

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Kube Sherron Jones (Applicant)  
**AND** Baycorp Advantage (NZ) Ltd (Respondent)  
**REPRESENTATIVES** Margaret Lewis, Counsel for Applicant  
Richard McIlraith, Counsel for Respondent  
**MEMBER OF AUTHORITY** Dzintra King  
**MEMORANDA RECEIVED** 15 March 2005 and 14 April from Respondent  
7 April from Applicant  
**DATE OF DETERMINATION** 12 May 2005

**COST DETERMINATION OF THE AUTHORITY**

The respondent successfully defended a personal grievance claim brought by the applicant and now seeks costs. Baycorp's costs total \$124,420 and disbursements amount to \$11,468.15. The respondent seeks full payment or a substantial contribution to its actual legal costs. Mr McIlraith submitted that costs should be awarded on the basis of Binnie v Pacific Health Limited [2002] 1 ERNZ 438. The applicant opposes costs being awarded on the basis of Binnie. I accept the applicant's submission that Binnie is not to be relied upon for an award of costs in the Authority: Harwood v Next Homes Limited [2003] 2 ERNZ 433, Graham v Airways Corporation of NZ Ltd (2004) 7 NZELC 97,421.

What I intend to do is consider the actual costs incurred, assess whether those costs were reasonably incurred and then determine what a reasonable contribution of the reasonably incurred costs would be.

Another matter which I must take into consideration is the two Calderbank offers made by the respondent. The first of these was made on 6 December 2001 shortly after Ms Jones' employment terminated on 25 October 2001. This was for \$9,250 gross and was rejected. A period of nine months elapsed before Ms Jones filed a claim on 20 September 2002. The parties attended mediation on 19 December 2002. The next day Baycorp made a very generous offer to Ms Jones of \$32,500 pursuant to s.123 (c) (i) in full and final settlement. The offer was rejected.

Three months later the applicant sought to have the matter removed to the Employment Court. This was determined on the papers and the application was declined and costs were reserved. It was then agreed that the matter would be heard on the basis of establishing liability only. During the course of the Investigation issues related to Ms Jones' computer records and the deletion of those by Baycorp were raised. A computer forensic expert was hired and submissions were made on the recovered documents.

Of the costs incurred by Baycorp \$4,024.50 were incurred in relation to the mediation in December 2002. The sum of \$3,950 was incurred in opposing the application for removal and \$28,200 was incurred in recovering documents after the Investigation Meeting, in making submissions regarding the documents and in making closing submissions. \$8,975.50 was incurred after the filing of the statement of Problem and in the filing of the Statement in Reply. \$79,270.00 was incurred in preparation for and in attending the Investigation.

The invoices cover a total of 386.6 hours of work which incorporates 111.4 hours of Mr McIlraith's time, 208 hours of Mr Turner's time and 49.2 hours of junior solicitors' time. The charge out rate for partner time was \$450 per hour, for senior solicitor time \$300 per hour and junior solicitor time of \$250 per hour. Mr McIlraith submitted the matter justified having two counsel given the amount of evidence involved and the quantum - \$430,000 – claimed by Ms Jones. The issues raised were of great importance to Baycorp as an entity and also of particular significance to some of the managers, one in particular.

Of significance is the fact that the matter was indubitably of significance to both parties, the fact that the claim, for a person of 12 weeks' employment, was substantial and that the delay pursuing it meant that some witnesses had left the company's employ. Furthermore, Ms Jones' claim was very broad.

The actual costs incurred by the respondent are very high. While the respondent was in the fortunate position of having the resources to enable it to have two counsel this was, fundamentally, a personal grievance that was not legally complex. Reasonable costs would amount to three days' hearing time plus six days' preparation time. At a charge out rate of \$450 per hour the costs would be \$32,400. To that must be added an amount for dealing with the unsuccessful application to remove proceedings to the Court. I set that at \$1,600. Reasonably incurred costs must also include an amount for dealing with the issues surrounding the recovery of documents. Because, as I said in the substantive determination, the respondent should not have deleted the files in the first place, and must accept some responsibility for the costs incurred in relation to this, I am prepared to set that at only \$5,000. The total reasonably incurred costs therefore total \$39,000.

Ms Lewis said that Ms Jones had no income and was financially dependant upon her family and therefore not in a position to pay costs. Therefore costs should lie where they fall. The respondent says that Ms Jones has not offered any evidence of her financial state and notes that despite having incurred legal costs of \$50,000 she is nonetheless challenging the Authority's decision.

The first Calderbank offer was made before either party had incurred significant legal costs. Ms Lewis submitted that Calderbank offers are not necessarily relevant to proceedings before the Authority in the equity and good conscience jurisdiction. She argued that relevant factors included whether the offers addressed non-monetary issues relevant to the applicant and whether existing legal costs were covered in the offer. She also argued that indemnity costs were generally awarded where a party had conducted itself in a reprehensible manner. The rejection of an offer to settle did not mean that indemnity costs would follow.

This cannot be a case where costs are left to lie where they fall. Ms Jones was unsuccessful on all counts. In Diver v Geo Boys & Co Ltd, 20/5/98, Penlington J, HC Hamilton, CP 58/93 the High Court said that the rejection of a Calderbank offer did not necessarily expose the unsuccessful party to an award of full solicitor-client costs but did go to the discretionary considerations in assessing the contribution to be made to the successful party's costs. The rejection of a substantial Calderbank offer is not something that can be ignored. In light of the rejection of the offer the

amount which Ms Jones must pay to Baycorp will be higher than it would have been otherwise. Ms Jones is to pay the respondent the sum of \$20,000.

As to disbursements, I have borne in mind that the forensic search was required because Baycorp had chosen to delete the records. In deciding whether Ms Jones should pay all or any of the fee for the recovery I have taken into account the fact that I am told she is still unemployed. In the circumstances, I will not order Ms Jones to pay any part of the \$11,468.15.

Dzintra King  
Member of Employment Relations Authority