

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 451
5368760

BETWEEN JANICE TAYLOR
 Applicant

A N D PAUL AND KYM SAMUELS
 LIMITED t/a NEW WORLD
 SOUTHMALL
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Paul Craggs, Advocate for Applicant
 Rodger Pool, Counsel for Respondent

Memoranda Received: 7 December 2012 from Applicant
 6 December 2012 from Respondent

Date of Determination: 12 December 2012

COSTS DETERMINATION OF THE AUTHORITY

A. Ms Janice Taylor is ordered to contribute \$4,600 towards the legal costs of Paul and Kym Samuels Limited t/a New World Southmall.

[1] In a determination dated 23 November 2012¹, the Authority dismissed Ms Taylor's unjustified dismissal claim. Costs were reserved and the parties encouraged to resolve costs by agreement. The parties were unable to reach agreement and filed memoranda on the matter.

[2] Mr Pool sought an order for a contribution to costs in the sum of \$4,600 to the total legal costs of \$14,660.50 incurred by Paul & Kym Samuels Limited t/a New World SouthMall (New World SouthMall). These costs excluded legal costs associated with attending mediation.

¹ [2012] NZERA Auckland 415

[3] Mr Craggs in response, did not address the reasons given by Mr Pool for seeking \$4,600 in costs, rather he made submissions about the reasons for Ms Taylor bringing the claim and her current financial situation.

[4] The Authority's power to award costs arises from Schedule 2, Clause 15 of the Employment Relations Act 2000. This confers a wide discretion on the Authority to award costs, on a principled basis. The general principle is that costs follow the event.

[5] The Employment Court in *Carter Holt Harvey v. Eastern Bays Independent Industrial Workers Union & Ors*² observed that a notional daily tariff approach, which was to be adjusted in a principled way, was best suited to the Authority's unique jurisdiction. Mr Pool for New World SouthMall seeks an award of costs of \$4,600 which is higher than the notional daily rate of \$3,500.

[6] Mr Pool relied on the existence of two *Calderbank* offers and other attempts to resolve the matter prior to the investigation meeting in support of his application for an award of \$4,600 contribution to costs.

[7] *Calderbank* offers were contained in two letters by Mr Pool for New World SouthMall headed "*without prejudice except as to costs*". The first offer was dated 9 August 2012 and was framed as a payment to Ms Taylor of \$2,500 under s.123(1)(c)(i) of the Employment Relations Act 2000 ("the Act"). The offer was expressed to be open for acceptance by Ms Taylor for seven days.

[8] A second offer was made in an emailed message to Mr Craggs dated 27 August 2012 and remained open for acceptance by Ms Taylor until Friday 31 August 2012. This offer was for \$4,000 under s.123(1)(c)(i) of the Act.

[9] The two *Calderbank* letters together with copies of Mr Pool's tax invoices are attached to the memorandum filed by Mr Pool.

[10] There are no emails from Mr Craggs in response. New World SouthMall's *Calderbank* offers are relevant in that they included monetary offers, yet Ms Taylor was ultimately unsuccessful in her claims. The offers were made in a timely manner when both parties' costs must still have been at low levels. It is appropriate for the *Calderbank* offers to be taken into account.

² [2011] NZEmpC 13

[11] The investigation meeting was scheduled to take place on 17 September 2012. However, during the course of the meeting it became apparent that Ms Taylor had not received New World SouthMall's witness statements. It appears that there was some confusion between the parties about service of the documents and I do not propose taking this matter into account in determining appropriate costs.

[12] Mr Craggs refers to Ms Taylor's poor financial situation and asks that it be taken into account in determining costs. Mr Craggs states in his memorandum that Ms Taylor is currently employed on a part-time basis and is being assisted financially by family members. Mr Craggs has not provided any further details about Ms Taylor's financial position. Further, there are no details about Ms Taylor's own legal costs.

[13] It is appropriate for Ms Taylor to contribute towards New World SouthMall's costs. She knew she was at risk of costs if her claim was unsuccessful. I also take into account the *Calderbank* offers that were made. I recognise that Ms Taylor will suffer some hardship as a result of the costs award but this is an expected and acceptable consequence of a party's decision to engage in unsuccessful litigation³.

[14] A notional daily rate of \$3,500 is commonly applied for a one day investigation meeting in the Authority. The meeting took a whole day. Accordingly, the starting point for assessing costs is \$3,500.

[15] The only question of substance affecting whether the notional daily rate should be increased or decreased concerns the offers to settle. Two *Calderbank* offers were received by Ms Taylor and not responded to. Further attempts to settle were made following the adjournment of the first investigation meeting hearing on 17 September. The matter was still not resolved.

[16] Taking into account all of the above considerations, I conclude that the notional daily rate should be increased to \$4,600 which is considerably less than the actual costs incurred by New World SouthMall in defending the claim.

³ *Gates v Air New Zealand Ltd* [2010] NZEmpC 26

[17] Ms Taylor is therefore ordered to contribute to New World SouthMall's costs in the sum of \$4,600.

Anna Fitzgibbon
Member of the Employment Relations Authority