

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 380
5536471

BETWEEN TRENT WILLIAMS
Applicant

AND BURKHART BUILDING
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Alex Hope for Applicant
Andrew Foster for Respondent

Submissions received: 9 November 2015 from Applicant
3 December 2015 from Respondent

Determination: 4 December 2015

COSTS DETERMINATION OF THE AUTHORITY

- A. Burkhart Building Limited is ordered to pay to Mr Williams the amount of \$1,750.00 without deduction as a contribution to his costs plus disbursements of \$200.62 within 14 days of the date of this determination.**

[1] In a determination dated 13 October 2015¹ I held Mr Williams was not disadvantaged in his employment but he was unjustifiably dismissed from his employment with Burkhart Building Limited. I awarded remedies of compensation amounting to \$5,000.00.

[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. The Authority has received submissions in accordance with the timetabled directions set out in the determination from Mr Williams however no submissions were received

¹ [2015] NZERA Auckland 320.

from Burkhart Building Ltd until well after the timetabled date. Following intervention from the Authority, Burkhart Building Ltd applied for leave to lodge its submissions out of time. The Authority could not discern any prejudice to Mr Williams in granting leave and therefore leave was granted.

[3] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority applies a starting point of a notional daily tariff for quantifying costs and may uplift where there is conduct which increases costs unnecessarily.

[4] The Employment Court has held that 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.² As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*³ awards in the Authority will be modest taking into account conduct which increases costs unnecessarily. Indemnity costs may be justified in relatively rare cases where a party's conduct is particularly egregious.⁴

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 Appeal⁵:

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.⁶

[6] As was held by the Employment Court in *Mattingly v Strata Title Management Limited*⁷:

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

² *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

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

⁴ *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2 at [9].

⁵ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385.

⁶ *Ibid* at [18].

⁷ [\[2014\] NZEmpC 15](#); [\[2014\] ERNZ 1](#).

the discretion of the Authority, and the Court on a de novo challenge, having regard to the circumstances of the particular case.⁸

[7] On 16 April 2015 following the case management call between the parties and the Authority, Burkhart Building wrote to Mr Williams offering to resolve matters by the payment to Mr Williams of \$3,000.00 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000. The offer remained open for acceptance until 5.00pm the following day 17 April 2015.

[8] The offer was unreasonable in that it not only did not meet or exceed the outcome Mr Williams achieved at the Authority but the time allowed for Mr Williams to consider the offer was extremely short.

[9] Mr Williams' rejection of the offer by Burkhart Building Ltd was reasonable in all the circumstances.

[10] The investigation meeting took about half a day. Mr Williams was successful in one of his two claims. Applying the daily tariff would see the award of a contribution in the order of \$1,750.00. Mr Williams, however, seeks more and asks for \$3,000 costs plus \$200.62 in disbursements. The claim for \$3,000 equates to more than 80% of his actual costs. There is no evidence to support that an increase in the daily tariff is warranted.

[11] In *Stevens v Hapag Lloyd*⁹ the Employment Court reiterated that proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical.¹⁰

[12] Mr Williams' costs were certainly modest and were reasonable in all the circumstances. However, there is nothing to indicate that a deviation from the normal tariff based approach should apply.

⁸ Ibid at [27].

⁹ [2015] NZEmpC 28.

¹⁰ Ibid at [94].

[13] I consider it appropriate that Burkhart Building Limited pay to Mr Williams the amount of \$1,750.00 without deduction as a contribution to his costs plus disbursements of \$200.62 and that this payment is made within 14 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority