

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 56/10
5129804

BETWEEN WILLIAM SIMPSON
 Applicant

AND TASMAN GLASS LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Anjela Sharma, Advocate for Applicant
 Janine Bonifant, Counsel for Respondent

Submissions Received: 19 January 2010 for Applicant
 22 February 2010 for Respondent

Determination: 9 March 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 2 December 2009 I found in favour of the applicant that he had been unjustifiably disadvantaged in his employment and that he was unjustifiably dismissed. I also made orders as to holiday pay.

[2] I reserved the issue of costs and have now received costs submissions from Ms Sharma and Ms Bonifant. Ms Sharma set out some delays in terms of responses from the respondent's representative about costs. I understand that whilst unfortunate some of the delay on the part of the respondent was due to a change in counsel and the lodging of a challenge to preserve the respondent's position over the Christmas period which has now been withdrawn.

The submissions

[3] Both Ms Sharma and Ms Bonifant refer to the leading Employment Court judgment on costs of *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] ERNZ

808. I accept that the principles referred to in *PBO* are those that should be applied in determining costs in this matter.

[4] Ms Sharma in her submissions asks that the Authority in the exercise of its discretion as to costs award the applicant his full costs of \$7500 plus GST or a significant contribution towards costs. Ms Sharma refers to offers made and correspondence headed *Without Prejudice Save as to Costs* that she submits are in the nature of a Calderbank offer on 11 May 2009 in the sum of \$12,000 and 26 June 2009 for \$10,000. The Authority made awards not including holiday pay of the sum of \$9903.84 in favour of the applicant. Ms Sharma also refers to additional costs because there was no payment of holiday pay requiring this matter to be dealt with in the Authority meeting, and that the respondent's case and argument lacked substantive basis and serious consideration should have been given to settling the matter. She also submits that the hearing itself occupied a full day.

[5] Ms Bonifant in her submissions submits that the matter was not complex and that costs awarded should be toward the lower end of the tariff referred to in recent Employment Court and Authority cases. Ms Bonifant accepts that there were settlement offers made on a without prejudice save as to costs basis but that the last offer was only received about one month prior to the investigation meeting and the respondent's file was by then largely completed. Ms Bonifant submits that the matter was largely one of credibility and the respondent was entitled to test the evidence raised against it. Ms Bonifant submits that whilst the respondent accepts that costs should follow the event the amount awarded should be toward the lower end of daily tariff and that a contribution to notional reasonable costs in the circumstances would be \$3,000.

Determination

[6] Ms Sharma refers to offers to settle the matter in letters dated 11 May 2009 in the sum of \$12,000 and a further offer on 26 June 2009 for \$10,000. Both these offers were rejected by the respondent. The award made by the Authority was very close to the amount of the second offer. The Calderbank procedure is more often commenced by an offer from a respondent giving the respondent some ability to gain some protection from costs by making offers to settle where otherwise they would have no protection. The applicant is usually seen as being able to control the risk of cost in deciding whether or not to pursue a claim. That aside I accept that if the offer had

been accepted then the cost of a full day of an investigation meeting would not have been incurred and the offers to settle were sensible. I am not persuaded on this particular occasion that aside from concluding the applicant's actual costs were reasonable when the offers are considered I should otherwise take those into account in determining the issue of costs in this matter.

[7] I accept Ms Sharma's submission that additional matters including the matter of holiday pay did add to the time taken to investigate the matter. This was not an altogether straightforward matter and there were significant issues and some complexity in the facts that went to credibility. This was required to be dealt with in the applicant's statements of evidence

[8] I do not consider that this is a matter where there should be an award of full costs. In the circumstances of this case and taking all the matters into consideration I conclude that an appropriate daily tariff is \$3,000 but given the significant range of matters in this case and the requirement to prepare quite full submissions there should be an adjustment upwards of \$1000. In all the circumstances I am of the view that a fair and reasonable award is the sum of \$4,000. I am not satisfied this is a case where there should be an award of actual legal costs.

[9] I order Tasman Glass Limited to pay to William Simpson the sum of \$4,000 being costs.

Helen Doyle
Member of the Employment Relations Authority