

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 54
3213679

BETWEEN NIRMAL WEHELLAGE
AND J & T CIVIL WORKS LIMITED
t/a J & T EARTHMOVERS
Respondent

Member of Authority: Eleanor Robinson
Representative: Simon Mitchell K.C., counsel for the Applicant
Danny Gelb, advocate for the Respondent
Costs Submissions: 31 January 2024 from the Applicant
12 & 16 January 2024 from the Respondent
Determination: 1 February 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a preliminary determination dated 18 December 2023 ([2023] NZERA 759) it was determined that the Applicant, Mr Nirmal Wehelling, had not raised his personal grievance with the Respondent, J & T Civil Works Limited trading as J & T Earthmovers (J & T), within the statutory 90 day time limit.

[2] In that determination I expressed the view that this was an appropriate case for letting costs lie where they fall. However the Respondent has applied for costs.

[3] The investigation meeting was held on the papers.

[4] Mr Gelb, on behalf of J & T, citing actual costs of \$10,330.80, is seeking a contribution to costs of \$4,500.00.

Submissions of the Respondent

[5] Mr Gelb submits that the starting point for a matter heard 'on the papers' should be \$2,250.00. From that starting point he submits that J & T made a Calderbank¹ offer, that is a

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA)

without prejudice save as to costs offer, to Mr Nirmal on 2 June 2023, together with a proposed record of settlement, and this provides the basis for an uplift from the starting point.

[6] The terms of the offer consisted of a compensation payment of \$500.00 plus \$500.00 as a contribution towards Mr Nirmal's costs. Mr Nirmal did not accept the Calderbank offer.

[7] Mr Gelb submits that Mr Nirmal would have been better off financially if he had accepted the offer, given that he was unsuccessful in his claim before the Authority.

Submissions of the Applicant

[8] Mr Mitchell on behalf of Mr Wehellige, submits that the Calderbank offer was of such a small amount that it cannot constitute a genuine offer to settle matters. If there had been a genuine intention to settle matters, it is submitted that J & T would have made a stronger offer that recognised the significant costs for an individual employee, in comparison to a profitable business such as that of the Respondent.

[9] It is submitted that whilst Mr Wehellige would have been financially better off if the offer had been accepted, Mr Wehellige would still have owed approximately \$2,000.00 more than J & T in the costs he had incurred.

Costs Award

[10] In considering the issue of a costs contribution, I note that it is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² that costs are modest. Principles also include that costs are reasonable and that they normally follow the event. J & T was the successful party in the matter.

[11] In regard to the Calderbank offer, whilst it is a factor to be taken into account and can be a basis for increasing the daily tariff, it is also incumbent that I consider the reasonableness of the offer.

[12] In this case, the amount offered was at such a level that I do not consider Mr Wehellige can be considered as acting unreasonably in refusing it in the circumstances.

[13] 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.

² *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

[14] This matter was determined 'on the papers'. I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a half day investigation meeting as the starting point.

[15] Accordingly Mr Wehellige is ordered to pay J & T the sum of \$2,250.00 towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act.

[16] As observed above in determination [2023] NZERA 759 I had stated that I considered this was a case in which costs should lie where they fell. Nonetheless J&T being the successful party, it is entitled to seek costs.

[17] However in circumstances in which it is submitted that Mr Wehellige will struggle to pay his own costs, I recommend that J & T consider making an arrangement with Mr Wehellige which would allow him to make payment by reasonable instalments. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

Eleanor Robinson
Member of the Employment Relations Authority