

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 199  
5419128

BETWEEN

CAMERON NELLEY  
Applicant

A N D

TOP ENERGY LIMITED  
Respondent

Member of Authority: T G Tetitaha

Representatives: A N McInally, Counsel for Applicant  
A Caisley/J Greenleaf, Counsel for Respondent

Submissions Received: 24 April 2014 from Respondent  
6 May 2014 from Applicant

Date of Determination: 21 May 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. Cameron Nelley is ordered to pay Top Energy Limited the sum of \$10,000.00 towards its actual legal costs by way of instalments of \$50 per week starting 20 June 2014.**

**Employment relationship problem.**

[1] The Authority in its substantive determination dated 11 April 2014<sup>1</sup> held Mr Nelley was justifiably dismissed. The application for personal grievance was dismissed.

[2] The respondent now applies for costs. Its actual costs were approximately \$20,000 from 22 January 2014 to completion of the case. These did not include those of junior counsel.

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<sup>1</sup> [2014] NZERA Auckland 140

## Issues

[3] The following issues are to be determined:

- (a) What is the starting point for assessing costs?
- (b) Are there any factors that warrant adjusting the notional daily tariff?

### **What is the starting point for assessing costs?**

[4] Both parties accept the correct approach to assessing costs is for the Authority to adopt its usual notional daily tariff based approach to costs.<sup>2</sup> The current notional daily tariff is \$3,500. This matter involved a two day investigation meeting. The starting point for assessing costs is therefore \$7,000.

### **Are there any factors that warrant adjusting the notional daily tariff?**

#### *Factors which warrant a reduction in the notional daily tariff*

[5] There are no factors which warrant a reduction in the notional daily tariff.

#### *Factors which warrant an increase to the notional daily tariff*

[6] The respondent seeks an uplift to reflect its “*substantial opening and closing submissions*”. The notional daily tariff is intended to cover all costs of preparation including opening and closing submissions. This is not a factor which warrants an increase to the notional daily tariff.

[7] The respondent seeks a further uplift to reflect a *Calderbank* offer dated 22 January 2014 to pay the applicant the sum of \$8,500 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000. This was equivalent to the lost income he suffered in the first 12 weeks following dismissal.

[8] In reply, Mr Nelley submits he was acting reasonably in declining the offer because there was a legitimate question of principle whether an employer whose own shortcomings set the scene for an accident to happen can reasonably dismiss an employee who then suffers an accident. There was also an issue of disparity and reputational factors which were not addressed by the offer.

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<sup>2</sup> *Mattingly v Strata Title Management Ltd* [2014] NZEMPC 15 at [16]

[9] *Calderbank* offers are discretionary factors for the Authority in determining an appropriate costs award. The making of such an offer does not automatically result in a more favourable award of costs. The offeror has the burden of persuading the Authority to exercise its costs discretion in their favour.<sup>3</sup> Public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a *Calderbank* offer without consequence on costs.<sup>4</sup>

[10] An offer to pay compensation at a level that is reasonable might be regarded as conveying vindication. A “steely” approach is required. Scarce resources of the Authority should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than he was previously offered.<sup>5</sup>

[11] The *Calderbank* offer was reasonable and timely. It addressed Mr Nelley’s losses. It was made prior to the parties undertaking an estimated two thirds of further preparation and the two days hearing time.

[12] Although the offer did not address reputational factors or disparity those issues became irrelevant, given the factual findings and the determination the dismissal was justified.

[13] Costs are not to be used as a punishment or as an expression of disapproval of a party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.<sup>6</sup> The employers conduct was assessed in the substantive determination. Unless it contributed to an increase in costs, it is not relevant to this determination.

[14] An increase in the daily tariff to \$5,000 has been applied by the Authority and approved by the Court where reasonable settlement offers are made.<sup>7</sup> This is appropriate here.

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<sup>3</sup> *Mayne v. Polychem Marketing Ltd* [2013] NZEmpC 127 at [16]

<sup>4</sup> *Aoraki Corp Ltd v. McGavin* [1998] 3 NZLR 276, [1998] 1 ERNZ 601 (CA)

<sup>5</sup> *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [19] and [20]

<sup>6</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808, 819 at [44]

<sup>7</sup> *Pickering v Detection Services Ltd* [2013]; *Wood v Board of Trustees of Woodford House School* [2011] NZERA Wellington 87; *Filta Vacuum Products Limited* Judge Travis, 9 July 2009, AC28/09

[15] Mr Nelley gave evidence of losses of income in the 12 week period following loss of his job, the uncertainty of future earnings and his personal and financial strife.<sup>8</sup> There is insufficient evidence to warrant any reduction in the costs award on the basis of financial hardship. However it seems an appropriate case for the Authority to exercise its discretion to order payment of costs by weekly instalments of \$50.

### **Outcome**

[16] Cameron Nelley is ordered to pay Top Energy Limited the sum of \$10,000.00 towards its actual legal costs by way of instalments of \$50 per week starting 20 June 2014.

**T G Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>8</sup> Brief of evidence C Nelley paras 3 to 29 and 115