

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 361  
5540519

BETWEEN                      HAYLEY TUNNELL  
   Applicant  
  
AND                                THE RIV LIMITED  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Ken Usmar for Applicant  
   Erin Locke for Respondent  
  
Submissions received:      5 October 2015 from Applicant  
   21 October 2015 from Respondent  
  
Determination:              19 November 2015

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A.      The Riv Limited is ordered to pay to Ms Tunnell the amount of \$3,500 without deduction as a contribution to her costs within 14 days of the date of this determination.**

[1]      In a determination dated 29 September 2015<sup>1</sup> I held Ms Tunnell was unjustifiably dismissed from her employment at The Riv Limited (The Riv Ltd) and awarded remedies of lost wages and compensation amounting to \$11,020.00.

[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.

[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

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<sup>1</sup> [2015] NZERA Auckland 301.

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.<sup>2</sup> As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup> 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.<sup>4</sup>

### **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 Appeal<sup>5</sup>:

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.<sup>6</sup>

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

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.<sup>8</sup>

[7] On 23 March 2015 and after the parties had attended mediation, Ms Tunnell through her advocate wrote to The Riv Ltd offering to resolve matters by the provision of a certificate of service, payment to Ms Tunnell of \$3,000.00 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 and a contribution to Ms

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

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

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

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

<sup>6</sup> *Ibid* at [18].

<sup>7</sup> [\[2014\] NZEmpC 15](#); [\[2014\] ERNZ 1](#).

<sup>8</sup> *Ibid* at [27].

Tunnell's costs of \$1,000 plus GST. The offer remained open for acceptance until Friday 27 March 2015 at which time Ms Tunnell intended lodging proceedings in the Authority.

[8] A further offer was made on 10 July 2015. This offer included a claim for short paid wages, the provision of a reference, compensation of \$4,000 and a contribution to costs of \$1,500 plus GST. The offer was open for acceptance until 16 July 2015.

[9] I have not been provided with any explanations as to the reasons why The Riv Ltd rejected the offers which I find to be more than reasonable particularly in light of Ms Tunnell's success in the Authority. The rejection of the offers by The Riv Ltd was unreasonable and warrants an up-lift in costs.

[10] The investigation meeting took approximately half a day and that included the delivery of an oral determination. Ms Tunnell was successful in all of her claims. Applying the daily tariff would see the award of a contribution in the order of \$1,750.00. Ms Tunnell, however, seeks more and asks for full reimbursement. In the event this is declined she asserts an increase in the daily tariff is warranted. Ms Tunnell incurred costs in the total sum of \$9,048.00.

[11] In *Stevens v Hapag Lloyd*<sup>9</sup> the Employment Court reiterated that proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical.<sup>10</sup>

[12] From the submissions lodged on behalf of Ms Tunnell I have ascertained that \$3,322.85 of the total costs were incurred prior to the first calderbank offer being made and related to various attendances including attendance at mediation. The balance of \$5,725.15 relates to the proceedings in the Authority. I have assessed this amount as being a modest fee and reasonable in all the circumstances.

[13] Given the unreasonable rejection of the calderbank offers an uplift would be in accordance with principle and I consider it appropriate that The Riv Ltd pay to Ms

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<sup>9</sup> [2015] NZEmpC 28.

<sup>10</sup> Ibid at [94].

Tunnell the amount of \$3,500 without deduction as a contribution to her costs and that this payment be made within 14 days of the date of this determination.

Vicki Campbell  
Member of the Employment Relations Authority