

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 340
5608414

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF
 BUSINESS, INNOVATION
 AND EMPLOYMENT
 Applicant

AND PARS AUTO LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Shona Carr for Applicant
 Paul Pa'u for Respondent

Submissions received: 26 June 2017 from Applicant
 7 July 2017 from Respondent

Determination: 31 October 2017

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS
AUTHORITY**

A. The Applicant is ordered to pay the sum of \$10,500 to Pars Auto Limited within 28 days of the date of this determination.

[1] In a determination dated 29 May 2017¹ I held the Labour Inspector had failed to establish to my satisfaction that her complainant was employed by Pars Auto Limited or that Pars Auto owed the complainant wages or holiday pay.

[2] I reserved costs, indicating that if the parties were unable to resolve that issue, both parties would have the opportunity to file cost memoranda and evidence. These have now been received by the Authority for consideration.

¹ [2017] NZERA Auckland 157.

[3] Due to an oversight the memoranda on costs were not provided to me until last week. In accordance with s 174C(4) of the Employment Relations Act 2000 the Chief of the Authority has decided that exceptional circumstances exist and this costs determination has been issued outside the statutory three month timeframe for issuing a reserved determination.

Determination of costs

[4] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. Under normal circumstances the Authority would apply a starting point of a notional daily tariff for quantifying costs. The daily tariff applicable to this matter is \$3,500. This is because it was lodged before 1 August 2016.²

[5] As held by the Employment Court, the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.³ As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, awards in the Authority will be modest taking into account conduct which increases costs unnecessarily.⁴

[6] Parris Auto seeks indemnity costs. This application is on the basis that a Calderbank offer was made and rejected by the Labour Inspector and the claims made by the Labour Inspector were without merit. Indemnity costs may be justified in relatively rare cases where a party's conduct is particularly egregious.⁵ I am not satisfied this case fits any of the categories for which indemnity costs would be awarded.⁶

[7] The Authority will take into account any offers made by the parties to settle matters. As stated by the Court of Appeal:⁷

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.

² Practice Note (2) of the Employment Relations Authority.

³ *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

⁴ (2006) 7 NZELC 98,128; [2005] ERNZ 808; (2005) 3 NZELR 1 (EMC).

⁵ *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2 at [9].

⁶ *Bradbury v Westbank Banking Group* [2009] NZCA 234 3 NZLR 400, (2009) 19 PRNZ 385 at 29.

⁷ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

[8] The Calderbank offer was made to the Labour Inspector on 9 December 2016. At that time the parties were negotiating a reduction in the claim originally made by the Labour Inspector. The offer did not address those negotiations. Instead Pars Auto required the Labour Inspector to withdraw her claims in their entirety and to pay a contribution to its costs.

[9] The purpose of a Calderbank offer is to provide an opportunity for parties to resolve their dispute by agreement thus avoiding the cost and risk of litigation. At the time the offer was made the parties had already participated in two full hearing days and incurred costs as a result.

[10] In the present case the Calderbank could not have been intended to resolve a dispute without recourse to litigation, because litigation was already in train at the time the offer was made. Accordingly, I am satisfied the rejection of the Calderbank offer was reasonable in all the circumstances.

[11] I have concluded there will be no uplift to costs. Taking into account the principle that costs should be modest and not used as a punishment it is appropriate that the Applicant contribute \$10,500 to Pars Auto's costs based on three days at the daily tariff.

[12] The Applicant is ordered to pay the sum of \$10,500 to Pars Auto Limited within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority