

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 155  
5521707

BETWEEN                      MORGAN TUAU  
   Applicant  
  
AND                                CRAIG SOUTHALL  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Andrew Foster for Applicant  
   Lucy Tucker for Respondent  
  
Submissions received:      8 May 2015 from Applicant  
   14 May 2015 from Respondent  
  
Determination:                3 June 2015

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A.      Mr Southall is ordered to pay to Mr Tuau the sum of \$3,000 within 14 days of the date of this determination.**

[1]      In a determination dated 10 April 2015<sup>1</sup> I held Mr Tuau was unjustifiably dismissed, awarded him remedies and dismissed the counter-claims against him.

[2]      I reserved costs, indicating that if the parties were unable to resolve that issue, both parties would have the opportunity to file cost memoranda and evidence. These have now been received by the Authority for consideration.

[3]      Counsel has submitted that Mr Tuau incurred costs in the total sum of \$7,625.00 and seeks a contribution of costs at least, at the daily tariff of \$3,500.00.

[4]      The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event.

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<sup>1</sup> [2015] NZERA Auckland 106.

## Calderbank offers

[5] The Authority will take into account, when dealing with the issue of costs, any offers made by the parties to settle matters. As stated by the Court of Appeal<sup>2</sup>:

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.<sup>3</sup>

[6] As was held by the Employment Court in *Mattingly v Strata Title Management Limited*<sup>4</sup>:

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a “steely approach” ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court’s observation in *Da Cruz* that Authority awards will be “modest”. What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a de novo challenge, having regard to the circumstances of the particular case.<sup>5</sup>

[7] On 24 February 2015 and after the parties had attended mediation, Mr Southall wrote to Mr Tuau through his representative, offering to resolve matters by payment to Mr Tuau of \$5,000.00 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000. Mr Tuau declined the offer.

[8] In February 2015 Mr Tuau was aware he was facing significant counter-claims in the Authority. In the absence of any undertaking as to the counter-claims it was not unreasonable of Mr Tuau to reject the offer.

[9] That position changed on 17 March 2015 when Mr Southall confirmed the offer to pay \$5,000 in addition to withdrawing the counter-claims against Mr Tuau. Mr Tuau did not have the opportunity to respond to that offer as it was withdrawn the next day on 18 March 2015 and the original offer set out in the letter dated 24 February 2015 was confirmed. That is, the counter-claims would continue to be pursued. I am satisfied Mr Tuau’s rejection of the Calderbank offer from Mr Southall

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<sup>2</sup> As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385.

<sup>3</sup> *Ibid* at [18].

<sup>4</sup> [2014] NZEmpC 15; [2014] ERNZ 1.

<sup>5</sup> *Ibid* at [27].

after 18 March 2015 was reasonable because he continued to face the prospect of defending the significant counter-claims against him.

[10] Mr Tuau was awarded a total of \$2,550 in compensation and the counter-claims against him were declined by the Authority. Mr Tuau was not as successful in the Authority in respect of his claims, as the offer made to him on 24 February 2015 and confirmed on 18 March 2015. However, the offer was reasonably rejected by Mr Tuau because of the significant counter-claims made against him by Mr Southall and the prospect that even if he accepted the offer made to him, he would still be required to defend the counter-claims in the Authority.

### **Determination of costs**

[11] Under normal circumstances the Authority would apply a starting point of a notional daily tariff for quantifying costs. The Authority has been provided with evidence that Mr Tuau incurred costs of \$7,625.00. The investigation meeting took one day.

[12] As held recently by the Employment Court, the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.<sup>6</sup> As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*<sup>7</sup> awards in the Authority will be modest taking into account conduct which increases costs unnecessarily.

[13] While Mr Tuau was put to additional expense in responding to significant counter-claims against him and the counter-claims were wholly unsuccessful the respondent was also put to unnecessary expense in preparing to defend an arrears of wages claim which was withdrawn by the applicant seven days prior to the investigation meeting.

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<sup>6</sup> *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

<sup>7</sup> (2006) 7 NZELC 98,128; [\[2005\] ERNZ 808](#); (2005) 3 NZELR 1 (EMC).

[14] I consider it appropriate that Mr Southall contribute to the costs incurred by Mr Tuau and he is ordered to pay to Mr Tuau the sum of \$3,000 within 14 days of the date of this determination.

Vicki Campbell  
Member of the Employment Relations Authority