

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 585
5414051**

BETWEEN HAKOPA WHAREWHITI
 Applicant

AND WESTERN PLUMBING &
 ROOFING LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Emma Miles, Advocate for Applicant
 Rose Alchin, Counsel for Respondent

Submissions received: 29 November 2013 from Applicant
 11 December 2013 from Respondent

Determination: 20 December 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2013] NZERA Auckland 501 the Authority found that the Applicant, Mr Hakopa Wharewhiti, had been unjustifiably dismissed by the Respondent, Western Plumbing and Roofing Limited (Western Plumbing).

[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 parties have filed submissions in respect of costs.

[3] The Authority's substantive decision dealt in principle with the employment relationship problem raised by Mr Wharewhiti, but left the question of compensation for lost wages to be quantified by the parties.

[4] The parties have been unable to quantify the issue of lost wages compensation between them and that matter has also devolved to the Authority for determination.

Costs

[5] This matter involved a one day investigation meeting. Ms Miles, on behalf of Mr Wharewhiti, citing actual costs of \$11,049.67 (inclusive of GST and disbursements), is seeking a contribution towards costs of \$3,000.00 on the following basis:

- Mr Wharewhiti had been successful in his unjustifiable dismissal claim before the Authority.
- Mr Wharewhiti was awarded remedies in respect of compensation, unpaid wages and a notice period which he had sought to claim on previous occasions, specifically by means of two Calderbank¹, that is without prejudice save as to costs, offers.
- The Calderbank offers were made on 4 February 2012 (the First Offer) in the amount of \$4,500.00, and on 30 April 2013 (the Second Offer) in the amount of \$5,000.00.

[6] Ms Alchin, for Western Plumbing, citing actual costs of \$12,920.25, seeks a contribution to costs on the basis that:

- The First Offer included a claim that Mr Wharewhiti be paid full wages and holiday pay up the date of resolution. This would have represented a significant uplift in the amount of \$4,500.00 offered to settle in the First Offer, and on that basis the First Offer had been rejected by the Respondent in a letter dated 21 February 2013 which contained a counter-offer to settle the matter in the sum of \$1,000.00 (the First Counter-Offer).
- The Second Offer had been responded to with a counter offer to settle the matter in the sum of \$3,500.00 (the Second Counter-Offer).
- Subsequent to the parties attending mediation, the Respondent had again sought to resolve the matter by means of a counter-offer made on 10 June 2013 via the mediator in the sum of \$5,500.00 (the Third Counter-Offer).

[7] Ms Miles submits that the Applicant was not aware of the Third Counter-Offer but had it been, the Third Counter-Offer would have been accepted, and the need for further costly litigation would have been avoided.

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

Principles

[8] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) 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.*

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

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

[11] 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.”

[12] It is also a principle that costs are not to be used to punish the unsuccessful party.

Determination

[13] 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.

The Calderbank offers

[14] It is necessary for me to consider the effect the First and Second Offers and the First, Second and Third Counter-Offer should have on costs. The Court of Appeal in *Health*

² [1996] 2 ERNZ 622

³ [2005] 1 ERNZ 808

⁴ [2005] 1 ERNZ 808

⁵ [2001] ERNZ 305

*Waikato Limited v Van Der Sluis*⁶ observed that: “the Calderbank letter field is fully discretionary”. The nature of this wide discretion is that if the Authority awarded a lesser amount than the amount offered in the Calderbank letter, there would be no absolute protection to the party which had made the offer in terms of costs. Equally, the Authority may take into consideration a Calderbank letter when more has been awarded than was offered.

[15] As noted by Chief Judge Goddard in a passage from *Oglivy & Mather v Darroch*⁷ *I* the purpose of a Calderbank offer is:

... to induce the Court by this means to exercise its discretion against granting the plaintiff any costs if it has recovered less by proceeding with the case than it could have by accepting the offer ...It is intended to put pressure on plaintiffs and discourage them from proceeding with litigation that may turn out to be unproductive simply for the sake of a cathartic day in court.

[16] The Court of Appeal in *Aoraki Corporation Ltd v McGavin*⁸ in commenting on the exercise of this discretion in respect of costs, 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 offers without costs being impacted:

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.

[17] 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*.⁹

[18] In determination [2013] NZERA Auckland 501 the Authority awarded Mr Wharewhiti a sum of approximately \$5,300.00 in total. The amount awarded to Mr Wharewhiti for hurt and humiliation under s 123(1)(c)(i) of the Act had been reduced on the basis of contributory conduct by Mr Wharewhiti. To also take that fact into consideration

⁶ [1997] 10 PRNZ 514

⁷ [1993] 2 ERNZ 943

⁸ [1998] 1 ERNZ 601

⁹ [2004] 1 ERNZ 172 (CA) at [53]

when assessing the level of costs to be awarded I consider would have the effect of further ‘punishing’ Mr Wharewhiti, which is not a principle to be used when assessing costs.

[19] In the lack of documentary evidence before the Authority, and the dispute between the parties as to the existence of the Third Counter-Offer I proceed on the basis that the Second Offer made to Western Plumbing proposed a sum for settlement which was very close to that awarded by the Authority to Mr Wharewhiti.

[20] The Second Offer was made in ample time for Western Plumbing to consider it prior to the Investigation Meeting, and indeed it had, countering it with the Second Counter-Offer which was at a level below that subsequently awarded by the Authority before contribution had been assessed.

[21] Having considered all of the circumstances, I can see no justification for not making the costs award to Mr Wharewhiti as the successful party in the proceedings.

[22] Accordingly, Western Plumbing is ordered to pay Mr Wharewhiti \$3,000.00 costs, plus disbursements of \$771.55 (incl GST) pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Lost wages quantification

[23] The Authority’s substantive determination held that Mr Wharewhiti was to be paid two weeks’ notice period in addition to 4 days worked but not paid. From that amount was to be deducted the increased amount of the Carer’s Benefit awarded during that two week period.

[24] Mr Wharewhiti stated at the Investigation Meeting that he worked a 40 hour week, and was paid an hourly rate of \$17.00. That equates to a weekly rate of \$680.00 gross, and a daily rate of \$136.00 gross.

[25] Western Plumbing is ordered to pay Mr Wharewhiti the sum of \$544.00 gross as loss of wages for 4 days.

[26] Western Plumbing is ordered to pay Mr Wharewhiti the sum of \$1033.40 gross as 2 weeks’ notice (calculated as \$680.00 gross per week, less carer’s supplement of \$163.31 per week)

Eleanor Robinson
Member of the Employment Relations Authority