

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 108
3022791

BETWEEN LUKE HADLAND
 Applicant

AND TRUCK STOPS (NZ) LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Robert Thompson, Advocate for Applicant
 Rob Towner and Rosemary Wooders, Counsel for Respondent

Memorandum received: 18 July 2018 from Applicant
 10 July 2018 from Respondent

Determination: 1 August 2018

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A Luke Hadland is ordered to pay to Truck Stops (NZ) Limited the sum of \$2600 costs and disbursements in the sum of \$296.

Proceedings discontinued

[1] An investigation meeting was set down for Tuesday, 10 July 2018.

[2] The applicant withdrew his claim on Friday, 6 July 2018. The respondent did not accept discontinuance on the basis that costs lie where they fall because it considered the offer had come at too late a stage. The respondent considered that it had already expended substantial time and money by way of legal costs and flights to attend the investigation meeting.

[3] The Authority timetabled for an exchange of memoranda in relation to costs.

The respondent's submissions

[4] The respondent seeks an award of costs in the sum of \$10,000.

[5] It says that the applicant put the respondent to increased costs by refusing to provide information requested on behalf of the respondent which was relevant to the allegation of constructive dismissal and by not complying with the Authority's directions.

[6] Further when the claim was discontinued the respondent had incurred most of its costs except for attendance at the investigation meeting.

[7] There was also a settlement offer attached to the memorandum from the respondent in the nature of a "Calderbank offer" that the respondent says was unreasonably rejected.

[8] From the point where the applicant rejected the settlement offer on 20 February 2018 the respondent says its legal costs totalled \$26,709. Further the respondent itself incurred travel costs of \$592 for a cancelled hotel booking and flights which were booked at cheap and non-refundable rates in the expectation that the investigation meeting would proceed.

[9] The respondent submits that it is seeking \$10,000 as a reasonable contribution towards its costs but not indemnity costs.

The applicant's submissions

[10] Mr Thompson submits that the costs sought by the respondent are not reasonable and are excessive. He submits that the matter was relatively simple and the statements of evidence lodged on behalf of the respondent were not lengthy.

[11] Mr Thompson submits that the first email which is headed "*Without prejudice save as to costs*" is not a Calderbank offer as it does not address the issue of the applicant's costs. Mr Thompson submits that the applicant made continued efforts to try and resolve matters and made the decision to withdraw following Ms Wooders email on 6 July at 9:43am which contained a statement that the applicant's claims had no merit and recommended that the

applicant “*cut his losses and discontinues proceedings forthwith before both parties incur further costs at the investigation meeting*”.

[12] Mr Thompson submits that it was after this that the applicant endeavoured to have the proceedings withdrawn and costs to lie where they fall. The applicant, he submits, should not be criticised or punished by taking pragmatic steps to withdraw proceedings where the parties would incur further costs in having the matter heard. Mr Thompson submits the applicant is a person of minimal funds but could make a time payment of \$25 per week on any amount awarded.

[13] The applicant submits that both parties attempted to find resolution and that the respondent could equally have accepted the applicant’s offer to settle the matter. Mr Thompson sets out the principles that apply to the Authority in making determinations as to costs awards.

[14] Mr Thompson referred the Authority to a determination *Anna Burns-Francis v Media Works TV Limited and Media Works Holding Limited*.¹ He submits that in that case the parties had an investigation meeting scheduled for three days but after the lunch break on the first day the applicant withdrew her claim and was ordered to pay costs of \$1,000. Mr Thompson submits a reasonable contribution towards costs would be in the range of \$500 - \$750. He further noted that the applicant should not be held accountable for the engagement of counsel outside Christchurch and neither should be punished for the respondent’s decision not to purchase flexi fares.

Analysis

[15] The applicant’s claim was withdrawn two business days before the scheduled one day investigation meeting. The respondent seeks a cost award in the sum of \$10,000.

[16] Mr Thompson submits that costs should lie where they fall. I do not find in the exercise of my discretion that would be appropriate. The respondent took all the preparatory steps for an investigation meeting before the matter was withdrawn and in doing so was put to considerable expense. I find that the respondent is entitled to a contribution towards reasonable costs.

¹ *Burns-Francis v Media Works TV Limited* [2017] NZERA Auckland 219

[17] Mr Thompson correctly submits costs in the Authority are often assessed on the basis of a daily tariff. Currently that is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day. Such an approach has been considered appropriate by the full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*² and in *Fagotti v Acme Co Limited*.³

[18] In *Burns-Francis*⁴ an investigation meeting had commenced before the matter was withdrawn and an assessment was made therefore on the basis of the daily tariff.

[19] The appropriate exercise of my discretion as to costs is to consider the work undertaken by the respondent in preparation for the investigation meeting. It is also appropriate to consider the “without prejudice save as to costs” offer. I am mindful that awards in the Authority are modest and that there should not be the same expectations about costs in the Authority as in the Court.

[20] The respondent undertook preparatory steps such as lodging a statement in reply and attending a telephone conference with the Authority to progress the matter to an investigation meeting. There was also some following up with the applicant for information as to when he accepted an offer of employment for the new role he commenced after his resignation, the remuneration in the new role, steps taken to mitigate loss and whether he had covertly recorded other conversations. The respondent lodged three statements of evidence two of which were reasonably full. The matter was not unduly complex. It was a claim of alleged unjustified constructive dismissal and there were also alleged unjustified actions causing disadvantage.

[21] On the basis of the above matters I would find a starting point of \$1800 to be fair and reasonable. For completeness that includes the necessary follow up to obtain information discussed at the telephone conference with the Authority

[22] I have considered the respondent’s “without prejudice save as to costs” offer on 14 February 2018 as to whether there should be some uplift. There was reference in the offer to a claim of substantial costs against the applicant should he not accept on the basis that the claims have no merit. The offer was \$3,500 under s 123(1)(c)(i) of the Employment

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 at 819 - 820

³ *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at 106 - 108

⁴ *Burns-Francis v Media Works* above n 1 at [9]

Relations Act 2000 (the Act) in full and final settlement of the claim and it was confidential and to be incorporated in a s 149 agreement under the Act. The offer remained open to 5pm Tuesday 20 February 2018.

[23] Mr Thompson on behalf of the applicant rejected the offer on 20 February 2018. Mr Thompson suggested that the offer was not relevant to an assessment of costs because it did not contain a specific figure for costs. I accept that Mr Thompson stated that if the applicant was successful then he would achieve a cost award. He may have also intended to say although it was worded in a somewhat confusing way that his clients costs exceeded the offer at the point it was made.

[24] On 26 March 2018 Mr Thompson made a “without prejudice save as to costs” offer to the respondent.

[25] The Employment Court has recognised that giving full weight to an unreasonably declined Calderbank offer in the Authority does not sit comfortably with the principles for costs in the Authority.⁵ The approach is usually if the offer was unreasonably rejected for uplift to costs.

[26] I turn now to whether the offer was unreasonably rejected. I accept that there was some disquiet by the applicant about the absence of a cost amount. The offer was nevertheless made at a reasonably early stage before statements of evidence were lodged and it was clear what was being offered to the applicant. There was no complaint about the time to respond from Mr Thompson. The applicant would clearly have been in a better position if he had accepted the offer. The refusal of the offer increased costs for the respondent with costs of \$26,709. I have considered whether the applicant was in a position to consider the merits of his claim. I am satisfied that he was as there had been quite full correspondence between the parties as attached to the statement of problem.

[27] I find that the offer was unreasonably refused and there should be uplift of \$800 from the starting point of \$1800.

[28] A fair and reasonable award for costs in the circumstances is the sum of \$2,600.

⁵ *Stevens v Hapag –Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [92]

Disbursements

[29] Mr Thompson submits that the respondent should have purchased fully flexible air fares instead of fares at the cheaper rates. I consider it fair and reasonable to award half of the unrecoverable travel costs including cancelled hotel rooms for the respondent in the sum of \$296 as disbursements.

[30] I order Luke Hadland to pay to Truck Stops (NZ) Limited the sum of \$2,600 being costs and \$296 for disbursements.

Payment by instalment

[31] Mr Thompson has stated the applicant will have difficulty in paying any award in full. He has suggested \$25 per week but there is no financial information provided to support that is necessary. As a first step Mr Thompson should discuss such an arrangement with Mr Towner and if agreement cannot be reached then he should return to the Authority under clause 15(2) of the second schedule to the Act.

Helen Doyle
Member of the Employment Relations Authority