

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2017] NZERA Auckland 354  
3007552**

BETWEEN

LUBELIA WILKINSON  
Applicant

AND

THE FARMERS' TRADING  
COMPANY LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Mandy Rusk, Counsel for Applicant  
Matthew McGoldrick, Counsel for Respondent

Costs Submissions 25 October 2017 from Applicant  
12 October 2017 from Respondent

Determination: 13 November 2017

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In a determination dated 31 August 2017 ([2017] NZERA Auckland 260), I found that the Applicant, Ms Lubelia Wilkinson, had not been unjustifiably dismissed from her employment by the Respondent, The Farmers Trading Company Limited (Farmers).

[2] In the earlier determination dated 10 May 2017 [2017] NZERA Auckland 141 I determined that Ms Wilkinson should not be granted interim reinstatement to her former position at Farmers.

[3] Costs in the substantive matter and those relating to a preliminary decision were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and both parties have filed submissions in respect of costs.

[4] The matter involved 2.25 days of meeting time (2 full days plus a quarter day in respect of the interim matter).

[5] Mr McGoldrick, on behalf of Farmers, submits that it made an offer to Ms Wilkinson to resolve the matter following the interim reinstatement claim being unsuccessful, and prior to the substantive matter being heard.

[6] Mr McGoldrick, citing actual costs of \$24,370.50 plus GST, is seeking a contribution to costs in the sum of \$18,500.00.

[7] Ms Rush, on behalf of Ms Wilkinson, submits that Ms Wilkinson has lost her job with Farmers, and in attempting access to justice should not be punished further by an award of costs which is punitive in nature.

#### Submissions for the Respondent

[8] Mr McGoldrick submits that although the interim reinstatement application was heard in the usual way for such applications, namely by way of affidavit evidence and an investigation meeting which consisted of submissions only, and occupied 1.5 hours only, it involved the Respondent in extensive preparation.

[9] On that basis the equivalent daily tariff rate for a 1 day investigation meeting of \$4,500.00 is appropriate in respect of the costs of the interim application investigation.

#### *Calderbank Offer*

[10] Mr McGoldrick submits that Farmers made an offer to settle the entire matter by letter dated 19 May 2017. The letter was not headed: “*Without Prejudice Save As To Costs*”, but stated it was: “*written on an open basis*” and offered to settle the matter on a full and final basis (the Offer). If not accepted the Offer stated it would lapse, not be capable of acceptance, and Farmers would seek an increase to the costs in the extent that it was successful in the substantive matter.

[11] The Offer provided with Ms Wilkinson with the opportunity to withdraw from the matter proceeding to a substantive hearing and without either party incurring further costs, on the basis that costs would lie where they fell.

[12] I accept that this was in essence, a Calderbank<sup>1</sup> offer. As such I consider it should be given due weight when considering the matter.

[13] Mr McGoldrick submits that the Offer that costs would lie where they fell was not a 'walk away' offer, in that at the date when it was made Farmers was prepared to forego seeking costs on the interim reinstatement application.

[14] Mr McGoldrick submits that it is appropriate for the Authority to increase the normal daily tariff rate in the Authority for a 2 day investigation meeting from \$8,000.00 to double that rate in recognition of the rejection of what was a substantial offer of settlement.

#### Submissions for the Applicant

[15] In support of her submission that costs should be reduced to nil, or in the alternative, should be reduced to the barest amount possible, Ms Rush submits that a costs award at the level claimed by the Respondent will result in considerable financial hardship to Ms Wilkinson who is of limited financial means.

[16] Ms Rush further submits that Ms Wilkinson has had to meet her own legal expenses which have been reduced in light of the circumstance of the advice provided to her by her previous Counsel, in respect of which a complaint has been filed with the New Zealand Law Society.

#### *Principles*

[17] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

#### ***15 Power to award costs***

*(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*

*(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

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<sup>1</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA)

[18] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*<sup>2</sup>.

[19] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup>.

[20] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>4</sup> (*Da Cruz*) that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*<sup>5</sup> at para [48] “*As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.*”

### **Determination**

[21] I have carefully considered the submissions of the parties. It is incumbent upon me that I approach the question of costs in a principled manner and not arbitrarily. The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *Da Cruz*.

[22] I am minded to give weight to the matter of the Offer and to take it in consideration as a factor, noting the comment made by Judge Ford in *Foai v Air New Zealand Limited* that:<sup>6</sup>

*...the making of such an offer does not in itself automatically result in a more favourable costs award. It is merely a discretionary factor.*

[23] In this case there was no financial offer of a payment to Ms Wilkinson to resolve her claims; however there was an Offer containing a proposal which, if Ms Wilkinson chose to accept it, meant that Farmers was prepared to forego seeking costs on the interim reinstatement application.

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<sup>2</sup> [1996] 2 ERNZ 622

<sup>3</sup> [2005] 1 ERNZ 808

<sup>4</sup> [2005] 1 ERNZ 808

<sup>5</sup> [2001] ERNZ 305

<sup>6</sup> [2013] NZEmpC 50 at [17]

[24] I find that as such, the Offer was of monetary value to Ms Wilkinson and: “*amounted to a genuine compromise by the defendant*”.<sup>7</sup> On that basis I find it is a factor to be considered in setting the level of costs to be awarded to Farmers.

[25] I also note that, whilst her Counsel submits that the legal expenses Ms Wilkinson owes to Aurora Law Limited have been reduced, they have not been extinguished.

[26] Costs normally follow the event and on the basis of the normal daily tariff rate in the Authority of \$4,500.00 for the first day of hearing and \$3,500.00 for the second day, this equates to \$8, 000.00.

[27] In addition the costs in relation to the interim matter equate to \$1,000.00. I appreciate that Mr McGoldrick submits that a higher sum should be awarded on the basis of the preparation required, but costs in the Authority are set at a level to take into consideration the necessary preparation.

[28] I determine that the starting point of \$9,000.00 should be uplifted to take into account the rejection of the Offer and set the contribution to costs to be awarded to the Respondent at a level of \$12,000.00.

[29] Ms Wilkinson is claiming financial hardship and that consequently she would struggle to meet an award of costs. She has provided a statutory declaration with supporting documentation and a financial statement in support of that submission, specifically her current income and regular out-goings.

[30] As stated in the Employment Court case *Bishop v Bennet*<sup>8</sup> at [30]: “*Assessment of the ability to pay requires consideration of the total financial position of the party concerned including both assets and liabilities and income and necessary expenditure.*”

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<sup>7</sup> *O’Hagan v Waitomo Adventures Limited* [2013] NZEmpC 58 at [27]

<sup>8</sup> [2012] NZEmpC 5

[31] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However I note the observation of Judge Inglis in *Tomo v Chekmate Precision Cutting Tools Ltd*<sup>9</sup> at [22] that:

*... the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account.*

[32] Having weighed all these considerations, I find that whilst Farmers as the successful party is entitled to some award, this is a case in which it is appropriate for the Authority to use its discretion by lowering the tariff because it is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings.

[33] As observed by Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*:<sup>10</sup> “...even an award of costs based on a low daily rate may not be feasible where the liable party does not have the means to pay...”

[34] However I find that in all the circumstances surrounding this case, Farmers as the successful party is entitled to some recompense for costs. In the circumstances I believe a contribution towards costs of \$3,000.00 is a reasonable contribution.

[35] Accordingly, Ms Wilkinson is ordered to pay Farmers a contribution to costs in the sum of \$3,000.00, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[36] An arrangement may need to be made for Ms Wilkinson to pay the costs by way of instalments over several months. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are sought and cannot be agreed.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>9</sup> [2015] NZEmpC 2

<sup>10</sup> Ibid at para [46]