

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 178  
5635728

BETWEEN ROSE CHRISTIAN  
Applicant

AND PLATINUM CHAUFFEUR  
DRIVE 2012 LIMITED  
Respondent

5635738

BETWEEN KEVIN CHRISTIAN  
Applicant

AND PLATINUM CHAUFFEUR  
DRIVE 2012 LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Andrew Swan for Applicant's  
Angela Evans for Respondent

Submissions received: 1 June 2017 from Applicant's  
17 May 2017 from Respondent

Determination: 20 June 2017

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**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS  
AUTHORITY**

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**A. Mr and Mrs Christian are each ordered to pay a contribution of \$5,000 to the costs incurred by Platinum Chauffeur Drive 2012 Limited.**

[1] In a determination dated 19 April 2017<sup>1</sup> I held Mr and Mrs Christian were not employees of Platinum Chauffeur Drive 2012 Limited (Platinum).

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<sup>1</sup> [2017] NZERA Auckland 117.

[2] I reserved costs, indicating that if the parties were unable to resolve that issue, both parties would have the opportunity to file cost memoranda and evidence. These have now been received by the Authority for consideration.

[3] As the successful party Platinum is entitled to a contribution to its reasonable costs.

### **Determination of costs**

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

[5] This matter was lodged on 21 July 2016. The appropriate daily tariff is \$3,500.<sup>2</sup> The investigation meeting lasted one day. Platinum seeks a contribution of 70% of its total costs of \$33,502.50 plus an additional \$500 to take into account costs submissions. In total Platinum seek costs of \$19,428.

[6] 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>3</sup> As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*<sup>4</sup> awards in the Authority will be modest taking into account conduct which increases costs unnecessarily. Indemnity costs may be justified in relatively rare cases where a party's conduct is particularly egregious.<sup>5</sup>

### **Calderbank**

[7] Platinum has submitted that it is appropriate to uplift the costs award based on the unreasonable rejection of a Calderbank offer.

[8] The Authority will take into account any offers made by the parties to settle matters. As stated by the Court of Appeal:<sup>6</sup>

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<sup>2</sup> See paragraph 4 of the Practice Note 2 of the Authority dated 30 June 2016.

<sup>3</sup> *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

<sup>4</sup> (2006) 7 NZELC 98,128; [2005] ERNZ 808; (2005) 3 NZELR 1 (EMC).

<sup>5</sup> *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2 at [9].

<sup>6</sup> As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.

[9] As was held by the Employment Court in *Mattingly v Strata Title Management Limited*:<sup>7</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 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.

[10] Platinum issued a Calderbank offer to Mr and Mrs Christian on 16 December 2016. At this time Mr and Mrs Christian had lodged and served all of their witness statements and Platinum had had the opportunity to consider their evidence. The offer was available for acceptance until 19 December 2016.

[11] The witness statements for Platinum were timetabled to be lodged and served on 21 December 2017. The Calderbank offer set out Platinum’s views that Mr and Mrs Christian would be unable to establish that they were employees, however with a view to resolving all matters it was willing to make a joint payment of \$10,000. The offer would cover not only the employment issues but also any issues arising out of the contract for service and its termination.

[12] Within 3 hours of receiving the offer Mr and Mrs Christian rejected it. In their submissions Mr and Mrs Christian say they did not accept the offer because it was given on the basis that it would settle all claims between them including any claim for payment for services provided outside the employment relationship.

[13] The rejection of the Calderbank offer was reasonable in all the circumstances. The offer, if accepted, would prevent Mr and Mrs Christian from pursuing any civil remedies relating to the cancellation of their contracts for service in the event that the Authority found, as I did, that there was no employment relationship.

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<sup>7</sup> [2014] NZEmpC 15; [2014] ERNZ 1 at [27].

### **Two separate cases**

[14] Platinum submits that there should be an uplift in costs to take into account that the preparation required for the investigation meeting covered two applications. If I had not heard the two applications together the parties would have been required to attend two separate hearings. Hearing the matters together was efficient and the most cost effective way to deal with Mr and Mrs Christian's claims which were similar in nature.

[15] However, hearing the matters together still required Platinum to prepare for both cases. This warrants an uplift in the costs. Mr and Mrs Christian will each contribute an equal amount to the costs incurred by Platinum.

### **Conduct of the parties**

[16] Platinum submits that the failure of summonsed witnesses to attend the investigation meeting in accordance with their witness summons extended the time required for hearing, exposed Platinum to unnecessary costs and prevented the parties from presenting submissions at the end of the investigation meeting.

[17] On 24 January 2017 the Authority approved Mr and Mrs Christian to summons five witnesses to the investigation meeting held on 9 February 2017. All witnesses were summonsed to attend at 9.30am until they were no longer required. Without any reference to the Authority Mr Swan instructed the witnesses that they did not have to attend as required.

[18] I delayed the start of the investigation meeting and directed Mr Swan to contact all witnesses and remind them they were summonsed to attend at 9.30 and they must attend as soon as possible.

[19] The start of the investigation meeting was delayed by over one and a half hours. This delay was caused by the applicant's and warrants an uplift in costs of \$1,000.

[20] The delay affected the ability of the parties to present written and oral submissions at the end of the investigation meeting. During the case management call on 7 November 2016 I advised the parties that if it was practicable an oral

determination could be issued at the conclusion of the investigation meeting. With that in mind the parties were directed to be prepared to hand up written submissions after the evidence had been heard and that they would be provided with a brief opportunity to speak to their submissions.

[21] Mr and Mrs Christian submit that at the end of the investigation meeting Platinum advised the Authority that its submissions were prepared, that there would be no changes and that they would be filed as directed. The information provided by Platinum shows that further work on submissions was necessary as a result of additional information called for by the Authority and this further work was undertaken following the investigation meeting. It is appropriate that an uplift in costs of \$500 is awarded to recognise the need for this additional work.

### **Determination**

[22] In all the circumstances an appropriate contribution to costs is \$5,000 for each matter determined by the Authority.

[23] Mr and Mrs Christian are each ordered to pay the sum of \$5,000 (a total of \$10,000) to Platinum within 28 days of the date of this determination.

Vicki Campbell  
Member of the Employment Relations Authority