

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Gail Williams (Applicant)
AND The Warehouse Limited (Respondent)
REPRESENTATIVES John Burley, Counsel for Applicant
Penny Swarbrick, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
MEMORANDA RECEIVED From respondent 27 March 2006
From applicant 17 May 2006
DATE OF DETERMINATION 16 June 2006

COSTS DETERMINATION OF THE AUTHORITY

The respondent successfully defended the applicant's personal grievance claim and now seeks costs. The respondent provided a Calderbank offer on 26 September 2005, several weeks prior to the investigation meeting which took place on 2 November 2005. The offer was for \$17,000 pursuant to s.123 (c) (i) and a \$3,000 contribution to legal costs and it was open for acceptance until 7 October 2005. The respondent seeks indemnity costs of \$13,695.00; or, if indemnity costs are not awarded, an award of \$8,000 plus \$150 of disbursements.

The respondent submitted that the key principles evident in NZALPA v Registrar of Unions [1989] 2 NZILR 550, Okeby v Computer Associates (NZ) Ltd [1994] 1 ERNZ 613, Julian v Air NZ [1997] 1 ERNZ 337 and Victoria University v Alton-Lee [2001] 1 ERNZ 305 were that while costs were discretionary they normally followed the event and would be awarded to the successful party, that any award should not be illusory and would generally reflect a reasonable contribution to the successful party's reasonably incurred costs but would not be so high as to be punitive or oppressive. Ms Swarbrick also submitted that where there had been a Calderbank offer full costs, or a substantial contribution to costs, should be awarded.

Costs for preparation and attendance at the investigation meeting were all incurred after mediation and in the conduct of litigation. The work covered by the invoices was all necessary for the preparation of the hearing given the scope of the pleadings and the range of the matters raised. The time spent was 37.5 hours of counsel's time including preparation for a full day's hearing, briefing of witnesses and drafting legal submissions.

The respondent was required to defend a wholly unmeritorious case, had to commit significant resources and incur significant legal costs. It was reasonable for the respondent to incur those costs given the serious implications for its business if the claim had been upheld, the hearing lasted a full day, an offer was made to settle and the respondent has also incurred the costs of executive time.

The applicant submits that indemnity costs are inappropriate. With regard to the Calderbank offer, Mr Burley noted the decision in Shanks v Agar (t/a Rod Agar & Co) [1996] 2 ERNZ 578 where the Court stated that it would not normally be appropriate to take such an offer into account when the plaintiff lost. That was in the context of a costs decision by the Court.

In PBO Ltd (formerly Rush Security Ltd) v Da Cruz, 9/12/05, Colgan CJ, Travis & Shaw JJ, AC 2A/05 the Full Court held that the principles established in a triumvirate of Court of Appeal cases were relevant to the exercise of the Court's discretion when awarding costs but were not applicable to the Authority.

The Authority is to judge the reasonableness of the parties' costs in the light of the procedure adopted by the Authority, which, in the instant case was largely inquisitorial but with the opportunity for counsel to ask additional questions.

The Full Court also held that costs principles applied by the Authority were not necessarily as comprehensive or prescriptive as those set out in Okeby. The principles are that:

- the Authority was to exercise its discretion according to equity and good conscience, which was to be considered on a case by case basis;
- costs were not to be punitive nor were they to express disapproval of conduct with the exception of conduct which unnecessarily increased costs;
- the Authority could consider whether all or any of the costs incurred were unnecessary or unreasonable;
- without prejudice offers can be taken into account;
- costs generally follow the event; awards are modest;
- frequently costs are judged against a notional daily rate.

This is not an appropriate case for the awarding of indemnity costs.

I have calculated the respondent's reasonably incurred costs as being a day's hearing time (8 hours) plus three day's preparation time – a total of 32 hours. Applying a rate of \$250 per hour gives \$8,000. The respondent was wholly successful in defending a not insignificant claim and is entitled to a reasonable contribution to these costs.

The Calderbank offer is a significant factor in assessing what reasonable costs should be. It was, as Mr Burley noted, a generous offer given the level of compensation awards; and it included a fair offer regarding costs. Had the applicant accepted the generous settlement offer the respondent would have been spared the costs of preparation for the investigation and the costs of appearing during the investigation meeting.

The making of the without prejudice offer is a significant factor in departing from the notional daily rate. The applicant is to pay the respondent the sum of \$5,000 plus \$150 disbursements.

Dzintra King
Member of Employment Relations Authority