



# New Zealand Employment Relations Authority Decisions

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## Hardgrave v CustomKit Buildings Limited (Auckland) [2007] NZERA 142 (23 July 2007)

Determination Number: AA 135A/07 File Number: 5036414

*Under the [Employment Relations Act 2000](#)*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE**

**BETWEEN** Bruce Hardgrave

**AND** CustomKit Buildings Limited

**REPRESENTATIVES** Christine Meechan, counsel for Bruce Hardgrave

Simon Dench, counsel for CustomKit Buildings Limited

**MEMBER OF AUTHORITY** R A Monaghan

**MEMORANDA RECEIVED** 28 and 29 June 2007

**DATE OF DETERMINATION** 23 July 2007

### **DETERMINATION OF THE AUTHORITY ON COSTS**

[1] In a determination dated 1 May 2007, I found CustomKit Buildings Limited ("CustomKit") had unjustifiably and constructively dismissed Bruce Hardgrave. Costs were reserved. The parties have now filed memoranda on the matter.

[2] The determination provided that, if it was necessary for the Authority to determine costs, memoranda were to be filed within 28 days of the date of the determination. The memorandum of counsel on behalf of Mr Hardgrave, seeking a contribution to costs, was received 4 weeks outside that time. There was no explanation of why, and no reasons advanced as to why the Authority should nevertheless consider the request for an order for costs. That is unsatisfactory.

[3] On the other hand there has been no assertion that CustomKit was prejudiced by that delay. I therefore proceed to determine the application.

[4] Counsel for Mr Hardgrave referred to **PBO Limited v Da Cruz** [\[2005\] NZEmpC 144](#); [\[2005\] 1 ERNZ 808](#), and suggested a contribution of \$10,500 is appropriate.

[5] Both parties referred to a Calderbank offer contained in a letter dated 19 October 2006. The offer, as it related to the matter before the Authority, was for a payment of \$15,000 under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#)

plus a payment of \$5,000 as reimbursement of income. Overall, the total of that offer was close to the total of the awards made by the Authority. It is important, though, that the offer was expressed to be inclusive of claims for costs. The practical effect of that was to reduce the real benefit to Mr Hardgrave of the offer, as compared with the remedies awarded in the Authority.

[6] Counsel for Mr Hardgrave submitted the offer was not relevant because the total was less than the total awarded by the Authority, while counsel for CustomKit submitted there was no clear winner in terms of the offer. He also submitted that the rejection of what was a realistic offer led to the parties spending three days unnecessarily in a hearing. For that reason, he submitted, there should be no order for costs.

[7] Because the inclusion of costs in the Calderbank offer reduced the apparent benefit to be obtained by accepting the offer, I do not accept there was 'no clear winner' in terms of the offer. I acknowledge the genuine attempt to settle, but it is

appropriate that a contribution to Mr Hardgrave's costs be awarded.

[8] Regarding the amount of the contribution, counsel for CustomKit submitted that I should take account of: the making of the Calderbank offer; the reduction in remedies awarded to Mr Hardgrave because of his contribution; and the withdrawal of CustomKit's counterclaim.

[9] Underlying both sets of submissions was the notion that the Authority sets costs on the basis of a daily tariff. The matter of a tariff-based approach was discussed by the court in the **da Cruz** (supra) case but the court also pointed out that the tariff should be applied flexibly, and that there may be occasions when it is appropriate to depart from it. In my view when, as here, both counsel have gone to a great deal of effort to prepare their clients' cases thoroughly and well, and that in turn has materially assisted the efficient conduct of the investigation, a tariff-based approach to costs is not necessarily appropriate.

[10] Having said that, I have been asked for a contribution of \$10,500 and that must be the basis of my consideration. Since Mr Hardgrave was not entirely successful in his claim in that I found he was guilty of contributory conduct, I apply a reduction in the amount I would otherwise have awarded. I make no further reduction in respect of the Calderbank offer. I regard the withdrawal of the counterclaim as prudent in the interests of preventing the parties' actual costs

from climbing higher than they did, rather than one that should sound in a discounting of costs already incurred. That is particularly so because, to the extent the investigation covered matters relevant to the counterclaim, those matters were also relevant to the personal grievances.

[11] CustomKit is therefore ordered to contribute to Mr Hardgrave's costs in the sum of \$9,000.

[12] Finally, during the investigation meeting, counsel for the applicant sought the reimbursement of certain medical expenses of Mr Hardgrave's. I now deal with them in a costs setting.

[13] Most of the expenses in question were doctor's bills and prescription costs. I do not accept that CustomKit should reimburse Mr Hardgrave in respect of them. I am not persuaded there was enough of a causal link between the incurring of those expenses and the basis on which I found Mr Hardgrave had a personal grievance to warrant such an order, whether by way of costs or otherwise. As for the costs associated with the involvement of Dr Pitsilis, Dr Pitsilis' evidence reflected her involvement in a primarily therapeutic rather than a forensic capacity. I do not regard her bills for treatment as reimbursable for the reasons I have outlined.

[14] I have not been addressed on witness' expenses in a costs setting. Accordingly I make no further order in that respect.

## **Summary**

[15] CustomKit is ordered to contribute to Mr Hardgrave's costs in the sum of \$9,000, plus the filing fee of \$70.

**R A Monaghan**

**Member of Employment Relations Authority**

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