

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

**[2019] NZERA 466  
3048194**

BETWEEN                      STEPHEN DONNELLY  
   Applicant

AND                              BCT PERFORMANACE  
   LIMITED t/a MAG AND TURBO  
   HAMILTON  
   Respondent

Member of Authority:        Eleanor Robinson

Submissions received:        23 July 2019 from the Applicant  
   7 August 2019 from the Respondent

Determination:                8 August 2019

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In determination [2019] NZERA 392 it was determined that the Applicant, Mr Stephen Donnelly had been unjustifiably disadvantaged. It was further determined that that the Respondent, BCT Performance Limited trading as Mag and Turbo Tyre and Service Centre (Mag and Turbo) owed him monies in respect of unpaid wages and holiday pay.

[2]     Costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and the Respondent has filed submissions in respect of costs.

[3]     The matter involved almost 1 day of meeting time. The Respondent is claiming costs for legal advice received in respect of the claim made by Mr Donnelly in the sum of \$2,501.25.

[4]     The Respondent submits that it made a Calderbank<sup>1</sup> Offer to the Applicant to resolve the matter prior to the substantive matter being heard in a letter headed 'Without prejudice save as to costs' dated 30 October 2018 (the Calderbank Offer).

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<sup>1</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA)

[5] This offered that the Respondent would settle the matter on a full and final basis upon payment of the sum of \$8,000.00 as compensation pursuant to s 123(1)(c )(i) of the Employment Relations Act 2000 (the Act).

[6] The Applicant rejected the Calderbank Offer made by the Respondent, and counter-claimed in the sum of \$20,000.00. This counter offer was declined by the Respondent which submits that it made further attempts to resolve the matter prior to the investigation meeting.

[7] Although the Respondent was represented at the Investigation Meeting by its director rather than by a professional representative, it submits that it incurred costs in respect of professional advice obtained post-mediation and the rejection of the Calderbank Offer. Invoices have been provided to substantiate the costs incurred.

[8] The Applicant submits that the parties were represented by lay advocates rather than by experienced employment lawyers and were both self-represented at the time of the Investigation Meeting and this should be taken into account in determining the level of costs.

[9] It further submits that the Respondent appeared to have prepared its own witness statements and this should be taken into account when determining costs. On that basis, the costs claimed by the Respondent should be reduced accordingly.

### *Principles*

[10] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

#### **15 Power to award costs**

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[11] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*<sup>2</sup>.

[12] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*<sup>3</sup>.

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<sup>2</sup> *NZ Automobile Assoc v McKay* [1996] 2 ERNZ 622

<sup>3</sup> *PBO Limited v Da Cruz* [2005] 1 ERNZ 808

## Costs

[13] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>4</sup> that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*<sup>5</sup> at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[14] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing.

[15] I consider that the Calderbank Offer is a factor that should be taken into consideration in determining the appropriate level of costs. Calderbank Offers represent the public interest in the fair and expeditious resolution of disputes, which would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted<sup>6</sup>.

[16] The Calderbank Offer was made well in advance of the Investigation Meeting, and there was therefore due time for the Applicant to consider it fully prior to taking any part in that proceeding. Whilst the Applicant was partially successful in the disadvantage, unpaid wages and holiday pay claims, he was wholly unsuccessful in the unjustifiable dismissal claim. The Calderbank Offer was a reasonable offer representing significantly more than the Applicant gained at hearing.

[17] The Investigation Meeting took almost a full day of hearing time. Accordingly I consider it appropriate to award the Respondent costs which take into consideration the partial success of the Applicant.

[18] Mr Donnelly is ordered to pay Mag and Turbo the sum of \$2,300.00 towards its legal costs within 14 days of the date of this determination.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>4</sup> [2005] 1 ERNZ 808

<sup>5</sup> [2001] ERNZ 305

<sup>6</sup> *Aoraki Corporation Ltd v McGavin*<sup>6</sup> [2004] 1 ERNZ 172 (CA) at [53]