

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 197
5447996

BETWEEN KANA SHANMUGANATHAN
 Applicant

A N D POWERNET LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Mary-Jane Thomas and Elizabeth Fraser, Counsel for
 Applicant
 Janet Copeland and Lucia Vincent, Counsel for
 Respondent

Submissions Received: 30 October 2014 from Respondent
 21 November 2014 from Applicant

Date of Determination: 27 November 2014

COSTS DETERMINATION OF THE AUTHORITY

A. Kana Shanmuganathan is ordered to pay to Powernet Limited costs in the sum of \$5,000.

[1] The Authority in its determination dated 2 October 2014 found that the applicant's demotion was unjustified and disadvantaged him. It ordered payment of \$1,875 gross in lost wages and compensation in the sum of \$2,000. The applicant's application for reinstatement was declined. Costs were reserved.

[2] The Authority has now received submissions from the applicant and respondent as to costs.

The applicant's submissions

[3] Ms Thomas on behalf of the applicant accepts that the legal principles in relation to costs in the Authority are those set out by the full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*.¹

[4] Ms Thomas acknowledged that a *Calderbank* offer was made on 3 April 2014 by the respondent offering –

- (a) The applicant would stay in the role of System Controller;
- (b) The applicant's salary as System Controller would be increased from \$85,000 to \$95,000, would be back-paid until 6 January 2014 and would be paid within 7 days; and
- (c) A contribution towards the applicant's costs of \$2,500 plus GST.

[5] That offer was not accepted.

[6] Ms Thomas refers to the steely approach suggested by the Court of Appeal in cases where reasonable settlement offers have been rejected, may not in fact be the correct approach in relation to costs in the Authority – *Mattingly v. Strata Title Management Ltd*.²

[7] Ms Thomas also referred to the Employment Court judgment in *Harvey Norman Stores (NZ) Pty Ltd v. Bolt*³ where the Court stated:

*While the Authority may properly take the unreasonable rejection of a **Calderbank** offer into account in fixing costs, it would be wrong to say that the Authority is required, as a matter of law, to do so by increasing the award of costs above the daily rate. It will always be a matter of discretion.*

[8] Ms Thomas submits that it has been stated by the Employment Court that the Authority will rarely award costs on an indemnity basis and that the applicant was partially successful in his application and the offer in light of the Authority determination was not significantly more beneficial. She submits that the Authority should exercise its discretion and find that costs should lie where they fall.

¹ [2005] NZEmpC 808

² [2014] NZEmpC 15

³ [2014] NZEmpC 28 at [17]

The respondent's submission

[9] Ms Copeland in her submission seeks full indemnity costs from the applicant in the sum of \$17,196.31 which includes GST and disbursements.

[10] Ms Copeland submits that the normal starting point for costs in the Authority is \$3,500. She sets out in her submissions the purpose of the *Calderbank* offer being to induce the Authority, or the Court, to exercise its discretion against granting the plaintiff (or applicant) any costs if it has recovered less by going to Court than it would have by accepting the offer – *Moore v. McNab*.⁴

[11] Ms Copeland submits that the *Calderbank* offer should be taken into account as the offer was more beneficial than the final determination and that a steely approach is required in the current case. In support of that submission, she submits that the respondent made it very clear to the applicant in its *Calderbank* offer that it would be producing its letter to seek full indemnity costs and that the *Calderbank* offer was made four months before the investigation meeting, at which time neither party had incurred significant costs.

[12] On that basis, the respondent seeks a full award of indemnity costs in the sum of \$17,196.31.

Determination

[13] The respondent made a *without prejudice except as to costs* offer to the applicant on 3 April 2014. The offer was declined and the applicant was awarded less than the offer to settle.

[14] I accept that the offer of settlement should be taken into account in the exercise of the discretion as to costs. It was a reasonable offer, made in a timely manner before the investigation meeting and before significant preparation costs had been incurred. The offer was for a sum which exceeded the monetary awards made by the Authority. Had the offer been accepted then the respondent would not have incurred the costs it did in preparing for and attending an investigation meeting. I accept and take into account in the exercise of my discretion that the applicant's main claim was reinstatement and that was not recognised by the offer. I have also taken

⁴ (2005) 18 PRNZ 127

into account that the claim for reinstatement was unsuccessful and there were some circumstances in this case that meant that finding of a grievance may not mean reinstatement was inevitable.

[15] I am not persuaded that this is a case where indemnity costs should be awarded. There was no improper conduct in the course of the litigation to justify such an award. Awards from the Authority are usually modest and an indemnity award would be inconsistent with the usual approach unless there are other compelling reasons to make an indemnity award which there are not in this case.

[16] I find that in light of the *Calderbank* offer the applicant is not entitled to costs but the respondent is entitled to costs. This was a full day investigation meeting. The matters were not particularly factually or legally complex. The starting point for costs is the normal daily tariff of \$3,500 and I make an uplift of \$1,500 because the applicant did not accept a reasonable settlement offer which meant the respondent had to incur additional costs. I make no award for disbursements as those incurred were normal office overheads and not payments to a third party.

[17] Kana Shanmuganathan is ordered to pay to Powernet Limited costs in the sum of \$5,000.

Helen Doyle
Member of the Employment Relations Authority