

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5363820 and 5363824
[2012] NZERA Auckland 368

BETWEEN

PAUL AND SYLVIA TAKI
Applicant

A N D

SPOTLESS FACILITY
SERVICES (NEW
ZEALAND) LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Warwick Reid and Rachel Rolston, Advocates for
Applicant
Peter Jennings and Rachel Langton, Advocates for
Respondent

Submissions Received 6 August 2012 from Applicants
20 August 2012 from Respondent

Date of Determination: 9 October 2012

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In the substantive determination of the Authority dated [...], the Authority rejected Mr and Mrs Taki's claim to have been constructively dismissed from their employment but found that Mr Taki had suffered a single count of disadvantage as a consequence of unjustified actions of the employer (Spotless) and Mrs Taki had suffered two counts of disadvantage as a consequence of the unjustified actions of Spotless.

[2] Costs were reserved.

The applicants' position

[3] The applicants' seek costs on the following basis:

- (a) As to Mr Paul Taki in the sum of \$4,500 plus disbursements of \$137.50; and
- (b) In respect of Mrs Sylvia Taki in the sum of \$7,500 together with disbursements of \$137.50.

[4] The reason for the significant difference in the sum claimed is that in respect to Sylvia Taki, reliance is placed on a *Calderbank* offer made to Spotless on 10 February 2012 prior to the matter being filed in the Authority.

The respondent's position

[5] The respondent (Spotless) seek costs totalling \$1,404.00 being the total amount of actual disbursements incurred by Spotless in defending the claim, the amount reflecting the fact that Spotless did not engage outside advocacy in the case and dealt with the matter exclusive in house.

The law

[6] The law in respect to the fixing of costs in the Authority is well known. The principles enunciated by Judge Shaw in the Employment Court decision in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 include the Court approving the daily tariff approach frequently adopted by the Authority in costs setting but also enumerate the various principles that would underpin the making of a costs decision in the Authority. Those principles include the fact that costs would normally follow the event, that costs are a discretionary remedy, that costs in the Authority will typically be modest and that the existence of otherwise of a *Calderbank* offer will be one of the factors that the Authority will take into account in fixing costs.

[7] In addition, the Authority has frequently applied the principles set out by the present Chief of Authority, Member Dumbleton, in the decision in *Graham v. Airways Corporation of New Zealand Limited (unreported)* Employment Relations Authority, Auckland AA39/04, 28 January 2004. In that decision, the Authority determined costs by responding to three questions, namely, what was the total quantum of costs

charged to the successful party; were those costs reasonable; and what percentage of those costs ought to be met by the unsuccessful party.

Discussion

[8] This is a case where both parties can claim some success in the Authority and both are seeking an award of costs. Spotless has quite properly drawn to the Authority's attention the fact that the most significant claim brought against them by the Taki's (that of constructive dismissal) was rejected by the Authority. Conversely, the Taki's rely on the fact that they were successful in disadvantage grievances, in relation to Mrs Taki, effectively in two separate and distinct disadvantage grievances.

[9] Further, as to Mrs Taki, there is a *Calderbank* offer in play. That offer is in the sum of \$10,000. It was served on Spotless before the proceedings were filed and the Authority is satisfied that it gave Spotless a proper opportunity to consider the implications of the proposal before the proceedings were actually filed.

[10] However, the *Calderbank* letter is in the sum of \$10,000 compensation to be payable pursuant to s.123(1)(c)(i) of the Act and the compensation under the same section of the Act awarded by the Authority in the proceeding itself was in the sum of \$7,000.

[11] It follows that applying the usual precepts in relation to the operation of *Calderbank* offers, it was not an effective *Calderbank* offer at all. It is trite law that a *Calderbank* offer is only effective where it is turned down by the offeree and the offeror is subsequently more successful in the subsequent proceeding than the figure in the offer. Then, and only then, can the Authority consider an "uplift" in costs awarded to the offeror. Because that is not the situation in the instant case, the Authority does not take the *Calderbank* offer into its consideration in respect the fixing of costs for Mrs Taki.

[12] Having dealt in that fashion with the *Calderbank* offer, the balance of the Authority's consideration of the matter can be informed by the principles in *Graham*. Here, each party seeks costs against the other. Each claims success against the other. Each has some merit in their contention. The short point is that while Spotless were successful in defending the fundamental claim of constructive dismissal, Mr and Mrs Taki were successful in respect to unjustified disadvantage grievances.

[13] Each party have indicated the costs that they incurred; both are modest, Spotless particularly so because in effect no time is charged because the advocacy work was done in-house.

Determination

[14] In all the circumstances of this case, the Authority has concluded that the appropriate course of action is to award modest costs to Mr and Mrs Taki. While it is true that this was truly a case where each party had its successes a proper view is that Mr and Mrs Taki were successful in respect of proving grievances, albeit not the particular kind that they claimed.

[15] However, Mr and Mrs Taki claim costs incurred by them in aggregate amounting to a total of *over \$7,537.50 each*. Wherever the proposal originated, as a matter of fact the several claims of the applicants' were dealt with in one hearing but each was represented by its own advocate. Arguably the effect of that arrangement was to artificially increase the costs and while that is any party's right to do, it is not reasonable to visit the costs of that arrangement on the other party when it is able to argue, with some justice, that it was almost as successful.

[16] In all the circumstances, the Authority considers that Spotless should make a contribution to Mr and Mrs Taki's costs in the sum of \$3500 in total. That sum takes account of the relative success of Spotless in the proceedings and also of the way in which the applicants chose to present their case.

James Crichton
Member of the Employment Relations Authority