

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 116
5419979

BETWEEN

GREGORY ALLOTT
Applicant

A N D

TELECOM NEW ZEALAND
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Mark Henderson (Counsel) and Geraldine Biggs
(Advocate) for Applicant
Emma Butcher, Counsel for Respondent

Submissions Received: 15 July 2014 from Applicant
25 July 2014 from Respondent

Date of Determination: 12 August 2014

COSTS DETERMINATION OF THE AUTHORITY

A. I order Telecom New Zealand Limited to pay to Gregory Allott the sum of \$4,400 costs together with disbursements in the sum of \$88.81.

The substantive determination

[1] The Authority in its substantive determination dated 25 June 2014 found that the applicant was unjustifiably disadvantaged in his employment and ordered the respondent to reimburse him the sum of \$44,561.37 for lost remuneration and holiday pay. Interest was payable on that sum. The respondent was in addition ordered to pay the applicant compensation in the sum of \$8,000. Costs were reserved and a timetable set for an exchange of submissions in the event that agreement was not reached.

[2] Submissions have now been received from both parties. Costs were not able to be agreed upon.

[3] The applicant's employment relationship problem with the respondent was heard consecutively with that of another applicant, Aaron White. The issues were very similar and dealing with the matter in this way saved considerable time because witnesses were only required to give their evidence once, there was one agreed bundle of documents and joint submission were provided.

The applicant's submission

[4] Mr Henderson and Ms Biggs refer in submissions to the full Court judgment in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*, [2005] 1 ERNZ 808 and the principles recognised in *PBO* to be consistent with the functions and powers of the Authority.

[5] Actual costs and disbursements incurred by the applicant were \$17,592.21. Invoices were attached to the submission. Costs were incurred on the basis of charge out rates inclusive of GST of \$330 per hour for Mr Henderson and \$220 per hour for Ms Biggs. It was acknowledged in the submission that the costs associated with mediation as reflected in the invoice dated 21 June 2013 are not usually awarded and it was further noted that the invoice also included an amount of recorded time of \$372.35 for discussions with the applicant about his redundancy and that those are not claimed.

[6] It was recognised in submissions that \$3,500 per day for an investigation meeting is the current and accepted daily tariff in the Authority.

[7] In the submissions Mr Henderson refers to a *without prejudice save as to costs settlement offer* made by the applicant by email on 24 July 2013. Although the letter refers to the date of 24 June 2013 this is a typographical error. Settlement was offered on the basis of \$25,000 in lost remuneration and \$2,000 in compensation. The respondent did not accept the offer but made a counter offer.

[8] There was then a second *without prejudice save as to costs offer* by way of email dated 24 March 2014. That offer was for \$25,000 in lost remuneration, \$2,000 in compensation and \$2,000 by way of a contribution towards legal costs. Mr Henderson and Ms Biggs submit that at the point of the second offer in the nature

of a *Calderbank* offer legal costs had already been invoiced in the sum of \$13,630.91. It is submitted that the second settlement offer was also unreasonably rejected on 27 March 2014 because the award in favour of the applicant significantly exceeds both of the applicant's settlement offers and therefore they were entirely reasonable.

[9] It is further submitted that there were complexities in the matter and that pre-hearing preparation was required in relation to obtaining detailed contractual and financial documentation and information about the respondent's claiming process and calculation of remuneration.

[10] It is submitted that there were some delays in providing that by the respondent and that documents in the agreed bundle GA.docs 1, 2 and 3 were provided without explanation as to their meaning.

[11] Mr Henderson and Ms Biggs submit that there was then further detailed correspondence regarding the relevant financial and contractual documentation and the respondent's claiming processes in letters dated 31 January 2014, 5 February 2014, 26 February 2014 and 10 March 2014. It is submitted that this significantly reduced the time that would otherwise have been required to address these issues at the investigation meeting.

[12] Reference is also made to the agreed bundle of documentation running to 200 pages and the length of the applicant's first statement of evidence, joint legal submissions and the provision of extensive case law authorities.

[13] It was submitted that the usual tariff which applies to straightforward cases should not be applied to this case as it would not adequately account for the nature and complexity of the case and in particular the extensive work that took place before the hearing.

[14] There is also reference in the submissions to some additional work after the investigation meeting required when the respondent produced its written approval document, the IGG document.

[15] The applicant claims an indemnity for costs from the date of its first *Calderbank* offer of 24 July 2014. Costs amount to \$10,508.96 including GST and disbursements with a proportional reduction to the invoice dated 30 October 2013 to reflect work which pre-dated the *Calderbank* offer and in addition it is submitted that

costs should be awarded for the period up to the date of the *Calderbank* offer of 24 July 2013 of \$2,300 including GST.

The respondent's submission

[16] Ms Butcher on behalf of the respondent notes that proceedings were commenced in October 2013 by the applicant. She confirms the nature of the *Calderbank* offers that were exchanged but submits that the reason for rejection of the *Calderbank* offers was not only the respondent's belief in its defence but that its treatment of all employees had been consistent so a substantial settlement with one would amount to the unacceptable action of treating employees differently. It was prepared to offer the amount that it did in recognition of the applicant's particular circumstances, including the costs that he had incurred to the point in pursuing his claims, but submits no response at all was received to the counter offer by the applicant.

[17] Ms Butcher submits that at the time the second offer was made most of the work for the investigation meeting had been undertaken by both parties, the applicant had filed his evidence and work had been completed for the agreed bundle. The respondent's witness statements had been prepared by that time also. It is further submitted that the offer did not state what would be settled by such a payment of \$25,000 and whether this was intended to be limited in the manner stated in the first settlement offer. The offer was expressed to be open for four days.

[18] Ms Butcher submits that the respondent co-operated with the applicant's request for information but that this was delayed due to the extent of the information sought and the time it took to retrieve it. The information was provided on 28 January 2014 rather than 15 December 2013 when it was thought it could be provided by.

[19] The applicant sought further information on 31 January 2014 which was largely provided on 5 February 2014 and further information sought on 26 February 2014 was provided on 10 March 2014.

[20] Ms Butcher submits that for the respondent it was important to get a determination of its position rather than compromise it. The respondent accepts that it is submitted that the applicant's legal costs were reasonable though notes a good deal of the costs set out are not costs incurred in the pursuit of the claims in the Authority

but arose prior to proceedings being filed and that those should not be taken into account.

[21] It is accepted that the respondent should make a contribution the applicant's costs, however Ms Butcher submits the daily tariff rate of \$3,500 should be applied and does not accept that this was a case of particular complexity. She submits that whilst the applicant's relied on a number of causes of action these were essentially reasonably straightforward personal grievance claims and that the respondent provided the relevant figures and these were never in dispute.

[22] Ms Butcher does not accept that GA.docs. 1, 2 and 3 were provided without explanation as to their meaning or significance. It is further submitted that the respondent approached its case responsibly and worked cooperatively with the applicant and the Authority to ensure costs were kept to a minimum. It is submitted that at the essence the claim should have been brought as either personal grievance or wages arrears and introducing estoppel, Wage protection and Fair Trading Act causes of action was unnecessary and the Authority did not consider it necessary to deal with these causes of action.

[23] It is submitted that the respondent had good reason to decline both offers made by the applicant and that it is submitted that the applicant should be awarded the daily tariff of \$3,500.

Determination

[24] Two full days were required to investigate the employment relationship problems of the applicant and Mr White. The applicant is entitled to a contribution towards his costs. The usual starting point for assessing costs is in \$3,500 for a one day investigation meeting.

[25] The applicant submits that costs should be recovered on an indemnity basis because he has made reasonable offers of settlement. There is reference to the Court of Appeal judgment in *Moore v McNabb* (2005) 18 PRNZ 127 (CA) and the statement therein that costs can strip the value of the subject matter in dispute and for a losing party, the costs of losing a case can be ruinous. To the extent that the applicant's submission suggests otherwise I do not find that indemnity costs against the unsuccessful party follow automatically from the rejection of a Calderbank offer. The

fact of such an offer is another matter to be taken into account in the overall exercise of the discretion as to costs.

[26] The offers to settle were reasonable. Although I have considered them I do not give them weight in the exercise of my discretion as to costs. The applicant achieved a better outcome by continuing with his legal proceedings than he did by settling. The first settlement offer was for payment of \$25,000 lost remuneration and \$2,000 compensation. The applicant achieved an award of \$44,561.37 for lost remuneration and \$8,000 compensation. That is a combined sum of \$52,561.37. The rationale of a Calderbank offer does not sit easily with a situation where the applicant is considerably more successful after the outcome of an Authority investigation.

[27] I am strengthened in my view that in these circumstances it is not appropriate to place weight on the offers to settle by the Employment Court judgment in *Watson v New Zealand Electrical Traders Ltd t/a Bray Switchgear* (2006) 4 NZELR 59. *Watson* concerned a challenge to a costs determination of the Authority. Chief Judge Colgan did take into account a *Calderbank offer* from the applicant at an early stage that he was to be paid \$6,000 compensation and \$1,500 towards his legal costs. This was rejected. The applicant achieved about \$150 short of the settlement offer. It was stated at [8] of the judgment *I consider that Mr Watson's proposal that Bray Switchgear settle for \$6,000 was so close to the actual outcome of the Authority's investigation after much more was spent on costs by the parties, that it is a significant conclusion in this case.* In the present case the outcome was not close to the settlement offer but exceeded it by a considerable margin and in those circumstances the costs incurred by the applicant could not be said to be unnecessary in the way that they were in *Watson*.

[28] I turn to whether the nature of the case should result in an increase to the daily tariff. The applicant submits that it was a complex matter but that is not accepted by the respondent. The daily tariff is applied on the basis of being inclusive of both preparation and the investigation meeting itself. I have considered whether there is anything over and above the usual type of case before the Authority that could justify an increase. The claim about the retrospective adjustment of the sales target was not particularly complex legally or factually. The claim about the re-win deductions had a degree of factual complexity in terms of understanding what was done and why it was done. Disclosure issues were important therefore for issues of liability and

quantum. Counsel worked together to ensure the Authority's investigation was cost and time efficient. Although there was some delay in providing information I am not satisfied it justified an increase to any costs award as it was for reason of time required to obtain the information rather than any deliberate delay strategy. Whilst there was more front end work the time for the actual investigation was reduced. I find a limited increase is justified and fair in the sum of \$500 as the front work was more extensive than in other cases. I do not find that the nature of the case justifies any further increase on the basis of complexity.

[29] One relevant document was omitted by mistake from the common bundle. The provision of that at a later time did cause some additional expense to the applicant and justifies an upward increase to the daily tariff of \$400.

[30] I intend to only award expenses to the extent that they are payments to third parties. I have assessed the various invoices on that basis and two disbursements fall into that category. The first is the filing fee to the Authority of \$71.56 as shown in invoice 30 October 2013 and the second is the courier fee of \$17.25 shown in the invoice 9 April 2014 of \$17.25.

[31] In conclusion from a starting point for costs of \$3,500 and allowing for an increase of \$900 there is to be an award of costs to the applicant in the sum of \$4,400 together with disbursements of \$88.81.

[32] I order Telecom New Zealand Limited to pay to Gregory Allott the sum of \$4,400 costs together with disbursements in the sum of \$88.81.

Helen Doyle
Member of the Employment Relations Authority