

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 115  
5336513

BETWEEN                      BRENDAN KELLERMAN  
                                         Applicant  
  
AND                                TRADESTAFF GROUP  
                                         LIMITED  
                                         Respondent

Member of Authority:      P R Stapp  
  
Representatives:            Brendan Kellerman, on his own behalf  
                                         Phil Butler, Counsel for the Respondent  
  
Submissions received by:   24 August 2012  
  
Determination:              28 September 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The respondent has applied for full indemnity costs. The claim has been opposed by Mr Kellerman.

[2]     The matter of costs was reserved in my determination [2012] NZERA Wellington 46 (dated 20 April 2012). The respondent successfully defended all Mr Kellerman's claims made against it.

**Issues**

[3]     How much is Mr Kellerman to pay in costs to Tradestaff Group Limited?

**The facts**

[4]     Mr Kellerman was unsuccessful in his claims against Tradestaff Group Limited. Costs therefore follow the event. As such Mr Kellerman is liable to pay

Tradestaff Group Limited an amount to contribute to costs. The investigation meeting took one day (19 September 2011). The Authority had a telephone conference to put in place the case management of its investigation meeting. Thus documents and briefs of evidence were provided in advance for the meeting.

### **Determination**

[5] The respondent has relied on the following factors to support its claim for indemnity costs:

- a. *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 as to the principles applied in the making of costs.
- b. Regulation 48 C (4) (now r14.6 (4)) of the High Court rules relating to indemnity costs. I am not satisfied that the criteria for indemnity costs have been satisfactorily satisfied.
- c. A *Calderbank* letter dated 15 July 2011 that related to Mr Kellerman being put on notice that the employer, if successful would seek indemnity costs. A *Calderbank* letter dated 30 August 2011 offering Mr Kellerman \$2,000 to settle and subject to terms in a settlement document that remained open until 1 September 2011. In a written response Mr Kellerman essentially declined the offer on terms he put forward that were unacceptable to the employer. I hold that these are acceptable for consideration.
- d. Mr Kellerman's conduct in complying and following the Authority's timetable and his interaction with the respondent and its representative.
- e. The respondent's costs total \$11,001. The costs relate to activities for the following periods: 1 April 2011 to 15 July 2011; 17 August 2011 to 30 August 2011 and 7 September 2011 to 21 November 2011 for getting instructions, preparation and attendances for the Authority's case management conference and investigation meeting. Also the costs for preparing the *Calderbank* offers have been included.

f. Invoices produced from the respondent supporting the amounts.

[6] Mr Kellerman has opposed any order for cost being made against him. He says they should lie where they fall.

### **Orders of the Authority**

[7] My approach to cost in this matter will be based on *PBO Ltd v Da Cruz* [2005] 1 ERNZ. That sets out the principles for costs as applied by the Authority. As this was an investigation and Calderbank offers are used in the Authority it is enough to consider the weight if any to be given to the latter. I must consider if any weight is to be given to the Calderbank offers. In doing so I do so in the context of an investigation and not a trial. Mr Kellerman had time before further costs were incurred to consider the Calderbank offers. Given the result it would have been reasonable for him to have accepted the last offer made for a monetary settlement. There was nothing unusual and/or out of the ordinary in the terms surrounding the offer made. However, Mr Kellerman says that the issues mattered more to him than the money, notwithstanding that he counter offered to accept the last Calderbank offer that included an increase in the sum of money offered. That was unacceptable to the respondent.

[8] I am not satisfied that there are exceptional circumstances to award full costs/indemnity costs. The tariff should be increased because of the Calderbank letters and that Mr Kellerman was entirely unsuccessful in all his claims. Finally the itemised costs from the respondent reflect the costs incurred in the Authority's investigation.

[9] Costs follow the event. Tradestaff is entitled to costs because it has been put by Mr Kellerman to the expense of defending the matter. Mr Kellerman was unsuccessful and his approach to the matter did not assist to crystallise and simplify the issues.

[10] I accept that Mr Kellerman had genuine issues he believed needed testing, but the outcome supports that they were risky and if they were solely matters of principle to him then he must face the costs that now accrue.

[11] I have noted that he is unemployed and in receipt of a benefit. Nothing has been provided to indicate to me that he will not be able to pay costs and if not immediately at least sometime in the future. There is no evidence that Mr Kellerman will not be able to pay.

[12] The range of the tariff applied by the Authority has moved over time. It has for sometime notionally been at \$3,000-\$3,500. In any event whatever expectation Mr Kellerman had he would have been aware that the Calderbank offers had been made and that they would be put before the Authority if the costs remained an outstanding issue. Mr Kellerman accused Tradestaff of threatening and intimidating him with the offer. I do not accept that allegation.

[13] The way in which Mr Kellerman approached the matter in regard to his preparation, contact with Tradestaff's representative has added to the issues that needed to be determined. A number of matters and comments have been made by Mr Kellerman in his submissions about the case. They relate to the substantive issues of the employment relationship problem. As such they can have no bearing on the matter of costs. His comments to do with the hearing and Mr Butler's role have been responded to by the respondent and I hold that since Mr Kellerman was unsuccessful there is not merit for costs to lie where they fall.

[14] I hold costs should be moved beyond the daily tariff.

[15] I proportion the costs on the basis of the one day investigation meeting and increase this with an additional \$2,000 consistent with the Calderbank offer. Mr Kellerman is to pay Tradestaff Group Limited \$5,500 costs.