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Jaques v Annadale Logistics Limited [2011] NZERA 299; [2011] NZERA Auckland 207 (16 May 2011)

Last Updated: 26 May 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 207 5323627

BETWEEN

DAVID JAQUES Applicant

AND

ANNANDALE LOGISTICS
LIMITED
Respondent

Member of Authority:

Eleanor Robinson

Costs Submissions

26 April 2011 and 9 May 2011

Determination:

16 May 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2011] NZERA Auckland 117 the Authority found that Mr Jaques was an independent contractor to Annandale Logistics Limited ("Annandale").and not an employee.

[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 Vane for Annandale, and Mr Jaques, have filed submissions in respect of costs.

[3] Mr Vane submits that the Respondent made a Calderbank^[1] offer, that is a without prejudice save as to costs offer, to Mr Jaques. This offer was made in a letter dated 9 December 2010 ("the Offer"), which is before the Authority.

[4] Mr Vane refers in his submission to *PBO Limited (formerly Rush Security Ltd) v Da Cruz*^[2] 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

[5] The amount proposed for settlement contained in the Offer was \$5,000.00.

[6] The Authority Investigation Meeting was held on 8 March 2011. The Offer was made well in advance of the Investigation

Meeting and consequently before preparation costs had been incurred. There was ample time for Mr Jaques to consider the Offer prior to the Investigation Meeting.

[7] 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*^[3] 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.

[8] The Court of Appeal in *Aoraki Corporation Ltd v McGavin*^[4] 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.

[9] The need for a "more steely" approach to costs where reasonable settlement proposals have been rejected was noted by the Court of Appeal in *Health Waikato Limited v Elmsley*.^[5]

[10] Mr Jaques did not succeed in his claim before the Authority, and consequently Mr Jaques received no award in respect of his claim.

[11] The Offer was a genuine attempt to resolve the matter without further expenditure on litigation made at an early stage in the proceedings.

[12] Mr Vane is seeking indemnity costs on a solicitor/client basis in the sum of \$14,129.75 (GST and disbursements inclusive), plus additional costs of \$750.00 plus GST with respect to the preparation of the Memorandum of Costs.

[13] I find it significant that in *Health Waikato Limited v Elmsley*^[6], whilst advocating a "more steely" approach, the Court of Appeal did not award indemnity costs. Nor were indemnity costs awarded in *Watson v New Zealand Electrical Traders Limited t/Bray Switchgear*^[7], a case which, while citing *Emsley*, nonetheless did not reject the application of the principles and approach confirmed in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*^[8]. The Court did however note that the particular factors of the case are to be considered, including any factor which requires an adjustment up or down of the notional daily rate. Taking into account a "without prejudice (except as to costs)" offer is one such factor. In *Watson* the Court considered that, in the particular circumstances of that case, what was required was a costs award which more than doubled the notional daily rate, but which was less than the costs that the successful party actually incurred.

[14] In the present case I take the notional daily rate of \$3,000.00 as the starting point for costs which should be awarded to Annandale. The following factors suggest that rate should be adjusted upward:

- (i) Mr Jaques rejected the Offer which was made some three months prior to the Authority investigation meeting;
- (ii) The Offer put Mr Jaques on notice that indemnity costs on a solicitor/clients basis would be sought should the Offer be rejected, and
- (iii) Mr Jaques was wholly unsuccessful in his claim before the Authority

[15] Factors suggesting that the rate should be reduced or remain the same are:

- (i) The principle that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct; and
- (ii) The principle that costs awards are to be modest and reflect what is reasonably required in preparing an Authority investigation.

[16] Weighing those factors in the discretionary exercise of awarding costs, I consider that the notional daily rate should be increased by \$2,000.00.

[17] Accordingly, Mr Jaques is ordered to pay Annandale \$5000.00 costs, pursuant to clause 15 of Schedule 2 of the [Employment Relations Act 2000](#).

Eleanor Robinson

Member of the Employment Relations Authority

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

[2] [\[2005\] NZEmpC 144](#); [\[2005\] 1 ERNZ 808](#)

[3] [\[1998\] NZCA 88](#); [\[1997\] 10 PRNZ 514](#)

[4] [\[1998\] NZCA 88](#); [\[1998\] 1 ERNZ 601](#)

[5] [\[2004\] NZCA 35](#); [\[2004\] 1 ERNZ 172 \(CA\)](#) at [\[53\]](#)

[6] *Ibid*

[7] (unreported, EC, AC 64/06, 24 November 2006, Colgan CJ)

[8] [\[2005\] NZEmpC 144](#); [\[2005\] 1 ERNZ 808](#)

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