

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 273
5403967**

BETWEEN NEVILLE BRADFORD
Applicant

AND EARTH CREST LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Applicant in person
Nick Elsmore, Counsel for Respondent
Submissions received: 16 & 24 June 2014 from Applicant
23 June 2014 from Respondent
Determination: 30 June 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2014] NZERA Auckland 196 the Authority found that the Applicant, Mr Neville Bradford, had not been unjustifiably constructively dismissed by the Respondent, Earth Crest Limited (Earth Crest).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and Mr Bradford has filed submissions in respect of costs.

[3] This matter involved three separate Investigation Meetings which took place on 18 April 2012, 11 September 2013 and 30 April 2014, and which incorporated preliminary issues and the substantive matter. Both parties have now provided written submissions in respect of costs.

Submissions of the Applicant

[4] Mr Bradford cites actual costs of \$20,474.92, which sum includes expenses related to his time lost as a result of taking time off work for preparation for the Investigation Meetings, witness attendance costs for Mr Stevenson, and disbursements for printing and photocopying.

Submissions of the Respondent

[5] Earth Crest acknowledges responsibility for the cost of disbursements.

[6] In respect of witness expenses, Mr Elsmore on behalf of Earth Crest, submits that these must be properly incurred and reasonable. As regards the costs that have been claimed in respect of Mr Stevenson, it is submitted that he was not acting as an expert witness at any stage of the proceedings and therefore there is no basis for him to charge for any preparation or travel time.

[7] Mr Elsmore further submits that Earth Crest made a Calderbank¹ offer, that is a without prejudice save as to costs offer, to Mr Bradford. This offer was made in an email to Mr Bradford, dated 28 April 2014 (the Offer), which is before the Authority.

Principles

[8] 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:

s. 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.

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

[10] 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.

[11] 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.”

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

² [1996] 2 ERNZ 622

³ [2005] 1 ERNZ 808

⁴ [2005] 1 ERNZ 808

⁵ [2001] ERNZ 305

Determination

[12] The normal rule is that costs follow the event and Mr Bradford is entitled to a contribution to his costs.

[13] It is necessary to consider what effect the Offer should have upon the award of costs in this matter. The Court of Appeal in *Health Waikato Limited v Van Der Sluis*⁶ observed that: “*the Calderbank letter field is fully discretionary*”. The nature of this wide discretion is that if the Authority awarded a lesser amount than the amount offered in the Calderbank letter, there would be no absolute protection to the party which had made the offer in terms of costs. Equally, the Authority may take into consideration a Calderbank letter when more has been awarded than was offered.

[14] The Court of Appeal in *Aoraki Corporation Ltd v McGavin*⁷ in commenting on the exercise of this discretion, noted that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore these Calderbank offers without costs being impacted:

The discretion as to costs is a judicial one to be exercised according to what is reasonable and just to both parties and the public interest in the fair and expeditious resolution of disputes requires that full weight be given to the extent to which costs were properly incurred subsequent to the non-acceptance of an offer of settlement at a figure above the amount eventually awarded in the litigation.

[15] By determination [2014] NZERA Auckland 196 Mr Bradford was awarded the sum of \$9,136.30 in respect of his claims for unpaid wages and holiday pay. The Offer was in the sum of \$8,000.00. The Offer was made by email dated 28 April 2014, just two days prior to the substantive investigation meeting.

[16] Whilst the Authority will take into consideration offers to settle, a prime consideration is whether or not such offers were “*expeditious*” i.e. made sufficiently in advance of the investigation meeting to allow ample time for consideration by the Applicant.

[17] In this case, I find that the Offer had not been made in sufficient time in order for the Mr Bradford to give it due consideration and to avert the accumulation of additional costs. I therefore have not taken the Offer into consideration in determining costs.

⁶ [1997] 10 PRNZ 514

⁷ [1998] 1 ERNZ 601

[18] Costs are not usually awarded in respect of mediation attendance. The costs of the Applicant and Respondent attending an Investigation Meeting are expected to be reimbursed by the parties themselves. However the Authority has discretion to order costs in respect of witness attendance at an investigation meeting.

[19] The Authority had not issued any witness summons in respect of the investigation meetings held on 18 April 2012, 11 September 2013 or 30 April 2014 respectively, however it issued witness summons for the investigation meetings at the request of Mr Bradford who believed that the evidence provided by the witnesses would be important for the presentation of his case before the Authority.

[20] In respect of the third investigation meeting which was held in Auckland on 30 April 2014, no witness statements on behalf of witnesses were provided by Mr Bradford and the witnesses did not give evidence.

[21] Costs of attending the investigation meetings are claimed in respect of Mr Stevenson. The investigation meetings held on 18 April 2012 and 23 September 2013 were held in Whangarei, and Mr Stevenson provided evidence at each of these, however he did not give evidence at the third investigation meeting held in Auckland on 30 April 2014.

[22] The normal practice in which witness expenses are reimbursed in the Authority is based on a calculation of the return bus fare between the witness's home base and the location of the investigation meeting, in addition to a lunch cost contribution of \$5.00 per day.

[23] I order that Earth Crest is to reimburse Mr Bradford for the costs of Mr Stevenson's attendance at the two Investigation Meetings held in Whangarei in the sum of \$276.00 pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[24] Mr Bradford may also be reimbursed in respect of the disbursements incurred, being printing and photocopying, incurred by himself and Mr Stephenson for the Investigation Meetings.

[25] I order that Earth Crest is to reimburse Mr Bradford for the costs of disbursements incurred in the sum of \$165.31.00 pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[26] Mr Bradford is also to be reimbursed the filing fee of \$71.56

Eleanor Robinson
Member of the Employment Relations Authority

