IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011]NZERA Christchurch 55
5115993

BETWEEN	MALCOLM JAMES McDONALD Applicant
A N D	ONTRACK INFRASTRUCTURE LIMITED First Respondent
A N D	ALLIED WORKFORCE LIMITED Second Respondent

Member of Authority:	Helen Doyle
Representatives:	Tony Bamford, Counsel for Applicant Peter Chemis, Counsel for First Respondent Gillian Service, Counsel for Second Respondent
Submissions Received:	Applicant: no submissions First Respondent: 26 November 2009 Second Respondent: 13 November 2009
Date of Determination:	27 April 2011

COSTS DETERMINATION OF THE AUTHORITY

---

[1] There has been some delay in the issuing of this costs determination. I shall briefly set out the reasons for this from my recall of the events rather than my notes and the contents of the file. This is because, as a result of the Christchurch earthquake, the file has as at this date been unable to be recovered.

[2] In my determination dated 22 September 2009, I reserved the issue of costs. The applicant had limited success in that he was awarded holiday pay to be paid by the second respondent but was otherwise unsuccessful in his claims against the first and second respondents. The determination was challenged by the applicant and submissions were received from the first and second respondents as to costs but not

from the applicant. Both the first and second respondents indicated that they were content to wait for the judgment of the Full Court of the Employment Court in this matter before costs were determined. I recall, there was no response on behalf of the applicant.

[3] Following a judgment of the Full Court of the Employment Court, the issue of costs was again raised by the parties and the senior support officer sent several emails to Mr Bamford asking for costs submissions. A deadline was given for a response shortly before 22 February 2011 and it was made clear that if there was no response the Authority would proceed to determine the issue of costs. There being no submissions lodged on behalf of the applicant I now proceed to determine the issue of costs.

Submissions

The first respondent

[4] The Authority found that the applicant had not been employed by the first respondent but was employed by the second respondent. One of the applicant's remedies that he sought was reinstatement to a position with the first respondent.

[5] The first respondent incurred actual costs in the sum of $25,909.50 (excluding GST) and disbursements in the sum of $788 for flights for counsel and witness. No costs were charged for the second counsel's attendance at the investigation meeting or for her flights.

[6] Mr Chemis submits, having regard to the principles set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808 the following factors should be taken into account:

- That the applicant was unsuccessful in his claim and put on notice from the outset that he would fail;

- That on 13 May 2009 the second respondent made a without prejudice save as to costs offer to the applicant which was substantial but which was declined.

[7] Having regard to those matters, Mr Chemis submits this is a case where the Authority should depart from the daily tariff and that an award of $8,000 plus disbursements would be appropriate.

The second respondent

[8] Ms Service also refers to *PBO Ltd* and the principles therein as they apply to costs in the Authority. In her submission, she refers to several cases where costs in excess of a daily tariff, usually $2,500-2,500, have been awarded by the Authority.

[9] Ms Service in her submission relies on the without prejudice save as to costs letter in the nature of a *Calderbank* offer written to the applicant's solicitor on 13 May 2009. The investigation meeting was held on 2 June 2009. The settlement proposed by Ms Service in that letter was:

- A payment by the second respondent of $10,000 under s.123(1)(c)(i) of the Employment Relations Act 2000;

- A contribution of $5,000 towards the applicant's legal costs.

[10] In addition to those sums, the second respondent offered casual employment to the applicant at either its Nelson or Christchurch branches with a commitment to providing the applicant with at least four months' casual employment within the next six months with payment of at least $14 per hour.

[11] In the letter, it was noted that the offer was a generous one and should be accepted and would be brought to the attention of the Authority in relation to costs if rejected.

[12] The applicant was put on notice that if he failed to recover more than the amount being offered, the second respondent may make an application for solicitor/ client costs against him.

[13] The offer was open for acceptance until 4pm on 18 May 2009.

[14] Ms Service referred in her submissions to the Employment Court case of *Blue Star Print Group (NZ) Ltd v. David Mitchell* (WC2/09; WRC19/06, 19 March 2009, Judge Shaw). In that case, the Employment Court considered costs in an offer by way of a *Calderbank* letter. At the time of Ms Service's submissions, that judgment had

been appealed. The judgment from the Court of Appeal is now available: *Blue Star Print Group (NZ) Ltd v. David Mitchell* (CA504/2009). The Court of Appeal allowed a judgment against the Employment Court costs judgment and quashed the costs order. The Court of Appeal, in its judgment, accepted that there may be cases where vindication through seeking a statement of principle in the employment context may be relevant. The Court said that this did not mean that the principles applicable to *Calderbank* offers should be adjusted or ignored in Employment Court cases because of their nature or because, in some cases, employees may be motivated in party by a desire for vindication.

[15] Ms Service submitted that the second respondent incurred significant costs in defending the proceedings after the time for accepting the *Calderbank* offer had passed in the sum of $22,031 and comprehensive submissions were provided in light of the novel issues involved. Disbursements were also incurred for courier charges in the sum of $36.90 and $1,393 for air travel. Ms Service submits that a reasonable contribution to the costs of the second respondent would be the sum of $8,000.

[16] The circumstances of this case where the applicant had been placed by the second respondent (an employment agency) with the first respondent and wanted a determination that he was an employee of the first respondent on the basis that his relationship with that company became one of employee had not directly been the subject of an employment case in New Zealand.

Determination

[17] The Authority, in exercising its discretion under clause 15 of the Second Schedule to the Employment Relations Act 2000 as to whether costs should be awarded and what amount, must do so in a principled way. The judgment in *PBO* sets out the principles within which the discretion should be exercised.

[18] This was a case where the second respondent in a *Calderbank* offer provided a higher monetary offer than that achieved by the applicant as a result of the Authority's determination and there was an offer of reinstatement on a casual basis guaranteed for a four month period with the second respondent. Provision was made in the *Calderbank* offer for costs incurred to that point in time by the applicant and although a very limited time for acceptance of the settlement proposal, there was nothing

before the Authority to support the applicant felt that was so unreasonable so as not to have regard to the offer.

[19] Importantly however the applicant wanted reinstatement to a position with the first respondent not the second respondent. The answer that he wanted from the Authority that he was an employee of the first respondent would not have been satisfied by virtue of the offer from the second respondent albeit that it included reinstatement. The difficulty with a *Calderbank* offer in these circumstances can be explained on the basis that this case was in effect, although commencing at the level of the Authority a true test case.

[20] There are several cases where the Employment Court has decided that if the matter is a true test case then it is not appropriate to award costs: *Air New Zealand Ltd v. V* (AC15A/09, 21 July 2009) is an example. The applicant's case was one where potentially many others in what is known as triangular type employment arrangements could be affected by a determination. The *Calderbank* letter refers to the wider implications for the industry the second respondent operates in of a determination in the case.

[21] The nature of this case is a significant mater that I take into account in the exercise of my discretion. I have then considered whether the recognition that this was a test case is outweighed by other elements so that nevertheless there should be an award of costs. I am not satisfied that there are such other elements.

[22] In exercising my discretion I determine that it would be a fair result that the parties meet their own costs of representation but that it would be fair for the applicant to meet the disbursements incurred by the first and second respondents in the circumstances of this case.

[23] I order the applicant to pay to the first respondent disbursements in the sum of $788.

[24] I order the applicant pay to the second respondent disbursements in the sum of $1429.90.

Helen Doyle
Member of the Employment Relations Authority