

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 183  
5522495

BETWEEN

MOBEEN BHIKOO  
Applicant

AND

STEPHEN MARR HAIR  
DESIGN NEWMARKET  
LIMITED  
Respondent

Member of Authority: Vicki Campbell  
Representatives: Paul Pa'u for Applicant  
Paul Wicks, QC for Respondent  
Submissions received: 17 June 2015 from Applicant  
2 June 2015 from Respondent  
Determination: 23 June 2015

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. Mr Bhikoo is ordered to pay to Stephen Marr Hair Design Newmarket Limited the sum of \$4,000 within 14 days of the date of this determination.**

[1] In a determination dated 8 May 2015<sup>1</sup> I held Mr Bhikoo had not been unjustifiably dismissed and declined Mr Bhikoo's application for penalties for breaches of the Employment Relations Act 2000.

[2] I reserved the matter of costs, indicating that if the parties were unable to resolve that issue, both parties would have the opportunity to file cost memoranda and evidence. I am now in receipt of submissions from both parties.

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<sup>1</sup>[2015] NZERA Auckland 130.

[3] Stephen Marr Hair Design Newmarket Ltd (Marr Hair Design) seeks an uplift at the higher end of what is normally awarded by the Authority.

[4] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event.

### **Determination of costs**

[5] Under normal circumstances the Authority would apply a starting point of a notional daily tariff for quantifying costs.

[6] The Authority has been provided with evidence that Marr Hair Design incurred costs of \$26,618.50.

[7] As held recently by the Employment Court, the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.<sup>2</sup> As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup> awards in the Authority will be modest taking into account conduct which increases costs unnecessarily.

### **Calderbank offer**

[8] The Authority will take into account, when dealing with the issue of costs, any offers made by the parties to settle matters. As stated by the Court of Appeal<sup>4</sup>:

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer with any consequences as to costs.<sup>5</sup>

[9] As was held by the Employment Court in *Mattingly v Strata Title Management Limited*<sup>6</sup>:

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a “steely approach” ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court’s observation in *Da Cruz* that Authority

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<sup>2</sup>*Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

<sup>3</sup> (2006) 7 NZELC 98,128; [2005] ERNZ 808; (2005) 3 NZELR 1 (EMC).

<sup>4</sup> As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385.

<sup>5</sup> *Ibid* at [18].

<sup>6</sup> [2014] NZEmpC 15; [2014] ERNZ 1.

awards will be “modest”. What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a de novo challenge, having regard to the circumstances of the particular case.<sup>7</sup> [my emphasis]

[10] On 16 February 2015 a Calderbank offer was made by Marr Hair Design to resolve the employment relationship problems between it and Mr Bhikoo. The offer was a pragmatic offer to resolve all matters with the payment of \$10,000 pursuant to section 123(1)(c)(i) with costs to lie where they fall. The offer was available for acceptance up until 1 March 2015. The offer was rejected by Mr Bhikoo.

[11] I have not been provided with any explanations as to the reasons why Mr Bhikoo rejected the offer which I find to be more than reasonable. The rejection of the Calderbank offer from Marr Hair Design was unreasonable and will affect the exercise of my discretion in determining an appropriate award for costs.

### **Determination**

[12] The investigation took less than a day. Mr Bhikoo was unsuccessful in all aspects of his claim. The Authority applies a starting point of a notional daily tariff for quantifying costs and may uplift where there is conduct which increases costs unnecessarily. The unreasonable rejection of the Calderbank offer warrants an uplift in costs.

[13] In *Stevens v Hapag Lloyd*<sup>8</sup> the Employment Court reiterated that proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical.<sup>9</sup> The Court stated that where there is a choice exercised by a party to obtain representation and apply significant legal resources that is a choice that must have regard to the generally applied daily rate.

[14] Marr Hair Design seeks to uplift in costs to \$17,500 for less than a day of investigation meeting time. The Employment Court struggled to see how a claim for \$20,000 for a two day Authority investigation meeting was “modest”.<sup>10</sup> Likewise I am not satisfied the claim for \$17,500 is modest. In any event, the offer was open for acceptance until 1 March 2015 which was the day before the respondents’ witness

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<sup>7</sup>Ibid at [27].

<sup>8</sup> [2015] NZEmpC 28.

<sup>9</sup> Ibid at [94].

<sup>10</sup> Ibid at [93].

statements were to be lodged and served. A considerable amount of the costs being claimed now would have been incurred prior to 2 March 2015.

[15] Mr Bhikoo submits that a reasonable contribution to costs that will not cause undue hardship is \$3,000. Given Mr Bhikoo's unreasonable rejection of the Calderbank offer an uplift would be in accordance with principle and I consider it appropriate that Mr Bhikoo pay to Stephen Marr Hair Design Newmarket Ltd the amount of \$4,000 without deduction as a contribution to its costs.

Vicki Campbell  
Member of the Employment Relations Authority