

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2015] NZERA Auckland 350  
5547896**

BETWEEN                      JELENA CRAMOND  
   Applicant  
  
AND                              YOUR PUBLICATIONS  
   LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Max Whitehead, Advocate for Applicant  
   Dyane May for Respondent  
  
Costs Submissions            22 October 2015 from Applicant  
   None from Respondent  
  
Determination:                11 November 2015

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In a determination dated 25 September 2015 ([2015] NZERA Auckland 294), I found that the Applicant, Ms Jelena Cramond, had been unjustifiably dismissed from her employment by the Respondent, Your Publications Limited.

[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 Mr Whitehead on behalf of Ms Cramond, has filed a submission in respect of costs.

[3]     The matter involved 1 day of meeting time. Mr Whitehead, citing actual costs of \$12,571.41 (including GST) is seeking a contribution to costs at a sum set at the normal daily tariff rate in the Authority of \$3,500.00 per day.

[4]     Mr Whitehead submits that Ms Cramond made a Calderbank<sup>1</sup> offer, which is a without prejudice save as to costs offer, to Your Publications Limited in the sum of \$10,000.00. Mr Whitehead claims that the Calderbank Offer was initially made in a letter

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<sup>1</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA)

dated 2 March 2015 in which Ms Cramond raised a personal grievance for unjustified dismissal.

[5] The offer to settle contained in the letter dated 2 March 2015 was not accepted by Your Publications Limited which by response offered to settle the matter in the sum of \$6,000.00 by way of a: “*Without Prejudice Except as to Costs*” offer contained in a letter dated 25 May 2015.

[6] Ms Cramond rejected the Calderbank offer made by Your Publications Limited in a letter dated 26 May 2015, reiterating the offer to settle in the sum of \$10,000.00.

[7] Your Publications Limited responded by making an increased offer to settle in the sum of \$7,000.00 in a letter dated 3 August 2015, again carrying the heading: : “*Without Prejudice Except as to Costs*”

[8] Ms Cramond did not accept the increased offer made by Your Publications Limited and the matter proceeded to an investigation meeting.

[9] Mr Whitehead refers in his submissions to *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>2</sup> and submits that the principles on which an award of costs are made are well settled. These well established principles are that costs generally follow the event, without prejudice offers can be taken into account, and costs are modest. I have relied upon the principles as set out in *Da Cruz* in determining this matter.

### **Determination**

[10] The offer to settle made by Mr Whitehead on Ms Cramond’s behalf in the letter dated 2 March 2015 I do not find to be a Calderbank offer as it is not expressed as being made on the basis of *Without Prejudice Except as to Costs*”. Nor do I find that the subsequent letter dated 26 May 2015 qualifies as a Calderbank offer on the same basis.

[11] The letters sent by Your Publications Limited however are expressed as being *Without Prejudice Except as to Costs*” and therefore qualify as Calderbank offers, the last one being in the sum of \$7,000.00.

[12] It is necessary to consider what effect the offers should have upon the award of costs in this matter. The Court of Appeal in *Health Waikato Limited v Van Der Sluis*<sup>3</sup> observed that: “*the Calderbank letter field is fully discretionary*”. The nature of this wide discretion is

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<sup>2</sup> [2005] 1 ERNZ 808

<sup>3</sup> [1997] 10 PRNZ 514

such 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.

[13] Ms Cramond was successful in her claim before the Authority, and received an award in respect of lost wages in the sum of \$11,056.07 gross and an award of \$6,000.00 pursuant to s. 123(1)(c) of the Employment Relations Act 2000. These sums were reduced on the basis of a finding of contribution by 50%

[14] Despite the reduction for contribution Ms Cramond received an award before the Authority in excess of the final sum offered to settle the matter by Your Publications Limited. Further I note as regards the reduction for contribution that the principles governing an award of costs as set out by the Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* include:<sup>4</sup>

*Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.*

[15] In all the circumstances I consider that as the successful party in this matter Ms Cramond is entitled to a costs award at the normal daily tariff rate in the Authority.

[16] Your Publications Limited is ordered to pay Ms Cramond the sum of \$3,500.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

#### **Filing Fee**

[17] I further order that Your Publications Limited reimburse Ms Cramond the filing fee in the sum of \$71.56.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>4</sup> 2005] 1 ERNZ 808 at para [44]