

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 220
5362222**

BETWEEN CARLA McKENZIE
Applicant
AND DAWSONS CATERING
LIMITED
Respondent

Member of Authority: Eleanor Robinson
Costs Submissions 18 & 26 June 2012 from Applicant
18 June from Respondent
Determination: 03 July 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2012] NZERA Auckland 183 the Authority found that Ms McKenzie had been unjustifiably dismissed by the Respondent, Dawsons Catering Limited (Dawsons).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and the parties have filed submissions in respect of costs.

[3] This matter involved 1 day of Investigation Meeting, with written submissions being submitted subsequent to that. Mr Law, on behalf of the Applicant, citing actual costs in excess of \$7,000.00, is seeking a contributory award of \$3,600.00 (plus GST) towards the actual costs.

Submissions for the Applicant

[4] Mr Law on behalf of Ms McKenzie submits that despite the Authority having determined that Ms McKenzie had been unjustifiably dismissed, she has been left in considerable debt. In making this submission, Mr Law points to the following:

- Ms McKenzie had not been awarded lost wages to compensate for the remainder of the unexpired period of her fixed term contract due to Ms

McKenzie having incorrectly stated at the Investigation Meeting that she had obtained alternative employment immediately when she had not in fact done so until after the expiration of the fixed term period.

- Although Ms McKenzie had been awarded \$3,000.00 in respect of hurt, loss of dignity and injury to feeling pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), this had been reduced to an award of only \$300.00 on the basis of her contributory behaviour.

[5] Mr Law submits that in assessing the issue of costs the Authority should take into consideration the fact that Ms McKenzie was successful in her claim that she had been unjustifiably dismissed, the loss of wages experienced by Ms McKenzie, the further humiliation suffered as the result of media coverage following the determination, and the fact that her compensatory payment has been drastically reduced.

Submissions for the Respondent

[6] Mr Swan submits that Dawsons made a ‘without prejudice’ offer (the Offer) to Ms McKenzie, the basis of which was that the parties ‘walk away’ and let costs lie where they fall. The Offer was made in the form of a telephone conversation with Mr Law on 16 April 2012, which was a couple of days prior to the Investigation Meeting on 19 April 2012.

[7] On 17 April 2012 Mr Law had responded by way of a letter which is before the Authority and which set out the terms upon which Ms McKenzie would settle the matter (the Counter-offer). The Counter-offer stated that the sum required by Ms McKenzie for a full and final settlement was a total amount of \$10,910.00.

[8] Mr Swan submits that this is a matter to which the Authority should give significant consideration on the basis that the Offer was very close to the actual award made to Ms McKenzie.

[9] Mr Swan further submits that Ms McKenzie’s case had little or no merit and this was confirmed by the outcome. In these circumstances Mr Swan is claiming a contribution towards its actual costs of \$11,760.25 of \$6,790.00. In support of this claim Mr Swan cites the Employment Court case of *Watson v New Zealand Electrical Traders Limited t/a Bray Switchgear*¹.

¹ (2006) 4 NZELR 59

Principles

[10] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

(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.

[11] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*².

[12] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³. These well established principles are that costs generally follow the event, without prejudice offers can be taken into account, and costs are modest. I have relied upon the principles as set out in *Da Cruz* in determining this matter.

[13] The Authority Investigation Meeting was held on 19 April 2012. The Offer was made to Ms McKenzie in advance of the Investigation Meeting and although there had not been an ample amount of time in which to consider the Offer, I find that there was sufficient time for consideration to be given to the Offer in light of the Counter-offer made by Mr Law on behalf of Ms McKenzie.

[14] It is necessary to consider what effect the Offer should have upon the award of costs in this matter. The Court of Appeal in *Health Waikato Limited v Van Der Sluis*⁴ observed that: “*the Calderbank letter field is fully discretionary*”. The nature of this wide discretion is that if the Authority awarded a lesser amount than the amount offered by way of a ‘without prejudice’ offer, there would be no absolute protection to the party which had made the offer in terms of costs. Equally, the Authority may take into consideration a ‘without prejudice’ offer when more has been awarded than was offered.

² [1996] 2 ERNZ 622

³ [2005] 1 ERNZ 808

⁴ [1997] 10 PRNZ 514

[15] The Court of Appeal in *Aoraki Corporation Ltd v McGavin*⁵ in commenting on the exercise of this discretion, noted that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore these ‘without prejudice’ offers without costs being impacted:

The discretion as to costs is a judicial one to be exercised according to what is reasonable and just to both parties and the public interest in the fair and expeditious resolution of disputes requires that full weight be given to the extent to which costs were properly incurred subsequent to the non-acceptance of an offer of settlement at a figure above the amount eventually awarded in the litigation.

[16] The need for a “*more steely*” approach to costs where reasonable settlement proposals have been rejected was noted by the Court of Appeal in *Health Waikato Limited v Elmsley*.⁶

Determination

[17] In reaching my decision as to whether costs should be awarded in this matter, and having had regard to the principles set out in *Da Cruz*, I find that the Offer was a genuine attempt to resolve the matter without further expenditure on litigation made prior to the Investigation Meeting. The outcome of the matter was an award to Ms McKenzie of only \$300.00. I have concluded that taking all these circumstances into account, the Offer should be given due consideration.

[18] In reaching this conclusion, I have taken note of Mr Law’s submission that the Counter-offer of 17 April 2012 was a genuine claim by the Applicant for an early settlement of the matter. However the actual award to Ms McKenzie of \$300.00 falls far short of the amount to settle offered in the Counter-offer. Accordingly I do not consider that the Counter-offer represents a realistic claim for an early settlement.

[19] I do however take into consideration Mr Law’s submissions on the matter and I accept that at this time Ms McKenzie is experiencing some financial difficulty, noting that it is a principle of *Da Cruz* that costs are not to be used as a punishment or expression of disapproval of the [unsuccessful] party’s conduct.

[20] Having given full consideration to all these considerations, I think this is an appropriate case for awarding some contribution towards its costs to Dawsons.

⁵ [1998] 1 ERNZ 601

⁶ [2004] 1 ERNZ 172 (CA) at [53]

[21] However it is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings and this is a case in which it is appropriate for the Authority to use its discretion by lowering the notional daily tariff rate of \$3,500.00.

[22] . Accordingly, Ms McKenzie is ordered to pay Dawsons \$1,000.00 costs, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson
Member of the Employment Relations Authority