IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 7A/09
5107445

	BETWEEN	NICOLA RUSSELL Applicant
	AND	FIRST SECURITY GUARD SERVICES LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Mark Henderson, Counsel for Applicant Michael Mulholland, Advocate for Respondent
Submissions received:	13 February 2009 from Applicant 9 March 2009 from Respondent
Determination:	30 April 2009

COSTS DETERMINATION OF THE AUTHORITY

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[1] In my determination dated 26 January 2009, I found that the applicant was disadvantaged in her employment and ordered the respondent to pay her compensation in the sum of $2,000 under s.123(1)(c)(i) of the Employment Relations Act 2000 and interest on wages that were not paid during the notice period. I did not find that the applicant was unjustifiably constructively dismissed and I dismissed the respondent's counterclaim in its entirety. I reserved the issue of costs and encouraged the parties to attempt to reach agreement on costs.

[2] The parties have been unable to reach agreement and submissions have been received from Mr Henderson on behalf of the applicant and from Mr Mulholland on behalf of the respondent.

The applicant's submissions

[3] Mr Henderson relies on the principles in relation to costs in the Authority as set out in the Full Court judgment of the Employment Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[4] He submits that the applicant was ultimately successful overall in her claims and that the respondent's counterclaim was dismissed. Mr Henderson submits that costs should follow the event and that the applicant made a without prejudice *Calderbank* offer on 18 March 2008 to accept the sum of $3,500 under s.123(1)(c)(i) of the Employment Relations Act 2000. The offer was expressed to remain open for 14 days and was made on the basis that it would settle all matters arising out of the employment relationship, including the counterclaim.

[5] Mr Henderson submits that another factor is that the respondent did not attend voluntarily at mediation which increased costs and that the applicant, having shifted to Australia before the investigation meeting, had to incur additional costs to return for the meeting. Mr Henderson also refers to the delay in paying the applicant's wages for the last few days of her notice period as a factor which should be taken into account in making an award of costs.

[6] Mr Henderson sets out the applicant's actual costs exclusive of GST at $9,130 and disbursements of $149.65. He submits that costs of $800 prior to the *Calderbank* offer and $7,875 thereafter with a further sum for the costs submissions and disbursements is appropriate.

The respondent's submission

[7] Mr Mulholland submits that the applicant was not ultimately successful because the foundation of her employment relationship problem was that she had been constructively dismissed from her employment and that the personal grievance claim in that respect was not successful. He submits that the facts of the case were straightforward and there was no legal complexity. He submits little additional time had to be spent on the counterclaim and does not accept the fact that the applicant had to travel from Australia being a factor which should be taken into account in terms of a costs award.

[8] Mr Mulholland submits the respondent did attend at mediation and why or how that attendance came about is not relevant to costs. Mr Mulholland submits that the failure to pay the four days lost wages was an administrative oversight and it should not be taken into account in a costs award and further that the *size and commercial backing of the respondent* as submitted by Mr Henderson to be an indication of its ability to pay an award of costs is irrelevant to any award that may be made against it.

[9] Mr Mulholland refers to the High Court case of *Sanson v. Parval Marketing Ltd & Ors* (unreported, CIV-2006-404-7231, 7 July 2008, Asher J), and submits it is relevant to the *Calderbank* offer put forward by the applicant on 18 March 2008.

[10] Mr Mulholland submits that any award of costs should not exceed $1,500 and that costs should not be awarded on a solicitor/client basis.

Determination

[11] I find that there is no good reason why the usual principle that costs follow the event should not apply. The applicant, therefore, is entitled to a contribution towards her costs.

[12] The leading Employment Court judgment on costs is *PBO*. The Employment Court in *PBO* sets out in para [44] of the judgment the costs principles that are appropriate for the Authority to apply, recognising that the Authority is able to set its own procedures and that the principles are not as comprehensive or as descriptive as set out in earlier Employment Court judgments.

[13] The principles set out in *PBO* recognise that costs are not to be used as a punishment or an expression of disapproval, although conduct which increases costs unnecessarily can be taken into account when inflating or reducing an award. The principles further recognise that it is open to the Authority to consider whether the parties' costs were unreasonable, that the Authority can take into account without prejudice offers, that awards will be modest and that frequently costs are judged against a notional daily rate.

[14] The Employment Court in *Sefo v. Sealord Shellfish Ltd* CC4B/08 (Chief Judge Colgan) referred to the judgment of Judge Shaw in *The Chief Executive of the*

Department of Corrections v. Tawhiwhirangi WC4/08 and noted in doing so the tariff in *PBO* subsequently being approved up to $3,000 per day.

[15] I find it is appropriate in this case to start with a daily tariff and then consider whether there needs to be an adjustment made to that tariff.

[16] Ms Russell was not entirely successful in terms of her personal grievance claim and although I do accept that there would have been considerable overlap between the matters that gave rise to the claim of constructive dismissal and those that gave rise to the unjustified action causing disadvantage, there were still two claims that required addressing in the evidence and in submissions. The investigation meeting commenced at 9.30am and did not conclude until after 6pm so that witnesses would not have to return for a second scheduled day. There were eight witness statements provided.

[17] I have taken into account the following matters in arriving at a daily tariff. The first is that Ms Russell was not entirely successful. The second is that the investigation took a very full day and the Authority heard from seven witnesses. The applicant prepared four initial witness statements although one witness was not required to give evidence. The matters were not unduly complex, either factually or legally. In the circumstances I find it is appropriate in this case to start with a daily tariff of $2,500.

[18] *PBO* does make it clear that without prejudice offers can be taken into account. Indeed in *PBO* two offers were taken into account that had been made by the applicant to settle the matter and there was also a counterclaim. I do not find in those circumstances that I need to undertake the analysis of the offer that was undertaken by Justice Asher in *Sanson.* Although the settlement offer of 18 March 2008 was for more than was ultimately awarded it is appropriate in my view to take the applicant's entitlement to costs into account. If that offer had been accepted then the applicant would not have had to incur further costs from that point. There are some employment cases where the sums claimed are not high and the cost of continuing with legal action can quickly become disproportionate. A sensible offer to settle at an early stage, as the offer on this occasion was because it was made before the parties had to incur the cost of preparing for an investigation meeting, should be taken into account in the exercise of a discretion as to a cost award. I do take the offer into account and there should be an adjustment in that regard of $500.

[19] I also take into account the counterclaim. The nature of the counterclaim was such that I accept Mr Mulholland's submission it would not have occupied as much preparation time as the personal grievance. It was a claim however that alleged matters pertaining to the integrity and honesty of the applicant and she took the allegations seriously. An adjustment should be made on that basis as the counterclaim was ultimately unsuccessful. Taking the nature of the counterclaim into account I am minded to make an adjustment for that of $600. There should also be a modest adjustment for Mr Henderson preparing submission as to costs of $400. There are no other factors that I consider I should take into account in the exercise of my discretion as to costs.

[20] The disbursements claimed and set out are reasonable and include the $70 filing fee. I make an allowance of $149.65.

[21] I order First Security Guard Services Limited to pay to Nicola Russell the sum of $4000 being costs together with the sum of $149.65 for disbursements.

Helen Doyle
Member of the Employment Relations Authority