

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 389
5299656

BETWEEN DAVID SKUDDER
Applicant

AND ARAI MATAWAI
INCORPORATION
Respondent

Member of Authority: K J Anderson

Representatives: L Hemi, Counsel for Applicant
D Sharp, Counsel for Respondent

Submissions received: 12 May 2011 and 27 May from Applicant
23 May from Respondent

Determination: 9 September 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 31st March 2011¹ the Authority found that the dismissal of Mr Skudder was unjustified. The parties were invited to resolve the issue of costs but have not been able to obtain resolution. Submissions on costs have been received from the parties. The investigation meeting took most of one day.

The submissions for the Applicant

[2] It is submitted for the applicant (Mr Skudder) that he has incurred costs of \$13,470 related to the investigation meeting, plus a further \$1,750 (plus GST) pertaining to the preparation of the costs submissions (\$250 x 7 hours). Counsel for the applicant has not provided any details of how the substantive amount has been calculated, but given that the applicant is seeking an award of \$6,000 (plus GST) and taking into account the overall nature of the proceedings, it is accepted that the costs

¹ [2011] NZERA Auckland 128

incurred relating to the investigation meeting fall within an acceptable range for such matters.

[3] The submissions acknowledge the tariff based approach of the Authority in awarding costs and the overall principles established by *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.² In support of an award of costs over and above the normal daily tariff of \$2,500-\$3,000, it is submitted that \$2,500 should be awarded for the investigation meeting and a further sum of \$3,500 for the associated preparation as it is said that the nature of issues to be investigated required more preparation than might normally be expected.

The submissions for the Respondent

[4] The respondent (AMI) refers the Authority to a *Calderbank*³ offer that was made to Mr Skudder on a date that has not been clarified; but it seems that the offer followed a mediation meeting on 26th November 2009. It is evidenced within an email dated 2nd December 2009, from counsel for Mr Skudder to AMI. The subject line of the email is: “*without prejudice except as to costs.*” The sum offered is \$27,500 but it was rejected by Mr Skudder via this email. The respondent submits that Mr Skudder had unrealistic expectations in regard to the loss of wages that he believed he was entitled to, if he was to be successful with his claims, as evidenced by the total awards made by the Authority in the sum of \$25,329. This included a reduction of 20% in regard to the award of compensation made under s.123(1)(c)(i) of the Employment Relations Act 2000. Therefore, AMI submits, any award of costs should be in its favour.

[5] AMI also refers the Authority to a further *Calderbank* offer made to Mr Skudder of the sum of \$15,000 via a “*Without Prejudice Save As To Costs*” letter dated 26th May 2010, nearly five months before the investigation meeting. It is submitted that this offer demonstrates that AMI adopted a “reasonable and responsible approach” in attempting to reach a resolution with Mr Skudder. I accept that this is so but there are other factors I am bound to consider.

² [2005] ERNZ 808

³ *Calderbank v Calderbank* [1975] 2 All ER 333

[6] In regard to the first *Calderbank* offer (\$27,500), it is submitted for Mr Skudder that this offer is not admissible before the Authority as it was: "... made in the context and for the purpose of a mediation conference between the parties and is therefore subject to section 148(3) of the Employment Relations Act 2000 (the Act)." Section 148(3) of the Act provides that:

No evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document, or information that, by subsection (1), is required to be kept confidential.

Subsection (1) refers to keeping confidential ...

... any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.

But counsel for AMI refers the Authority to s.148 (6)(a); it provides that:

Nothing in this section –

- (a) prevents the discovery or affects the admissibility of any evidence (being evidence which is otherwise discoverable or admissible and which existed independently of the mediation process) merely because the evidence was presented in the course of the provision of mediation services;

Analysis and Conclusions

[7] In regard to the first *Calderbank* offer made to Mr Skudder, of the sum of \$27,500, there is little point in engaging in an analysis of whether or not the circumstances fell under the provisions of s.148 of the Act. This is for two reasons. Firstly, there is an absence of material evidence relating to the details of the circumstances surrounding the offer. Secondly, and more importantly, the offer was rejected by Mr Skudder on 2nd December 2009 and hence it fell away.⁴ It was subsequently replaced by the second offer that was made to him on 26th May 2010. Mr Skudder also rejected this offer. The relevance of all of this is that as of 26th May 2010, there was a *Calderbank* offer of \$15,000 available to Mr Skudder (not \$27,500) and given that he obtained approximately \$10,000 more from the determination of the Authority, then the second *Calderbank* offer cannot be taken into account in the assessment of an appropriate award of costs.

⁴ Given the overall outcome including the costs incurred by Mr Skudder he would have been considerably better off if he had accepted this offer.

Determination

[8] The normal tariff adopted by the Authority in regard to awarding costs to a successful party, is more often than not, \$3,000 for each day of an investigation meeting. This sum can then be adjusted up or down depending upon the circumstances of a particular case. I accept that there was a considerable amount of preparation involved for the proceedings and that this warrants an increase upwards to a sum of \$4,000. Mr Skudder also seeks a further sum of \$1,750 (plus GST) for the preparation of his costs submissions. This claim cannot be accepted as it was not necessary to provide such comprehensive submissions, along with the attached judgments. However, I accept that given the *Calderbank* issues raised by AMI, an award of \$500 is appropriate.

[9] Arai Matawai Incorporated is ordered to pay to Mr Skudder the sum of \$4,500 as a contribution towards his costs.

K J Anderson
Member of the Employment Relations Authority