



# New Zealand Employment Relations Authority Decisions

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## Randall v Davys (Auckland) [2018] NZERA 14; [2018] NZERA Auckland 14 (15 January 2018)

Last Updated: 2 February 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 14  
3018112

BETWEEN KELLY RANDALL Applicant

AND PAUL DAVYS Respondent

Member of Authority: Eleanor Robinson

Representatives: Alex Kerjes, Advocate for Applicant

Julie Hardaker, Counsel for Respondent

Costs Submissions 11 January 2018 from Applicant

20 December 2017 from Respondent

Determination: 15 January 2018

### COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 15 December 2017 ([2017] NZERA Auckland 389), I found that the Applicant, Ms Kelly Randall, was an employee rather than an independent contractor and had been unjustifiably dismissed from her employment by the Respondent, Mr Paul Davys.

[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 the parties have filed submissions in respect of costs.

[3] The matter involved one day of meeting time. Ms Kelly is seeking either indemnity costs or in the alternative, a contribution of 75% of her actual costs of \$9,269.17, plus disbursements of \$453.17.

#### Submissions for the Applicant

[4] On behalf of the Applicant, Mr Kerjes submits that the Respondent wilfully disregarded known facts and to secure legal advice at an early date as advised by the Applicant.

[5] In addition the Applicant submits that a Calderbank1 Offer was made to Mr Davys.

[6] In regards to the Calderbank Offer, the Applicant submits that it wrote to the Respondent by letter sent via an email dated 6 October 2017 containing an offer from Ms Randall to settle her grievances in the sum of \$12, 820.00 including a contribution to costs. This is less than the amount Ms Randall was awarded in remedies by the Authority.

#### Submissions for the Respondent

[7] Ms Hardaker for the Respondent submits that the daily tariff should only be exceeded in limited circumstances, and this case does not fall into that category.

[8] In regard to the Calderbank letter, Ms Hardaker submits that the wording would have been unfamiliar to Mr Davys who had not obtained legal advice at that time. Further that Mr Davys genuinely believed that Ms Randall was an independent contractor and therefore did not consider settlement as suggested in the Calderbank letter as appropriate.

## **Determination**

### *Principles*

[9] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the [Employment Relations Act 2000](#) (the Act) 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.*

[10] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in

*NZ Automobile Association Inc v McKay*<sup>2</sup>.

1 *Calderbank v Calderbank* [1976] Fam 93 (CA)

2 [1996] 2 ERNZ 622

[11] 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*<sup>3</sup>.

[12] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>4</sup> that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*<sup>5</sup> at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[13] I have carefully considered the submissions of the parties. It is incumbent upon me that I approach the question of costs in a principled manner and not arbitrarily, and I therefore consider each relevant ground for uplift separately as appropriate.

[14] I observe that there is no pressure on parties to have to obtain legal representation in regard to matters before the Authority. I further observe as stated at paragraph [61] of my substantive determination, that Mr Davys had a genuine, if mistaken, belief that Ms Randall was an employee.

[15] I find therefore that this genuine but mistaken belief had an impact on how Mr Davys viewed the Calderbank Offer. Despite that, I find that the Calderbank Offer represented a genuine attempt to resolve matters at an early stage in the proceedings at a lesser amount than Ms Randall was subsequently awarded by the Authority. As such it should be taken into consideration in determining the appropriate level of costs.

[16] In all the circumstances, I determine that costs follow the event. Indemnity costs require exceptionally bad behaviour as noted by the Court of Appeal in *Bradbury v Westpac Banking Corporation*<sup>6</sup>. I do not find that there has been such behaviour by the Respondent to merit an award of indemnity costs in this case.

[17] Taking as the appropriate starting point of the normal daily tariff in the Authority of

\$4500.00, I apply an uplift in respect of the Calderbank Offer of \$1,000.00.

[30] Mr Davys is ordered to pay Ms Randall \$5,500.00 costs, plus \$453.27 as disbursements pursuant to clause 15 of Schedule 2 of the Act.

## **Eleanor Robinson**

### **Member of the Employment Relations Authority**

3 [2005] NZEmpC 144; [2005] 1 ERNZ 808

4 [2005] NZEmpC 144; [2005] 1 ERNZ 808

5 [2001] NZCA 313; [2001] ERNZ 305

6 [2009] NZCA 234

