

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 457  
5414772

BETWEEN

CHAUNTE HEPI  
Applicant

A N D

TRAFFIC MANAGEMENT  
NZ LIMITED  
Respondent

Member of Authority: T G Tetitaha

Representatives: S Scott, Counsel for Applicant  
R Drake, Advocate for Respondent

Submissions Received: 23 September 2013 from Applicant  
23 September 2013 from Respondent

Date of Determination: 9 October 2013

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

**Orders**

- A. Traffic Management NZ Limited is to pay Chaunte Hepi costs of \$2,081.76.**

**The application for costs**

[1] Following the successful application under s.11 of the Wages Protection Act 1983, Chaunte Hepi sought costs against Traffic Management NZ Limited (Traffic Management) at the daily notional rate.

[2] Traffic Management resisted costs seeking that they fall where they lie. It also referred to a settlement offer made on 2 August 2013 which was never replied to.

**Issues**

[3] The following issues are to be determined:

- (a) Should there be an award of costs?
- (b) If yes, what is the starting point for assessing costs?
- (c) Are there any factors which warrant adjusting the starting point?

**Should there be an award of costs?**

[4] The Authority may order any party to pay such costs and expenses as it thinks reasonable.<sup>1</sup> Ms Hepi was successful. Costs would usually follow this event.<sup>2</sup> She is entitled to an award of costs.

**What is the starting point for assessing costs?**

[5] The starting point for costs in the Authority is its notional daily tariff of \$3,500. Ms Hepi was legally aided (File No 13459716). She has invoiced legal aid \$2,396.60 comprising \$1,984.00 legal fees, \$100 disbursements and \$312.60 GST. Her legal fees and expenses are within the fixed fee amounts for 1 day hearings before the Authority and appear reasonable.

[6] It is an established principle costs should not exceed the costs incurred.<sup>3</sup> Therefore the starting point shall be reduced to the amount of the grant of legal aid being \$2,396.60.

[7] This case does not meet the threshold required for an award of indemnity costs. Indemnity costs require “*exceptionally bad behaviour*” or may be awarded where a party has behaved very unreasonably.<sup>4</sup> Traffic Management did not evidence any bad behaviour. The refusal of settlement offers is insufficient to warrant an award of indemnity costs. Accordingly there shall be a further reduction of costs by one third to \$1,581.76.

---

<sup>1</sup> Clause 15, Schedule 2, Employment Relations Act 2000

<sup>2</sup> *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808 (EmpC at [35])

<sup>3</sup> Rule 14.2(f) High Court Rules

<sup>4</sup> *Bradbury & Ors v. Westpac Banking Corporation* [2009] NZCA 234

## **Are there any factors which warrant adjusting the starting point?**

### ***Factors which warrant a reduction in costs***

[8] Conduct which increased costs unnecessarily can be taken into account when inflating or reducing an award<sup>5</sup>. There is no conduct to warrant reducing costs.

### ***Factors which warrant an increase in costs***

[9] Both parties made *Calderbank* offers on or about 2 August 2013. Ms Hepi made a *Calderbank* offer to settle upon payment in full of the wages owed. This was rejected in the counter-offer by Traffic Management for payment of \$1,500 for acceptance within a timeframe. There was no reply to this offer.

[10] *Calderbank* offers are a discretionary factor for the Authority in determining costs. An offeror has the burden of persuading the Authority to exercise its costs discretion in its favour<sup>6</sup>. Public interest in fair and expeditious resolution of disputes would be undermined if a party were able to ignore a *Calderbank* offer without consequence on costs.<sup>7</sup> A “steely” approach to reasonable settlement offers is required.<sup>8</sup>

[11] Ms Hepi’s settlement offer was clear, transparent and made in a timely manner. If it had been accepted, it would have produced a far better outcome than what occurred. An increase in costs has been applied by the Authority and Courts where settlement offers are made.<sup>9</sup> A modest increase of \$500 is warranted here taking into account the lack of reply to the counteroffer above.

[12] Traffic Management is to pay Ms Hepi costs of \$2,081.76. A copy of this determination is to be provided to the Legal Services Agency DX JX10551 Rotorua 3040.

**T G Tetitaha**  
**Member of the Employment Relations Authority**

---

<sup>5</sup> *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808 (EmpC) at [35]

<sup>6</sup> *Mayne v. Polychem Marketing Ltd* [2013] NZEmpC 127 at [16]

<sup>7</sup> *Aoraki Corp Ltd v McGavin* [1998] 3 NZLR 276, [1998] 1 ERNZ 601 (CA)

<sup>8</sup> *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20]

<sup>9</sup> *Pickering v Detection Services Ltd* [2013]; *Wood v Board of Trustees of Woodford House School* [2011] NZERA Wellington 87; *Filta Vacuum Products Limited* Judge Travis, 9 July 2009, AC28/09