

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 346
5354709**

BETWEEN DERYK THOMPSON
 Applicant

AND ADVANCED TRAINING
 ACADEMY LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Costs Submissions 4 October 2012 from Applicant
 20 September 2012 from Respondent

Determination: 5 October 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2012] NZERA Auckland 286, the Authority found that the Respondent, Advanced Training Academy Limited (ATA), had not constructively dismissed, and had not unjustifiably disadvantaged, the Applicant Mr Thompson. However Mr Thompson had succeeded in his claim for unpaid commission for the Financial Year Ended (FYE) 2008.

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

[3] This matter involved 2 days of Investigation Meeting, with written submissions being submitted subsequent to that. Ms Foden on behalf of ATA, citing actual costs of \$5,589.00 (including GST), is seeking that full amount as being a fair and reasonable award of costs.

Submissions of the Respondent

[4] Ms Foden, in support of the level of the claim by the Respondent, submitted for the consideration of the Authority that account should be taken of:

- i.* Preparation time: Ms Foden highlighted the fact that the Applicant, in relation to his claim for commission payments, had sought

extensive disclosure of financial information relating to FYE 2011 including detailed disclosure of information relating to rates, rents, repairs and maintenance, vehicle costs, and the business purpose of the company owned vehicles, lists of employees and students, student tuition fees and grants, which resulted in detailed correspondence between the representatives. The correlation of this information involved the current CEO and accounts clerk in extensive work. Significantly, this aspect of the Applicant's claims was subsequently withdrawn.

- ii. The fact that the Respondent made a Calderbank¹ offer, that is a without prejudice save as to costs offer, to Mr Thompson. This offer was made in a letter dated 3 April 2012 (the Offer), which is before the Authority.
- iii. The conduct of the Applicant, which extended the length of the Investigation Meeting by recalling the Applicant to seek to rebut evidence relating to the unsuccessful unjustifiable dismissal claim.

Submissions of the Applicant

[5] Mr Finnigan, on behalf of Mr Thompson, submitted that:

- i. The GST element of the costs award claimed by the Respondent should not be included as it is recoverable by the Respondent.
- ii. Whilst Mr Thompson was unsuccessful in the personal grievance part of his claim, he was successful in his claim for a commission payment.
- iii. In respect of the Offer, significant costs had already been incurred by Mr Thompson and these were in excess of the Offer amount. In the event that Mr Thompson had claimed costs in respect of the successful part of his claims, the Offer would have marginal relevance to the Authority's discretion on costs.
- iv. Mr Thompson's claim for unpaid commission for FYE 2011 was a responsible action given his legitimate concerns about the accuracy of

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA)

the Respondent's financial information, and further, had been withdrawn based on the information disclosed by the Respondent. Had the information been provided at an earlier stage, this would have had the effect of Mr Thompson withdrawing the claim at an earlier stage, and saving his own costs.

- v. The conduct of the Applicant did not unnecessarily prolong the investigation process, and therefore did not affect the Respondent's costs adversely.
- vi. The work undertaken by ATA's CEO and accounts clerk cannot be held to have increased the Respondent's legal costs.

Principles

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

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.

[7] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*².

[8] The principles and the approach adopted by the Authority on which an award of costs is made are well settled: *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³

[9] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁴ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁵ at para [48] "As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.

² [1996] 2 ERNZ 622

³ [2005] 1 ERNZ 808

⁴ [2005] 1 ERNZ 808

⁵ [2001] ERNZ 305

Determination

[10] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a 1 day investigation meeting this would normally equate to \$3,500.00, and therefore for 2 days of investigation meeting, this would normally equate to an award of \$7,000.00.

[11] Ms Foden is not seeking an award of costs at the notional daily tariff rate for the 2 day Investigation Meeting, but the reimbursement in full of the Respondent's actual costs which I observe are lower than the notional daily tariff rate applicable in this case.

[12] I see no reason in the current case for departing from the normal level of awards made by the Authority on the basis of the level of preparation time undertaken by the Respondent, for participation in additional telephone conferences with the Authority, or indeed for preparation of costs submissions. These actions are part of the normal Authority process

[13] However the reasonable and timely efforts to settle proceedings are of more persuasion. The first day of the Authority Investigation Meeting was held on 24 April 2012. The Offer dated 3 April 2012 was made in advance of the Investigation Meeting, albeit not before some preparation costs had been incurred in relation to the Applicant's requests for detailed information. I consider that there was sufficient time for the Applicant to consider the Offer prior to the Investigation Meeting.

[14] Mr Thompson was successful in his claim for unpaid commission payments and was awarded the sum of \$1,949.60 by the Authority. The amount contained in the Offer was \$4,000.00 which was in excess of the amount awarded to Mr Thompson by the Authority. . The Offer placed the Applicant on notice that it would be produced to the Authority in support of an application for a full costs award.

[15] In considering the effect the Offer should have upon the award of costs in this matter, I take into consideration the Court of Appeal decision in *Aoraki Corporation Ltd v McGavin*⁶ in which the Court in commenting on the exercise of this discretion, noted that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore these "Calderbank"⁷ offers without costs being impacted:

⁶ [1998] 1 ERNZ 601

⁷ *Calderbank v Calderbank* [1976] Fam 93 (CA)

The discretion as to costs is a judicial one to be exercised according to what is reasonable and just to both parties and the public interest in the fair and expeditious resolution of disputes requires that full weight be given to the extent to which costs were properly incurred subsequent to the non-acceptance of an offer of settlement at a figure above the amount eventually awarded in the litigation.

[16] Additionally the need for a “*more steely*” approach to costs where reasonable settlement proposals have been rejected was noted by the Court of Appeal in *Health Waikato Limited v Elmsley*.⁸

[17] I also take into consideration the fact that, whilst Mr Thompson was successful in his claim for unpaid commission, the majority of the 2 days of the Investigation Meeting were concerned with the unsuccessful personal grievance claim.

[18] Weighing those factors in the discretionary exercise of awarding costs, I consider that the Respondent should be awarded reimbursement of its actual costs. However taking into consideration the Chief Judge’s conclusions on the issue of whether or not GST should be included in any costs award⁹, I take cognizance of the fact that in respect of the Respondent GST will be recoverable, and consequently do not include the GST element as part of the costs award.

[19] Accordingly, Mr Thompson is ordered to pay ATA \$4,860.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority

⁸ [2004] 1 ERNZ 172 (CA) at [53]

⁹ *Davidson v Christchurch City Council* [1995] 1 ERNZ 523