

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 399
5539051

BETWEEN PADMINI SINGH
 Applicant

AND COMPASS GROUP NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Kish Proctor for Applicant
 Ethelred Chey for Respondent

Submissions received: 28 October and 17 November 2015 from Applicant
 11 November 2015 from Respondent

Determination: 17 December 2015

COSTS DETERMINATION OF THE AUTHORITY

A. Ms Singh is ordered to pay to Compass Group New Zealand Limited the sum of \$1,000 as a contribution to its costs within 28 days of the date of this determination.

[1] In a determination dated 30 September 2015¹ I held Ms Singh was neither unjustifiably disadvantaged in her employment nor was she unjustifiably dismissed from her employment with Compass Group New Zealand Limited (“Compass Group”).

[2] I reserved costs, indicating that if the parties were unable to resolve that issue, both parties would have the opportunity to file cost memoranda and evidence. These have now been received by the Authority for consideration.

¹ [2015] NZERA Auckland 305.

[3] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority applies a starting point of a notional daily tariff for quantifying costs and may uplift where there is conduct which increases costs unnecessarily.

[4] The Employment Court has held that the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.² As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*³ awards in the Authority will be modest taking into account conduct which increases costs unnecessarily. Indemnity costs may be justified in relatively rare cases where a party's conduct is particularly egregious.⁴

Calderbank offers

[5] The Authority will take into account, when dealing with the issue of costs, any offers made by the parties to settle matters. As stated by the Court of Appeal⁵:

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.⁶

[6] As was held by the Employment Court in *Mattingly v Strata Title Management Limited*⁷:

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a "steely approach" ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court's observation in *Da Cruz* that Authority awards will be "modest". What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a de novo challenge, having regard to the circumstances of the particular case.⁸

[7] On Friday 22 May 2015, Compass Group wrote to Ms Singh and offered to resolve matters with her by a payment of \$6,000.00 pursuant to section 123(1)(c)(i) of

² *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

³ (2006) 7 NZELC 98,128; [\[2005\] ERNZ 808](#); (2005) 3 NZELR 1 (EMC).

⁴ *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2 at [9].

⁵ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385.

⁶ *Ibid* at [18].

⁷ [\[2014\] NZEmpC 15](#); [\[2014\] ERNZ 1](#).

⁸ *Ibid* at [27].

the Employment Relations Act 2000 (the Act). The offer remained open for acceptance until Wednesday 27 May 2015. Ms Singh responded to the offer on Monday 25 May 2015 rejecting the offer.

[8] I have not been provided with any explanations as to the reasons why Ms Singh rejected the offer which I find to be reasonable particularly in light of Compass Group's success in defending Ms Singh's applications in the Authority. The rejection of the offer by Ms Singh was unreasonable and warrants consideration of an up-lift in costs.

[9] The investigation meeting took a full day. Applying the daily tariff would see the award of a contribution in the order of \$3,500. Compass Group seeks an uplift to \$5,600 to reflect the unreasonable rejection of the calderbank offer by Ms Singh. Further, Compass Group says an additional uplift should be made to reflect what it says was Ms Singh's "...scattered and unfocussed approach in presenting her case."

[10] The criticism of Ms Singh is unnecessary. Ms Singh was not represented by professional representation throughout the Authority's processes, although she was accompanied by a friend at the investigation meeting who, likewise was not a professional representative. A lay litigant is not expected to take the same approach as a professional representative with experience on managing matters in the Authority.

[11] Following the issue of the determination Ms Singh did seek professional assistance and has lodged a challenge to the determination together with an application for leave to challenge out of time.

[12] The submissions lodged on behalf of Ms Singh included a request that the Authority not determine this matter until Ms Singh's challenge has been determined. An election under section 179 to challenge a determination of the Authority does not operate as a stay.⁹

⁹ Employment Relations Act 2000, section 180.

[13] The Authority was also requested to hear oral submissions on the matter of costs, however, extensive efforts to make contact with Ms Singh's representative have failed and therefore I have, as is the usual practice in the Authority, proceeded to determine this matter on the papers currently before the Authority.

[14] Mr Elthered Chey represented Compass Group throughout the Authority's processes. Mr Chey is employed by Compass Group as its in-house employment relations specialist. Mr Chey's duties include providing advice and support on employment relations and industrial relations.

[15] What Compass Group is claiming by way of costs is a profit on costs. I am not of a mind to award profit costs unless there is some evidence that Mr Chey would have been employed on work that might have yielded profit costs to Compass Group.¹⁰ No evidence of this has been provided to the Authority.

[16] In *Open Systems v Pontifex*¹¹ the Court held that normally, it could be expected that costs should be absorbed because a human resources manager, for example, required to attend to the conduct of a case could still ensure that his or her other responsibilities were attended to by someone else with no reduction in productivity for the organisation.¹²

[17] The Court in *Dumolo v Lakes District Health Board*¹³ held that in appropriate cases, representation by in-house counsel, advocates or employees will not necessarily preclude an award of costs.¹⁴

[18] In *Stevens v Hapag Lloyd*¹⁵ the Employment Court reiterated that proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical.¹⁶

[19] Taking into account the unreasonable rejection of the calderbank offer, making an allowance for Mr Chey's time but noting that Compass Group did not

¹⁰ See *Clarke v Attorney-General*, WEC29A/97, Wellington Employment Court, Goddard CJ, 24 October 1997.

¹¹ [1995] 2 ERNZ 211.

¹² *Ibid* at page 216 line 21-40.

¹³ [2014] NZEmpC 40.

¹⁴ *Ibid* at [43].

¹⁵ [2015] NZEmpC 28.

¹⁶ *Ibid* at [94].

incur any additional costs outside the salary cost it was already committed to pay to Mr Chey, I consider it appropriate that Ms Singh pay to Compass Group the amount of \$1,000 without deduction as a contribution to Compass Groups costs and that this payment be made within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority