifiable dismissal but her remedies were reduced by 60% to take account of her contributory conduct so the effect is that *both parties were partially successful*.

[12] In *Singh v Sherildee Holdings Limited t/a New World Opotiki* (26/10/05) AC 53A/05 Couch J held that a similar contributory contribution did not of itself warrant a reduction in a costs award. In *Gorrie Fuel (South Island) Ltd v Marlow* (5/10/04) CC 14A/05 on a challenge de novo from a determination of the Authority, Couch J upheld the finding of unjustified dismissal but found that Mr Marlow had substantially contributed by way of 60% to the situation that gave rise to his grievance and on the facts of the particular case, ordered that costs should lie where they fell.

[13] In this particular matter I had to make findings about the reasons for the dismissal which were at the heart of the personal grievance. On that basis I am not minded to reduce the award of costs that the applicant would otherwise be entitled to.

[14] I need to consider the *calderbank* offer. Ms Sullivan was awarded \$15,293.76 gross as reimbursement of lost wages and \$4,800.00 as compensation after the award for contribution was taken into account.

[15] The respondent is correct in its submission that the effect of the *calderbank* offer is more advantageous, in money terms alone, than the effect of the determination. The net effect of the *calderbank* offer is to give Ms Sullivan \$21,700.00.

[16] Ms Sullivan says that the *calderbank* offer was rejected because it contained a no-contact clause with current or prospective clients for a 12 month period from expiry of notice. This was outside the terms of her employment agreement. The purpose of *calderbank* offers is to facilitate settlement agreements and, as TQ3 says in its submissions, ...*to ensure that a plaintiff who does not accept a reasonable settlement offer carries the full cost of litigating a claim that does not realise more than the offer.*

[17] I have come to the conclusion that the *calderbank* offer ought to be excluded from consideration because of the addition of the no-contact clause. In my view it had a significant effect on the value of the *calderbank* offer to Ms Sullivan, because it restricted her freedom and was outside the terms of her employment agreement.

[18] Given that I have found that the *calderbank* offer does not bear on the present issue, I must conclude the matter on the basis of general principles. I am of the view that the applicant is entitled to an award for costs.

[19] In the circumstances of this case I am of the view a fair and reasonable award for costs and disbursements is \$3,000.00.

### ***Determination***

[20] I order Navigant New Zealand Limited trading as TQ3 Navigant to pay to Ruth Sullivan the sum of \$3,000.00 for costs.

Helen Doyle  
Member of Employment Relations Authority