

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 435
5321848**

BETWEEN HAYDEN ROSS
 Applicant

AND AIR NEW ZEALAND LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Costs Submissions 20 September 2011 and 3 October 2011

Determination: 6 October 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2011] NZERA Auckland 376 the Authority found that the Respondent, Air New Zealand Limited (“ANZL”), had carried out a fair and reasonable investigation into the allegation of assault against the Applicant, Mr Ross.

[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 an Investigation Meeting, with written submissions being submitted subsequent to that. Mr Thompson, on behalf of the Respondent, is seeking a contributory award above the normal daily tariff rate of \$3,000.00 towards the actual costs.

[4] Mr Thompson, in support of the level of the claim by the Respondent, submitted for the consideration of the Authority that account should be taken of:

- the reasonable and timely offers (“the Offers”) made by the Respondent to settle proceedings, these consisting of:
 - an email dated 25 February 2011 to the Applicant’s then representative headed “**Without prejudice save as to costs**” and

which consisted of an offer that in the event of the Applicant discontinuing proceedings, “*costs lie where they fall*”;

- 3 March 2011: an open offer on the same basis being made to the Applicant during an Authority telephone conference call;
 - 9 March 2011: the advice provided to the Applicant in an email that the Respondent would be seeking an award of costs in excess of the normal daily tariff rate in the event that the Applicant rejected a reasonable offer from the Respondent.
- the increased level of preliminary activity, the very late change in the Applicant’s representation, and additional telephone conferences subsequently necessitated;
 - the significant amount of evidence and supporting documents in preparation;
 - that costs normally follow the event; and
 - the preparation of memorandum in relation to costs

[5] Mr Ireland for the Applicant submits that there is no reason to depart from the normal daily tariff on the basis that it is a principle in relation to costs that costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party’s conduct.

[6] Mr Bennett submits that in these circumstances, a costs award of \$3,000.00, the normal daily tariff rate, would be appropriate.

Principles

[7] 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.

[8] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[9] The principles and the approach adopted by the Authority on which an award of costs is made are well settled: *PBO Limited (formerly Rush Security Ltd) v Da Cruz*²

[10] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁴ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.

[11] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a 1 day Investigation Meeting this would normally equate to an award of \$3,000.00.

Determination

[12] I see no reason in the current case for departing from the normal level of awards made by the Authority on the basis of the level of preparation time undertaken by the Respondent, for participation in additional telephone conferences with the Authority, or for preparation of costs submissions. These actions are part of the normal Authority process, and in this case, resulted to a significant extent from the change in the Applicant’s representation at a very late stage, for which the Applicant should not reasonably be held responsible

[13] However the reasonable and timely efforts to settle proceedings are of more persuasion. The Authority Investigation Meeting was held on 19 July 2011. The Offers were made well in advance of the Investigation Meeting and consequently before preparation costs had been incurred. There was ample time for the Applicant to consider the Offers prior to the Investigation Meeting.

[14] In considering the effect the Offers should have upon the award of costs in this matter, I take into consideration the Court of Appeal decision in *Aoraki Corporation Ltd v*

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

*McGavin*⁵ in which the Court 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”⁶ offers, that is without prejudice save as to costs, 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.

[15] Additionally 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*.⁷

[16] 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 ANZL. The following factors suggest that rate should be adjusted upward:

- Mr Ross rejected the Offers which was made almost four months prior to the Authority investigation meeting;
- The Offers put Mr Ross on notice that an increase in the daily tariff rate would be sought should the Offers be rejected, and
- Mr Ross was wholly unsuccessful in his claim before the Authority

[17] 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.

⁵ [1998] 1 ERNZ 601

⁶ *Calderbank v Calderbank* [1976] Fam 93 (CA)

⁷ [2004] 1 ERNZ 172 (CA) at [53]

[18] Weighing those factors in the discretionary exercise of awarding costs, I consider that the notional daily rate should be increased by \$1,000.00.

[19] Accordingly, Mr Ross is ordered to pay ANZL \$4,000.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority