

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 76C/08  
5099048

BETWEEN

JONATHAN JOSEPH  
Applicant

AND

MAATAA WAKA KI TE TAU  
IHU TRUST  
Respondent

Member of Authority: Helen Doyle

Representatives: Kay Stringleman, Advocate for Applicant  
Brian Fletcher, Counsel for Respondent

Submissions Received: 6 November 2008 from the applicant  
13 November from the respondent

Determination: 4 December 2008

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In my determination dated 30 June 2008 I found that the applicant had a personal grievance that he had been unjustifiably dismissed.

[2] The issue of remedies was reserved to enable Mr Fletcher to provide some further information about alleged later discovered misconduct which he said impacted on remedies. There was a further issue as to whether or not Mr Joseph had breached a non-publication order.

[3] In a further determination dated 3 November 2008 I determined the issue of remedies and made an award to Mr Joseph for compensation for humiliation and loss of dignity in the sum of \$2,000 but did not make an order that he be reinstated to his previous position with the respondent. I was not satisfied that there had been the alleged later discovered misconduct and therefore that was not taken into account in determining remedies.

[4] Submissions were received from Ms Stringleman and Mr Fletcher with respect to costs. Ms Stringleman submitted Mr Thompson's actual costs, including disbursements and GST, were \$6440.30 for the investigation meeting of one day's duration. Ms Stringleman said that there were additional costs relating to the matters following the determination of 30 June 2008.

[5] Mr Fletcher submits that the respondent made a without prejudice offer save as to costs to the applicant and there is no justification given the nature of that offer for an award of costs to the applicant, and there should be an order in favour of the respondent in terms of costs, or the costs should lie where they fall.

[6] Ms Stringleman and Mr Fletcher refer in their respective submissions to *PBO Limited v. Da Cruz* [2005] 1 ERNZ 808 and the principles in that case with respect to costs held to be appropriate to the Authority and consistent with its functions and powers. I have applied the principles in *Da Cruz* in determining costs in this matter.

### **Determination**

[7] It is well established that the party who is not successful pays a contribution towards the costs of the successful party. The Authority has before it an offer made in a letter dated 16 November 2007, expressed to be without prejudice save as to costs, to the union representing Mr Joseph. The offer contained in the letter is \$1,500. A letter of this nature is known as a Calderbank letter. The offer made to Mr Joseph was made well before the investigation meeting and therefore before preparation costs had been incurred. There was a fair period for consideration of the offer by Mr Joseph until 20 December 2007. The letter provided that if the offer was not accepted the right to produce the letter in support of any claim for costs was reserved. Mr Joseph received an additional \$500 as a result of pursuing the matter in the Authority.

[8] It is necessary to consider what, if any, effect the letter of 16 November 2007 should have on costs. The Court of Appeal in *Health Waikato Ltd v. Van Der Sluis* [1997] 10 PRNZ 514 made it clear that the effect of a Calderbank offer on an award of costs is fully discretionary. That means that even if the Authority had awarded payment of a lesser amount than that offered in a Calderbank letter there is no absolute protection to the party making the offer in terms of costs. Because the discretion is a wide one the Authority can also take into account a without prejudice

offer in the nature of a Calderbank offer when more is awarded than was offered. All the circumstances have to be taken into account and not simply the offer.

[9] The offer was a proper attempt by the respondent at an early point to attempt to resolve the matter without expending further funds on litigation. It was less than but extremely close to, the amount awarded to Mr Joseph. At the time the offer was made costs would not have been incurred by Mr Joseph in preparation for the investigation meeting. I have taken into account that Mr Joseph wanted a non-monetary order that he be reinstated and I accept that he was genuine in seeking that. Mr Joseph was unsuccessful in obtaining an order for his reinstatement and there was always a considerable risk that such an order would not be made in light of his conduct.

[10] I have concluded taking all the circumstances into account that the Calderbank letter should be given some weight and taken into account in terms of any cost award made in favour of the applicant but I do not conclude in the circumstances that it should result in an award in the respondent's favour or that costs should lie where they fall. There is no departure therefore from the usual principle that the party who is not successful pays a contribution towards the costs of the successful party.

[11] I would have started with a notional daily tariff for costs for the applicant of \$2,500. I reduce that taking into account the offer of settlement to \$1,500. The investigation meeting took one day. I do not consider it unreasonable that the respondent would raise the alleged breach of the non-publication order concerning a witness with the Authority and Ms Stringleman. There was however no evidence to support that Mr Joseph was responsible for the inquiries by The Dominion. I therefore adjust the award upwards by \$300. This reflects that any time spent and costs incurred by Mr Joseph would have been spread between himself and two other individuals who also took personal grievances against the respondent.

[12] I do not find that the allegation of later discovered misconduct by the respondent was unreasonably put. The Authority however was not satisfied that the misconduct alleged had taken place and it was not taken into account in terms of remedies. In terms of this matter I have also taken into account that Mr Fletcher did not receive a copy of an email which contained an early denial of the allegation. In all the circumstances I make an adjustment to allow for costs that Mr Joseph would have incurred in dealing with this additional matter in the sum of \$500.

[13] There is a claim for travel and accommodation expenses for Ms Stringleman in the sum of \$345.30. Mr Fletcher takes issue with that claim and in particular with the claim for accommodation costs. He submits that such a disbursement for accommodation is not allowed in the High Court without special direction of the Judge and without special reason. I have considered under Schedule 2 of the Employment Relations Act whether the appointment of Ms Stringleman and the expenses incurred because she was an out of town representative were reasonable. I am not persuaded that the appointment of Ms Stringleman was so unreasonable that Mr Joseph should be deprived of any contribution towards her expenses in travelling to and staying in Blenheim and returning to Christchurch. I have reduced the claim to make some allowance for the fact that it was the applicant's choice or, that of his union, to instruct an out of town representative.

[14] In all the circumstances I am of the view that an award of \$200 for expenses for travel and accommodation would be fair. I consider the disbursement for printing, postage and telephone in the sum of \$20 to be reasonable.

[15] I order Maataa Waka Ki Te Tau Ihu Trust to pay to Jonathan Joseph the sum of \$2300 costs and \$220 disbursements in this matter.

Helen Doyle  
Member of the Employment Relations Authority