

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 149  
3109317

	BETWEEN	BOB THANABABU Applicant
	AND	KEIGHTLEY MOTORS LIMITED Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Emma Moss, advocate for the Applicant Greg Denholm, counsel for the Respondent	
Costs Submissions	24 March 2021 from the Applicant None from the Respondent	
Determination:	15 April 2021	

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In a determination dated 9 March 2021, I determined that Mr Thanababu had been unjustifiably dismissed and unjustifiably disadvantaged by the respondent, Keightley Motors limited (KML).

[2] Costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and the applicant has filed submissions in respect of costs.

[3] The matter involved a half day investigation meeting on 11 February 2021.

[4] Ms Moss, on behalf of Mr Thanababu, is seeking a costs award of \$6,61250 (including GST) being the costs incurred by Mr Thanababu from the date of a Calderbank Offer.

*Calderbank Offers*

[5] Ms Moss submitted that she made a *Calderbank*<sup>1</sup> Offer in a letter headed 'Without prejudice save as to costs' to the respondent on 11 August 2020. The *Calderbank* Offer was

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<sup>1</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA)

an offer to settle the matter by way of the payment of \$20,000.00 pursuant to s 123(1)(c )(i) of the Employment Relations Act 2000 (the Act), plus a payment in respect of costs incurred by KML

[6] The respondent was given two days in which to consider the *Calderbank* Offer, however no response was received and the offer expired on 13 August 2020.

[7] Mr Thanababu was successful in the majority of his claims before the Authority and awarded an aggregate amount as remedies in a sum slightly in excess of the *Calderbank* Offer.

[8] Ms Moss further submits that the conduct of the respondent ought to be taken into account when assessing the level of costs to be awarded to Mr Thanababu. It is submitted that the Respondent's conduct of the proceedings significantly increased the time and costs involved in the process following the expiry of the *Calderbank* Offer by the failure:

- of counsel for the respondent failing to attend a case management conference call on the agreed date and time, requiring a subsequent case management conference call;
- by counsel for the respondent to provide information requested by the Authority at the case management conference call;
- of the respondent and his counsel to attend the Investigation Meeting which resulted in additional drafting of the applicant's final submission;
- of the respondent and his counsel to attend the Investigation Meeting significantly increased the time and costs associated with attending ;

[9] It is submitted by the applicant that in line with the 'steely approach' adopted by the courts with respect to rejected *Calderbank* Offers, and the respondent's conduct, in the proceedings, the respondent should pay the actual costs incurred by the applicant from the date of the *Calderbank* Offer to the date of the determination.

#### *Principles*

[10] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

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### **15 Power to award costs**

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[11] Costs are at the discretion of the Authority<sup>2</sup>.

[12] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*<sup>3</sup>.

[13] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

[14] Of relevance in this instance is the principle that costs will be modest. The Employment Court further observed at para [47]:

... we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.

### **Costs Award**

[15] In this matter the applicant was the successful party and costs normally follow the event.

[16] I have considered whether or not the failure of the respondent and its counsel to attend the Investigation Meeting should impact upon costs.

[17] I note firstly that the failure of the respondent witness(es) to attend the Investigation Meeting impacted upon the weight that could be given to its evidence, and this was taken into consideration when determining the matter. It is a principle that costs are not to be used as a punishment and taking the non-attendance of the respondent into account when assessing costs would have that effect.

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<sup>2</sup> *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

<sup>3</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

[18] Secondly counsel for the respondent did attend the Investigation Meeting by telephone and was able to carry out cross-examination on behalf of his client. On that basis I therefore consider that any impact on drafting the submissions would be not significant.

[19] In respect of the submission that the failure of the respondent to attend the Investigation Meeting significantly increased the time associated with attending it, I note that the hearing proceeded without delay and was concluded within a couple of hours.

[20] I consider that the Calderbank Offers should be taken into consideration in determining the appropriate level of costs.

[21] Whilst taking note of the comments made by Judge Inglis as regards the ameliorating of the ‘*steely*’ approach noted in the judgment in *Stevens v Hapag-Lloyd (NZ) Ltd*<sup>4</sup> which referred to ‘*significant costs awards*’, I consider that Calderbank Offers may still be taken into consideration in the matter of costs in the Authority on the basis that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted<sup>5</sup>.

[22] The *Calderbank* Offer set out in the letter dated 11 August 2020 provided KML with two days in which to consider it. Although this was a tight timeframe I nonetheless consider this was a reasonable time frame, allowing time for consideration and for seeking legal advice on the settlement offer.

[23] Taking the normal daily rate in the Authority of \$4,500.00 as a starting point, a half day investigation meeting would merit an award of \$2,250.00. Taking the above considerations into account, I consider that \$3,250.00 is the appropriate costs award in this case.

[24] **I order KML to pay Mr Thanababu a contribution to costs in the sum of \$3,250.00, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000. KML is also ordered to pay Mr Thanababu the Authority filing fee of \$71.56.**

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>4</sup> [2015] NZEmpC 137 at para [95]

<sup>5</sup> *Aoraki Corporation Ltd v McGavin*<sup>5</sup> [2004] 1 ERNZ 172 (CA) at [53]