

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 356  
5514841

BETWEEN KEVIN HUGH DAVID VAN  
DER MERWE  
Applicant

A N D GLASSHAPE LIMITED  
Respondent

Member of Authority: T G Tetitaha  
Representatives: N Bhowmick, Counsel for Applicant  
J Foden, Advocate for Respondent  
Submissions: 2 September 2015 from Applicant  
18 August and 14 September 2015 from Respondent  
Date of Determination: 12 November 2015

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A. Kevin van der Merwe is ordered to pay Glasshape Limited \$6,500.00 towards its actual legal costs at the rate of \$25 per week starting within 28 days of this determination.**

**Employment relationship problem**

[1] The Authority in its substantive determination dated 10 August 2015<sup>1</sup> dismissed the application for personal grievance and reserved costs.

[2] The respondent now applies for costs. Its actual costs were \$8,730 plus GST. It also seeks to recover the costs of attending mediation of \$720.

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<sup>1</sup> *Van Der Merwe v Glasshape Limited* [2015] NZERA Auckland 238.

### **What is the starting point for assessing costs?**

[3] This matter does not meet the very high threshold required before indemnity costs may be imposed. Indemnity costs are exceptional so require “*exceptionally bad behaviour*” or may be awarded where a party has behaved either badly or very unreasonably.<sup>2</sup>

[4] The starting point for assessing costs here is to adopt the Authority’s usual notional daily tariff based approach to costs.<sup>3</sup> The current notional daily tariff is \$3,500. This matter involved a one and a half day investigation meeting. The starting point for assessing costs is therefore \$5,250.

### **Are there any factors that warrant adjusting the notional daily tariff?**

[5] The respondent seeks an increase to the tariff because it submits the applicant was wholly unsuccessful, rejected a reasonable Calderbank offer, it incurred \$6,030 costs post the Calderbank offer, the findings that the applicant’s actions drove the redundancy, the requirement to attend mediation, the need to file amended pleadings, attendance at a teleconference where the disadvantage claim was discussed and additional disclosure sought then subsequently abandoned incurring costs of \$486 and the unreliability of the applicant’s evidence including the length of time spent on examination during the 1 ½ day hearing. The applicant submits he was self-represented at mediation and hearing to save costs and made several attempts to settle this matter through mediation and Calderbank offers. He seeks payment at \$25 per week and has produced evidence of his financial circumstances.

[6] Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party’s conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.<sup>4</sup> The raising then abandonment of the disadvantage claim falls within that type of conduct. An uplift of \$250 is sufficient to reflect this.

[7] Without prejudice offers or Calderbank offers can be taken into account in determining costs and awards will be modest.<sup>5</sup> Several Calderbank offers appear to have been exchanged firstly by the applicant seeking \$10,000 plus \$1,500 plus GST

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<sup>2</sup> *Bradbury & Ors v. Westpac Banking Corporation* [2009] NZCA 234.

<sup>3</sup> *Mattingly v Strata Title Management Ltd* [2014] NZEMPC 15 at [16].

<sup>4</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808, 819 at [44].

<sup>5</sup> See above.

costs contribution to which the respondent did not reply. The respondent then made a Calderbank offer on 20 March 2015 to pay \$1,000 in settlement of all claims. The applicant made a further Calderbank offer of \$8,000 on 1 April 2015 and a final Calderbank offer of \$3,000 on 15 April 2015 both of which the respondent did not reply to.

[8] The respondent's Calderbank offer offered more than the applicant achieved at hearing. There is a need for a "*more steely*" approach to costs where reasonable settlement proposals have been rejected.<sup>6</sup> However the awards achieved here were always going to be modest, perhaps reflected in the applicant's choice to be self-represented and the low offers to settle exchanged by the parties. An increase of \$1,000 to reflect the Calderbank offers is appropriate.

[9] The remaining conduct alleged to justify an increase is either part of the litigation process in the Authority and therefore reflected in the daily notional tariff or insufficient to warrant any further adjustment.

[10] The applicant's financial situation indicates his current expenditure exceeds his income. I exercise my discretion and direct payment of costs at the rate of \$25 per week starting within 28 days of this determination.

### **Outcome**

[11] Kevin van der Merwe is ordered to pay Glasshape Limited \$6,500.00 towards its actual legal costs at the rate of \$25 per week starting within 28 days of this determination.

**T G Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>6</sup> *Health Waikato Limited v Elmsley* [2004] 1 ERNZ 172 (CA) at [53]