

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 18
5376159

BETWEEN	GOPAL KALICHETI Applicant
AND	ARMOURGUARD SECURITY LIMITED Respondent

Member of Authority: Trish MacKinnon

Representatives: Geoff Davenport, Counsel for the Applicant
Andrew Schirnack, Counsel for the Respondent

Determination: 12 February 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 6 August 2013 I found that Mr Kalicheti was not able to pursue a personal grievance against Armourguard Security Limited (Armourguard), or seek any remedies under the Employment Relations Act 2000. I found he had been in a contract for services relationship and not an employment relationship with Armourguard.

[2] Armourguard now seeks a contribution to the costs it incurred in resisting Mr Kalicheti's claims. It submits that the contribution should be in excess of the Authority's normal daily tariff of \$3,500 per day for reasons that can be summarised as follows:

- a. The applicant had rejected a timely and realistic *Calderbank* offer dated 26 September 2012, which had been made before the parties incurred the costs of preparation for the Authority's investigation meeting;
- b. The evidence clearly indicated a contract for services relationship;

- c. The Authority's finding that the applicant had only claimed employee status after the termination of his contractual relationship with Armourguard;
- d. The pursuit of the application despite a recent determination in *Lyall May v Armourguard* in which the applicant was found to be an independent contractor;
- e. The applicant's late application to give his evidence remotely by Skype or video conferencing resulting in an adjournment of the investigation meeting.

[3] Armourguard seeks a contribution of \$20,753 for legal costs and \$3,301.26 for disbursements, which represents fifty percent of its actual costs. It provided itemised receipts for costs and disbursements.

[4] Mr Kalicheti submits there are no grounds for awarding costs in excess of \$3,500 per day and urges the Authority to reduce the daily tariff to \$2,500 and dismiss the claim for disbursements which he described as "*disproportionate*". He notes the decision to use Auckland lawyers for an investigation meeting held in Wellington should not be at his expense.

[5] He says it would be improper to rely on the *Calderbank* letter to raise an award of costs in a jurisdictional issue. If Mr Kalicheti had accepted it, he would have been denied the ability to take any action for breach of contract if it was determined that he was not an employee. He is currently attempting to pursue a claim for damages through arbitration.

[6] Mr Kalicheti rejects the other factors cited by Armourguard in support of its submission for an increased award of costs. He submits that among factors supporting a reduction in costs are the following:

- f. The merit of his claims to have been treated unfairly by the respondent;
- g. A shift in grounds relied on by the respondent for termination of his contract;
- h. The difficulty of obtaining documents from the respondent;
- i. The imbalance of power between the parties.

[7] Armourguard repudiates those factors. It also rejects Mr Kalicheti's assertion regarding the *Calderbank* letter, noting that it reflected an earlier offer he had made to Armourguard, albeit Mr Kalicheti's offer was for a greater sum.

Discussion

[8] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000, which is set out below:

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[9] Underpinning the award of costs are principles that have been developed and applied over time. Those principles were referred to with approval by the Full Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.¹, which both Armourguard and Mr Kalicheti cite in their submissions. The principles include:

- j. There is a discretion as to whether costs would be awarded and what amount.
- k. The discretion is to be exercised in accordance with principle and not arbitrarily.
- l. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- m. Equity and good conscience is to be considered on a case by case basis.
- n. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- o. It is open to the Authority consider whether all or any of the parties costs were unnecessary or unreasonable.
- p. That costs generally follow the event.
- q. That without prejudice offers can be taken into account.
- r. That awards will be modest.
- s. That frequently costs are judged against a notional daily rate.
- t. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

¹ [2005] 1 ERNZ 808

[10] Mr Kalicheti was unsuccessful in his claim to have been an employee of Armourguard and there is no reason to deviate from the normal principle of costs following the event.

[11] In many instances it will be appropriate for *Calderbank* offers to be taken into account, but I am not persuaded that Armourguard's offer is one such instance. Factors in favour of taking it into account are that the offer was made in a timely manner, allowing Mr Kalicheti sufficient time to consider it. The amount offered was \$5,000 which, in the ordinary course of events, would have been worthy of some consideration.

[12] The main factor against taking it into account is that the offer was expressed as settling all issues between Mr Kalicheti, Target and Armourguard. Target is Target Securities Limited whose sole director is Mr Kalicheti. It is also the vehicle through which he had a contractual relationship with the respondent. Acceptance of Armourguard's offer would have extinguished any option Mr Kalicheti had to take civil action for breach of contract in the event that he was found to be a contractor and not an employee.

[13] The sum offered by Armourguard was relatively small in comparison to that sought by Mr Kalicheti in his own offer to settle made to the respondent on a *without prejudice* basis by letter dated 5 September 2012. The sum is also substantially less than the amount Mr Kalicheti is currently seeking in damages through civil action. On balance I find in the circumstances that Mr Kalicheti did not unreasonably reject Armourguard's *Calderbank* offer and it is not a situation where a "*steely approach*" is appropriate in considering an award of costs.

[14] The legal costs and disbursements sought by Armourguard are fifty percent of those incurred after Mr Kalicheti's rejection of its *Calderbank* offer. They include the cost of flights from Auckland to Wellington for counsel for Armourguard and one of the respondent's witnesses.

[15] I have reservations about the level of legal costs and disbursements sought in relation to a one day investigation meeting on a preliminary matter for which Armourguard called two witnesses. It may well be, as submitted by counsel for the respondent, that the level of costs reflects the importance of the matter to Armourguard and I accept that parties have a right to choose their own

representatives. However, I do not accept that the applicant should bear the additional cost of Armourguard choosing a representative from another city when many excellent alternatives were available in the city in which the investigation meeting was held.

[16] I find no merit in Mr Kalicheti's submission that an award of costs should be less than the normal daily tariff. There are some factors, such as the volume of documentation, which would have contributed to the amount of time Armourguard spent in preparation for the investigation meeting, that justify raising the Authority's notional daily tariff. I find a fair contribution to Armourguard's costs (including disbursements) to be \$5,000.

Order

[17] I order the applicant, Gopal Kalicheti, to pay costs to the respondent, Armourguard Security Limited in the sum of \$5,000.

Trish MacKinnon
Member of the Employment Relations Authority