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XZZ and TSL v RNH (Auckland) [2017] NZERA 254; [2017] NZERA Auckland 254 (28 August 2017)

Last Updated: 10 September 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 254
Not published

BETWEEN XZZ and TSL Joint Applicants

AND RNH

First Respondent

AND UWQ

Second Respondent

Member of Authority: Vicki Campbell

Representatives: Robert Bryant for Applicants

Brent O'Callahan for First Respondent

Robert Milne for Second Respondent

Investigation Meeting: On the papers

Submissions Received: 18 July 2017 from the Applicant

1 August 2017 from the First Respondent

1 August 2017 from the Second Respondent

Determination: 28 August 2017

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. The first and second respondents are ordered to pay to the joint applicants the total sum of \$2,565.48 within 28 days of the date of this determination.

[1] In a determination dated 4 July 2017¹ I granted applications for removal and non-publication orders.

¹ [2017] NZERA Auckland 197.

[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.

Determination of costs

[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. Under normal circumstances the Authority would apply a starting point of a notional daily tariff for quantifying costs. The daily tariff applicable to this matter is \$4,500.

[4] The Authority has been provided with evidence that shows the joint applicants incurred costs of \$8,388 excluding GST plus disbursements totalling \$315.48 including GST. The joint applicants claim a contribution to their costs of \$5,500 and reimbursement of the disbursements in full.

[5] 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.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.

Calderbank

[6] The joint applicants have submitted that it is appropriate to uplift the costs award based on an unreasonable rejection of a Calderbank offer.

[7] The Authority will take into account any offers made by the parties to settle matters. As stated by the Court of Appeal:⁴

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.

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

³ [2005] NZEmpC 144; (2006) 7 NZELC 98,128; [2005] ERNZ 808; ([2005] NZEmpC 144; 2005) 3 NZELR 1 (EMC).

⁴ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

[8] The Calderbank offer was made to the first respondent on 29 May 2017. The offer was not extended to the second respondent. The offer contained in the joint applicants' letter sought the consent of the first respondent to the removal application.

[9] Whether a matter is removed to the Court without first being investigated by the Authority is a matter for the Authority and not the parties. The purpose of a Calderbank offer is to provide an opportunity for parties to resolve their dispute by agreement thus avoiding the cost and risk of litigation.

[10] In the present case the Calderbank could not have been intended to resolve a dispute without recourse to litigation, because an application for removal is not something the parties can agree to without the involvement of the Authority. Recourse to the Authority was inevitable. For that reason there will be no uplift in the daily tariff.

Conclusion

[11] By the consent of the parties the applications for non-publication and removal were dealt with on the papers and did not require any attendances. The applications were not complex. In particular the application for non-publication was essentially an application to extend orders already made by the Court. The application for removal was relatively straight forward. In all the circumstances an appropriate contribution to costs is \$2,250 plus \$315.48 disbursements.

[12] The first and second respondents are ordered to pay to the joint applicants the total sum of \$2,565.48 within 28 days of the date of this determination.

Vicki Campbell

Member of the Employment Relations Authority