

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 176
3021294**

BETWEEN GLEN BAVISTER
 Applicant

AND OCKHAM CONSTRUCTION
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Michael Smyth, Counsel for Applicant
 Anthony Drake & Naoimh McSparron, Counsel for
 Respondent

Costs Submissions None from Applicant
 26 April 2018 from Respondent

Determination: 31 May 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 29 March 2018 ([2018] NZERA Auckland 107), I found that the Applicant, Mr Glen Bavister had been unjustifiably disadvantaged by the Respondent, Ockham Construction Limited (OCL), but that he had not been unjustifiably dismissed by OCL.

[2] In that determination costs 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 the Respondent has filed submissions in respect of costs.

[3] The matter involved two days of meeting time. Mr Drake, on behalf of OCL, citing actual costs of \$41,625.58 (inclusive of GST and disbursements), is seeking a contribution to costs in the sum of \$1,190.25 (inclusive of GST and disbursements) in respect of a pre-hearing discovery application, and \$9,200.00 (Inclusive of GST and disbursements) in respect of the investigation meeting, a total of \$10,390.25 (inclusive of GST and disbursements).

[4] Mr Drake in respect of the pre-hearing application for document discovery by the Applicant, submits that he was required to respond to a pre-hearing memorandum requesting disclosure of specific documents.

[5] Mr Drake submits that he had previously advised counsel for the Applicant that there were no specific documents to disclose and as a consequence there was no proper basis for the Applicant to file a pre-hearing request.

[6] The Authority refused the pre-hearing request for document disclosure on 21 March 2018.

[7] Mr Drake further submits that the Respondent made a Calderbank¹ Offer to Mr Bavister.

[8] In regards to the Calderbank Offer, Mr Drake submits that he wrote to the Applicant by letter sent by letter dated 11 September 2017 containing an offer from the Respondent to settle the matter in the sum of \$10,000.00 net. This amount is significantly more than the amount Mr Bavister was awarded in remedies by the Authority.

Determination

Principles

[9] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) 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.

[10] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*².

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA)

² [1996] 2 ERNZ 622

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

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

[13] In respect of the pre-hearing discovery request the Respondent had made clear its intention to seek costs in respect of the application in the memorandum submitted on 20 March 2018.

[14] I find that the Calderbank Offer represented a genuine attempt to resolve matters at an early stage in the proceedings at a greater amount than Mr Bavister was subsequently awarded by the Authority. As such it should be taken into consideration in determining the appropriate level of costs.

[15] In all the circumstances, I determine that costs follow the event.

[16] In respect of the pre-hearing document discovery application I award \$1,000.00 calculated on the basis of the Authority’s time to determine the application.

[17] In respect of the substantive matter, I take as the appropriate starting point the normal daily tariff in the Authority of \$8,000.00 for a 2 day meeting; I apply an uplift in respect of the Calderbank Offer of \$1,000.00.

[30] Mr Bavister is ordered to pay OCL a total sum of \$10,000.00 (inclusive of disbursements) as a contribution to costs, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson
Member of the Employment Relations Authority

³ [2005] 1 ERNZ 808

⁴ [2005] 1 ERNZ 808

⁵ [2001] ERNZ 305