

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 102
5374496

BETWEEN DAVID LIM
 Applicant

AND KERRICK INDUSTRIES
 LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: M Moncur, Advocate for Applicant
 J Clark, Counsel for Respondent

Submissions received: 21 February 2013 from Respondent
 Nil from Applicant

Determination: 26 March 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 25th January 2013¹ the Authority found that the dismissal of Mr Lim was justified and his claims were unsuccessful. The counterclaims of Kerrick Industries Limited (Kerrick) were also unsuccessful. The parties were invited to resolve the matter of appropriate costs but have not done so and the Authority is now required to determine the issue.

[2] The closing submissions for Kerrick in relation to the substantive matter also contained some detail pertaining to costs. Further, details of an offer that was made to Mr Lim on 17th April 2012, have now been provided to the Authority. There are no submissions for Mr Lim.

[3] The costs incurred by Kerrick amount to \$28,059.50 but there are no details as to how such costs arose, relative to what was a quite straight forward case, albeit

¹ [2013] NZERA Auckland 27

counsel for Kerrick has informed that invoices are available should the Authority require them. Kerrick have produced a “Without Prejudice Save as to Costs” letter that was forwarded to Mr Lim on 17th April 2012; well before preparations would have been required for the investigation meeting that took place on 25th September 2012. There is no evidence of any response to the offer of settlement: \$3,000. The submissions for Kerrick urge the Authority to award the company full indemnity costs on a solicitor client basis on the basis that Mr Lim’s case was without merit and “falls squarely within” the “hopeless case” test set out within *J Corp Pty Limited v Australian Builders Labourers Federation Union of Workers (WA Branch)(No 2)*² that was recognised by the New Zealand Court of Appeal in *Bradbury v Westpac Banking Corporation*.³ But these are rare cases and seldom found within the employment law jurisdiction; and the circumstances pertaining to Mr Lim and Kerrick do not even remotely fall within such category.

[4] It is now well established by *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*⁴ that the Authority can and does, adopt a tariff based approach with the current tariff being \$3,500 per day of hearing (\$1,750 for a half day). This sum can be increased or reduced taking into account any particular aspects of a case that may warrant a modification of the “base” rate. And while without prejudice save as to costs (*Calderbank*) offers are certainly relevant to the Authority when exercising its discretion to award costs, I am reluctant to substantially increase the usual award of costs that would apply, due to the circumstances that pertain to this particular matter. This is largely because I am aware that Mr Lim is unemployed (as of 25th September 2012) and his age and skill base is such that he may have difficulty obtaining new employment that will provide reasonable remuneration. It is not appropriate for the Authority to impose further hardship upon an unsuccessful grievant. Further, the counterclaims pursued by Kerrick were unsuccessful.

Determination

[5] The investigation meeting was reasonably standard and the parties conducted their respective cases efficiently and comfortably within little more than half of a day. But given that a *Calderbank* offer was made to Mr Lim, and he was totally

² (1993) 46 IR 301

³ [2009] 3 NZLR 400

⁴ [2005] ERNZ 808

unsuccessful with his claims, I conclude that it is appropriate to increase the usual half date rate (\$1,750) to \$2,500 in recognition of the fact that the sensible course of action for Mr Lim would have been to accept the offer made to him, hence the respondent would not have incurred the costs involved with defending a case that had little likelihood of success. Pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000, Mr Lim shall pay to Kerrick Industries Limited the sum of \$2,500.00 as a contribution towards the costs incurred by the company.

K J Anderson
Member of the Employment Relations Authority