

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 172A/09
5147389

BETWEEN Shanan Rochfort
 Applicant

AND MVT Services Limited
 First Respondent

AND Mike Tobin
 Second Respondent

Member of Authority: Denis Asher

Representatives: Jessica Greville for Mr Rochfort
 Dave McLeod for the Company and Mr Tobin

Submissions received: By 15 December 2009

Determination: 22 December 2009

COSTS DETERMINATION OF THE AUTHORITY

- [1] In my determination dated 5 November 2009 (WA 172/09) I found in favour of Mr Rochfort's claim he had been unjustifiably dismissed. I ordered the respondents to pay the applicant \$3,000 compensation for humiliation, lost wages of \$1,283 and penalties totalling \$1,500 to be paid to Mr Rochfort.
- [2] While costs were reserved I indicated that an award of \$3,000 would be a fair and reasonable starting point in making a costs determination in respect of what was a largely conventional grievance.

Applicant's Costs Submissions Summarised

- [3] Amongst other things, the applicant relies on a "Calderbank" offer (attached to the submissions dated 23 November 2009) in respect of actual costs totalling \$6,716.26.
- [4] The Calderbank offer is dated 25 August and was a proposal to settle all matters and avoid costs by the respondents paying Mr Rochfort \$4,000 under s. 123 (1) (c) (i) of the Employment Relations Act 2000 (the Act) and \$2,000 inclusive of GST as a contribution to his costs. The amount sought was lower than the total awarded by the Authority.
- [5] The Authority's approach since *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808 has not relied on proof of actual costs because it does not award costs on that basis. Preparation was for 7 witnesses over a scheduled two-day investigation, whereas only 2 of the respondents' claimed 7 witnesses presented. The conduct of the respondent was such that a reduction from the usual award is not warranted.

The Respondents' Position Summarised

- [6] The applicant has not provided a detailed copy of costs actually incurred in order that the Authority may establish if costs requested are reasonable in the circumstances.
- [7] The matter was set down for a day and lasted less than the time allotted.
- [8] Mr Tobin was helpful throughout and assisted the Authority reach a rapid conclusion.
- [9] This case warrants an award toward the lower end of the usual range, of \$1,500.

Findings

- [10] The Authority's discretion with which to award costs is now well settled and – as acknowledged by the applicant – typically follow the event: *Da Cruz* (above).

- [11] This is not a Calderbank situation as Mr Rochfort succeeded with his claim.
- [12] Costs are awarded not to punish the losing party. In this instance penalties were awarded against both respondents.
- [13] There is also no suggestion or possibility of Mr Rochfort being denied the fruits of his success.
- [14] I do accept that more preparation was required of Mr Rochfort as a result of Mr Tobin's advice as to the number of witnesses he intended calling.
- [15] Having regard to the above I am satisfied a costs award of \$4,000 for the investigation is appropriate in all the circumstances.

Determination

- [16] The respondents, jointly and severally, are to pay to Mr Rochfort as a contribution to his fair and reasonable costs \$4,000 (four thousand dollars).

Denis Asher
Member of the Employment Relations Authority