

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 70/10
5121090

BETWEEN BRIAN SAMUEL BATES
 Applicant

A N D ADEN ELECTRICAL
 LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Jenny Guthrie, Counsel for Applicant
 Chris Eggleston, Counsel for Respondent

Submissions Received: 16 December 2009 for Respondent
 8 February 2010 for Applicant

Determination: 17 March 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In its determination of the substantive issues, the Authority found the applicant's claims were not made out and now has received submissions from counsel for the parties on the matter of costs.

[2] Mr Eggleston submits his client's relevant costs amounted to a little over \$11,000. Counsel urges me to consider an award of \$8,000 given the two *Calderbank* offers made in an attempt to avoid litigation.

[3] The first proposed each party withdrawing their respective proceedings with no question as to costs. This was in response to a proposal from Mrs Guthrie to settle the applicant's claims for \$4,500.

[4] The first offer of settlement on behalf of the respondent was declined and on 13 May 2009 the respondent offered \$2,500 in full and final settlement, the offer to remain open until 6pm that day as counsel was to begin preparation of statements of evidence the following morning. Mrs Guthrie submits the timeframe on the second offer was too restrictive and the first was made in the context of the respondent

threatening to issue proceedings against Mr Bate's business partners. In her submission, *neither was made in a timely fashion*.

[5] While there is some merit in this submission, I think the respondent's offers were genuine attempts to resolve the issues between the parties prior to major costs being incurred, and thus will weigh in the balance when I am considering the costs.

[6] Counsel for the applicant urges the Authority to consider the principles regarding an unsuccessful party's ability to pay citing *Crook v. Sovereign Services Ltd* WC6/08, 19 March 2008. Shaw J wrote:

In assessing an appropriate level of costs, ability to pay is a relevant factor. In this case, the plaintiff's ability is impacted by her ongoing disability which causes her to be still unemployed and receiving payments under her disability income protection insurance which is approximately one third less than her pre-disability earnings. She has a mortgage and usual outgoings as well as significant credit card debt. ... Of the well settled principles to be applied in considering applications for costs, this case requires, in particular, consideration of what award of costs and expenses would be reasonable in all the circumstances.

[7] Earlier in this costs decision, the learned Judge said:

I accept Ms Fleming's submission that this was a complex case. It required an unusual number of interlocutory applications to deal with disclosure and other pre-trial matters.

[8] I think it fair to say the substantive matters before the Authority were far less complicated than those of Ms Crook. In the present matter, both counsel have referred me to *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808 and the principles established therein. For his part, Mr Eggleston urges me to consider moving up from the daily tariff of \$3,000. On behalf of her client, Mrs Guthrie submits I should start at \$2,500 but take into account, under the Authority's equity and good conscience jurisdiction, the ability of her client to meet a substantial award.

[9] Standing back and considering the application of the principles set out in *PBO* (supra), I confirm that costs will follow the event.

[10] As to quantum, I think an award of \$8,000 would be punitive and beyond the applicant's ability to pay within a reasonable time. Mrs Guthrie urges the Authority

to make an award of \$2,000 which I find would be insufficient in the light of the respondent's earnest attempts to settle the matter.

[11] In the particular circumstances of this case, I think it just to award costs to the respondent in the sum of \$3,800.

[12] The applicant is ordered to pay the respondent the sum of \$3,800 as a contribution to its reasonably incurred costs.

Paul Montgomery
Member of the Employment Relations Authority