IN THE EMPLOYMENT COURT
AUCKLAND

AC 64/06
ARC 56/06

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DAVID ERNEST WATSON Plaintiff
AND	NEW ZEALAND ELECTRICAL TRADERS LIMITED T/A BRAY SWITCHGEAR Defendant

Hearing: By memoranda of submissions filed on 27 October and 9 and 17 November 2006

Judgment: 24 November 2006

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] On 12 July 2006 the Employment Relations Authority issued its costs determination following its earlier conclusion that David Watson had been dismissed unjustifiably by New Zealand Electrical Traders Limited that trades as Bray Switchgear. Mr Watson challenges the costs ordered by the Authority to be paid. Counsel for the parties agreed that the matter could be *"heard"* by the Court considering affidavits and written submissions and these have now been filed. No further hearing was sought as had been allowed for.

[2] The Authority's costs determination was succinct. It summarised the principles extracted from the most recent leading decision in this area, *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808. The determination acknowledged that costs awards in the Authority of between $2,000 and $3,000 are appropriate for one day investigations as this was. It also acknowledged the employee's two offers of settlement made before the investigation meeting, the

second of which was on its eve. The Authority concluded that the first offer was both reasonable and provided a reasonable time for Bray Switchgear to consider and respond to it and was made at a time when little or no preparation for the Authority's investigation had been undertaken by the parties. The Authority directed the employer to pay Mr Watson $2,500 *"as a reasonable contribution to costs given the subject of the investigation and the duration of the investigation meeting"*.

[3] The remedies awarded to Mr Watson for his unjustified dismissal included $845.76 (after deduction of income tax) for lost wages and $5,000 distress compensation under s123(1)(c)(i) of the Employment Relations Act 2000.

[4] Mr Watson says that his actual legal costs for representation in the Employment Relations Authority were $9,884.25 (including GST) and that he incurred the Authority filing fee of $70. He seeks a contribution of $7,500 towards these legal costs. Bray Switchgear has deposed to the Court that its legal costs amounted to $6,308.59.

[5] The first "*Calderbank* offer", albeit an offer of settlement made by Mr Watson, was that he be paid $6,000 under s123(1)(c)(I) and a contribution of $1,500 towards his legal costs together with a written apology for the manner in which he was dismissed. This proposal was rejected by Bray Switchgear, as was the company's lower counter-offer to Mr Watson. The second "*Calderbank* offer" was made, as the Authority noted, immediately before the beginning of the investigation meeting and sought the increased sum of $11,500 under s123(1)(c)(i) but inclusive of legal costs. A written apology was again sought.

[6] Bray Switchgear emphasises in its submissions the settlement counter-offer it made to Mr Watson referred to above. This was for the sum of $3,000 including costs.

[7] In support of the challenge, counsel for Mr Watson, Mr Jacobson, submits that although the Authority cannot be said to have been in error by applying a tariff based approach, it was wrong in having applied this in a rigid manner without regard to the particular characteristics of the case: see the *PBO* case. In particular, Mr Jacobson submits that his client came within only about $150 of obtaining the sum first proposed as an acceptable settlement of his claim and that this should be considered as a material factor in assessing the employer's contribution to costs. An

additional relevant factor not taken into account by the Authority is said to have been the employer's failure or refusal to give reasons for Mr Watson's selection for redundancy which was subsequently found not to have been genuine. By doing so, Mr Jacobson submitted that Bray Switchgear sought to defend an indefensible position and put Mr Watson to proof and to significant legal costs. Mr Jacobson points to the Authority's conclusion that: *"… Mr Bray had determined that, for whatever reason, he no longer wanted Mr Watson working for him and saw redundancy as a way to achieve that end"*.

[8] Although not precisely predictive of the final outcome, I consider that Mr Watson's proposal that Bray Switchgear settle for $6,000 was so close to the actual outcome of the Authority's investigation after much more was spent on costs by the parties, that it is a significant consideration in this case. Put another way, had Bray Switchgear paid this sum within a reasonable time of Mr Watson's offer, it would have saved itself significant legal costs as well as those incurred unnecessarily by Mr Watson. It follows, in my conclusion, that there is therefore an obligation on Bray Switchgear to contribute significantly to the post-offer costs that Mr Watson incurred as a result of Bray Switchgear's refusal to settle at that early stage. The Authority's determination tends to indicate, by the absence of any real reference to this significant factor, that it did not take into account this relevant consideration and, therefore, decided the costs question erroneously. I accept the submission made for Mr Watson that the Authority appears to have applied a tariff based quantification for costs and has not taken into account the special circumstances of the case and, in particular, the settlement offer that was both reasonable in the circumstances and rejected by the employer.

[9] The Court of Appeal has recently remarked that there should be a *"more … steely"* approach to costs where reasonable settlement proposals have been rejected: see the judgment of William Young J in *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (Para [53]).

[10] The present case is one in which the matter could have been justly settled at an early stage by a realistic acceptance by Bray Switchgear of its unjustified dismissal of Mr Watson and of the relatively modest remedies to which he would likely have been entitled in the Employment Relations Authority and was ultimately

awarded. Even if the Authority had taken the offer of settlement into proper account, its response cannot be described as *"steely"*.

[11] I conclude that the Authority ought to have awarded Mr Watson substantially more in costs than the $2,500 that it did and, in allowing the challenge, I increase this figure to $6,000 together with the disbursement of $70 being the Authority's filing fee.

[12] So far as this challenge is concerned, Mr Watson has been successful and is entitled to costs that I fix in the sum of $1,000 together with the disbursement of the Court's filing fees.

GL Colgan
Chief Judge

Judgment signed at 9 am on Friday 24 November 2006

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