

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2012] NZERA Auckland 64  
5298835**

BETWEEN	DAVID NEWICK Applicant
AND	WORKING IN LTD First Respondent WORKING IN VISAS LTD (IN LIQUIDATION) Second Respondent SCOTT MATHIESON Third Respondent HAYLEY ROBERTS Fourth Respondent

Member of Authority:	Eleanor Robinson
Representatives:	David Neutze, Counsel for Applicant Michael O'Brien, Counsel for Respondent
Costs Submissions	22 June 2011 from Applicant 8 June and 8 August 2011 from Respondent
Determination:	22 February 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] The Authority (Member J Wilson) issued its determination ([2001] NZERA Auckland 195) on 11 May 2011. The determination rejected the most significant claims of the Applicant, although the Applicant did have a small degree of success in respect of the more minor claims concerning additional payment in lieu of notice and holiday pay on that payment.

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

### *Respondent's Submissions*

[3] Mr O'Brien for the Respondents submits that the Respondents made a Calderbank<sup>1</sup> offer, that is a without prejudice save as to costs offer, to Mr Newick. This offer was made in a letter dated 15 April 2010 ("the Offer"), which is before the Authority.

[4] Mr O'Brien submits that Mr Newick was given 11 days to consider and accept the Offer and that this time period was reasonable as it was anticipated that any investigation would require significant preparation given that Mr Newick was seeking ten separate remedies.

[5] Mr O'Brien submits that the Offer had been made at an early stage and after pleadings had been filed.

[6] Mr O'Brien submits that in addition to the two full days for the Investigation Meeting and the half day meeting to address the preliminary matter, the Authority had asked the parties for submissions in writing to follow the amended Statement of Problem and that as Mr Newick submitted a 38 page submission, there were significant costs incurred in reviewing them and drafting reply submissions. As such Mr O'Brien submits that an additional day should be reflected in any costs award.

[7] Mr O'Brien, on behalf of the Respondents, citing actual costs of \$25,339.00 (excluding GST) incurred since the expiry of the Offer, is seeking a contributory award of \$25,339.00 (plus GST) towards the actual costs. I note that Mr O'Brien submits that the actual costs have been significantly discounted.

[8] From the contributory award, Mr O'Brien submits that a deduction of \$1,000.00 should be made for costs associated with a preliminary issue in which Mr Newick was wholly successful.

### *Applicant's Submissions*

[9] Mr Neutze for Mr Newick submits that costs in the Authority should be governed by the principles as set out in the leading Full Court judgement in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>2</sup>, in particular the principle that costs should be modest. Mr

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<sup>1</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA)

<sup>2</sup> [2005] ERNZ 808

Neutze submits that the approach to costs referred to in this case have been upheld by the Employment Court in *Jinkinson v Oceana Gold (NZ) Ltd*<sup>3</sup>

[10] Mr Neutze further submits that costs should lie where they fall on the basis that Mr Newick was wholly successful in the preliminary matter before the Authority, and partly successful in his claims before the Authority. Additionally, that the Offer should be disregarded as being unclear and not providing any vindication to Mr Newick.

[11] In this latter respect, Mr Neutze submits that the Offer did not address Mr Newick's claim to a shareholding which was pivotal in his claim, and nor did it state that Mr Newick could pursue his claim in an alternative jurisdiction.

[12] Should the Authority not be minded to let costs lie where they fall, Mr Neutze submits in the alternative that costs should be awarded in accordance with the usual daily rate tariff, and that a deduction should be made in respect of the preliminary matter in which Mr Newick was wholly successful and which occupied half a day of hearing time.

#### *Submissions in response from the Respondent*

[13] Mr O'Brien submits that the Authority should take full cognisance of the Offer in accordance with the approach advocated by the Court of Appeal in *Health Waikato Limited v Elmsley*.<sup>4</sup>

[14] Mr O'Brien further submits that the Offer was not unclear in that it was sent after the Statement in Reply had been filed, and that the Statement in Reply fully set out the Respondents' position including the fact that the Authority had no jurisdiction to address the shareholding matter. Additionally, there was no requirement on the Respondents to inform Mr Newick in the Offer that he was free to pursue his claims in another jurisdiction.

#### **Determination**

[15] 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*<sup>5</sup> 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 in the Calderbank letter, there would be no absolute protection to the party which had made the offer in terms of costs.

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<sup>3</sup> [2011] NZEmpC 2 at para 7

<sup>4</sup> [2004] 1 ERNZ 172 (CA) at [53]

<sup>5</sup> [1997] 10 PRNZ 514

Equally, the Authority may take into consideration a Calderbank letter when more has been awarded than was offered.

[16] The Court of Appeal in *Aoraki Corporation Ltd v McGavin*<sup>6</sup> 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 Calderbank 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.*

[17] 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*.<sup>7</sup>

[18] The Authority Investigation Meeting was held on 7, 8 and 9 December 2010. The Offer was made well in advance of the Investigation Meeting and consequently before considerable preparation costs had been incurred. There was a reasonable amount of time provided for Mr Newick to consider the Offer prior to it expiring on 26 April 2010.

[19] The Offer was made subsequently to the Statement in Reply which was filed on 26 March 2010. I accept that given this fact, the Offer was clear, and further note that, irrespective of the information contained to that effect in the Statement in Reply, there was no onus on the Respondents to inform Mr Newick in the Offer of his legal avenues of address in relation to his claims.

[20] I have concluded that taking all these circumstances into account, the Offer should be given full weight. However it is also important to consider the Offer in conjunction with the principles identified in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.<sup>8</sup> In this context, I find it significant that in *Health Waikato Limited v Elmsley*<sup>9</sup>, whilst advocating a “*more steely*” approach, the Court of Appeal did not award indemnity costs. Nor were indemnity costs awarded in *Watson v New Zealand Electrical Traders Limited t/Bray Switchgear*<sup>10</sup>, a case which, while citing *Emsley*, nonetheless did not reject the application of the principles

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<sup>6</sup> [1998] 1 ERNZ 601

<sup>7</sup> [2004] 1 ERNZ 172 (CA) at [53]

<sup>8</sup> [2005] 1 ERNZ 808

<sup>9</sup> *Ibid*

<sup>10</sup> (unreported, EC, AC 64/06, 24 November 2006, Colgan CJ)

and approach confirmed in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>11</sup>. The Court did however note that the particular factors of the case are to be considered, including any factor which requires an adjustment up or down of the notional daily rate. Taking into account a ‘without prejudice (except as to costs)’ offer is one such factor. In *Watson* the Court considered that, in the particular circumstances of that case, what was required was a costs award which more than doubled the notional daily rate, but which was less than the costs that the successful party actually incurred.

[21] In the present case I take the notional daily rate of \$3,000.00 as the starting point for costs which should be awarded to the Respondents. The following factors suggest that rate should be adjusted upward:

- Mr Newick did not respond to the Offer despite being provided with a reasonable amount of time in which to do so;
- The Offer was clear when taken in association with the Statement of Reply which had been filed prior to it; and
- Mr Newick was only partly successful in his claim before the Authority and the award made was less than the amount made in the Offer.

[22] Factors suggesting that the rate should be reduced or remain the same are:

- The principle that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party’s conduct; and
- The principle that costs awards are to be modest and reflect what is reasonably required in preparing an Authority investigation.

[23] Weighing those factors in the discretionary exercise of awarding costs, I consider that the notional daily rate should be increased by \$2,000.00. As regards the Respondents’ submissions in relation to preparation time, I observe that it is unusual for the Authority to allow preparation time per day of the investigation meeting. However in the circumstances of this case, I accept that significant preparation was required, and make an award of \$1,000.00 in respect thereof.

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<sup>11</sup> [2005] 1 ERNZ 808

[24] Accordingly, Mr Newick is ordered to pay the Respondents a total amount of \$11,000.00 costs, in respect of the two days of the Investigation Meeting and the preparation cost, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[25] From this award is to be deducted the sum of \$1,500.00 in respect of the preliminary matter in which Mr Newick was wholly successful and which occupied half a day of hearing time.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**