

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 192
5365455**

BETWEEN DR ROY BARTON
Applicant

AND DARGAVILLE HIGH SCHOOL
BOARD OF TRUSTEES
Respondent

Member of Authority: Eleanor Robinson

Representatives: Emma Smith, Advocate for Applicant
Richard Harrison, Counsel for Respondent

Costs Submissions 7 May 2013

Determination: 14 May 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2013] NZERA Auckland 120, the Authority found that Dr Barton had not been unjustifiably constructively dismissed, but had been unjustifiably disadvantaged by Dargaville High School Board of Trustees (the Board).

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

[3] Both parties agree that the Board made a Calderbank¹ offer, that is a without prejudice save as to costs offer, to Dr Barton. This offer was made in a letter dated 28 November 2012 (the Offer), which is before the Authority.

[4] Ms Smith refers in her submission to *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² and submits that the principles on which an award of costs are made are well settled. These well established principles are that costs generally follow the event, without prejudice

¹ *Calderbank v Calder bank* [1976] Fame 93 (CA)

² [2005] 1 ERNZ 808

offers can be taken into account, and costs are modest. I have relied upon the principles as set out in *Da Cruz* in determining this matter.

Determination

[5] The amount proposed for settlement contained in the Offer was \$7,000.00. Dr Barton did not respond to the Board's offer.

[6] The Authority Investigation Meeting was held on 26 – 28 February 2013. The Offer was made well in advance of the Investigation Meeting and consequently before preparation costs had been incurred. There was ample time for Dr Barton to consider the Offer prior to the Investigation Meeting.

[7] It is necessary to consider what effect the Offer should have upon the award of costs in this matter. The Court of Appeal in *Health Waikato Limited v Van Der Slues*³ observed that: “*the Calderbank letter field is fully discretionary*”. The nature of this wide discretion is that if the Authority awarded a lesser amount than the amount offered in the Calderbank letter, there would be no absolute protection to the party which had made the offer in terms of costs. Equally, the Authority may take into consideration a Calderbank letter when more has been awarded than was offered.

[8] The Court of Appeal in *Aoraki Corporation Ltd v McCain*⁴ in commenting on the exercise of this discretion, noted that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore these Calderbank offers without costs being impacted:

The discretion as to costs is a judicial one to be exercised according to what is reasonable and just to both parties and the public interest in the fair and expeditious resolution of disputes requires that full weight be given to the extent to which costs were properly incurred subsequent to the non-acceptance of an offer of settlement at a figure above the amount eventually awarded in the litigation.

[9] The need for a “*more steely*” approach to costs where reasonable settlement proposals have been rejected was noted by the Court of Appeal in *Health Waikato Limited v Elmsley*.⁵

³ [1997] 10 PRNZ 514

⁴ [1998] 1 ERNZ 601

⁵ [2004] 1 ERNZ 172 (CA) at [53]

[10] Dr Barton had partial success in his claims before the Authority and was awarded compensation in the amount of \$7,500.00 in respect of the disadvantage grievance. The Offer of \$7,000.00 made by the Board must be viewed in this context.

Submissions for the Applicant

[11] Ms Smith, on behalf of Dr Barton, citing actual costs of \$27,347.00 (including GST) in legal fees, submitted that Dr Barton should be awarded costs assessed at the nominal daily tariff rate in the Authority, on the basis that:

- Dr Barton was successful in his claim against the Board, albeit in part;
- Dr Barton was awarded an increased amount in the Authority than that which had been made in the Offer;
- Success is not to be assessed solely in financial terms because matters pertaining to vindication and personal reputation or standing are of equal importance, citing the Employment Court's observation in *T&L Harvey Ltd v Duncan*⁶ that other non-monetary factors should be taken into consideration when deciding the weight to be given to a Calderbank offer;
- In Dr Barton's case, there were other non-monetary factors involved, and the Offer made by the Board offered no apology or other acknowledgment of the distress which had been caused to Dr Barton.
- In this situation it was reasonable for Dr Barton to proceed to the Authority to receive the vindication and relief he required, in particular in relation to the determination of breach of duty by the Board in relation to its failure to address his notified stress in September 2011.

[12] Ms Smith submits that the Authority should exercise its discretion to award costs to Dr Barton, noting that indemnity costs are not being sought, in the sum of \$10,500.00 based on the notional daily tariff rate of \$3,500.00 in respect of the 3 day Investigation Meeting, plus the filing fee of \$71.56 and hearing fee of \$153.33.

Submissions for the Respondent

[13] Mr Harrison on behalf of the Board submits that:

⁶ [2010] Neck 36, 31 March 2010

- The principle thrust of Dr Barton's claim against the Board was in respect of unjustifiable constructive dismissal which it successfully defended. In support of this submission, Mr Harrison highlights the level of remedies claimed by Dr Barton which totalled \$496,096.34 and which left the Board with no option but to defend the claim;
- The disadvantage claim was subservient to the unjustifiable constructive dismissal claim, and that had Dr Barton approached this in a more realistic manner there is a strong likelihood that the matter might have settled without proceeding to a 3 day Investigation Meeting, or if it had proceeded, that the hearing time required would have been drastically reduced;
- The Offer was realistic and virtually equates to the amount awarded by the Authority to Dr Barton in respect of the unjustifiable disadvantage;
- The Offer had been made well in advance of either party commencing preparation for the hearing.

[14] Mr Harrison submits that there should be an award of costs in the Board's favour taking into account the realistic Offer made by the Board at an early stage of the proceedings and acknowledging the relatively minor remedies to which Dr Barton was likely to have been entitled in the Authority.

[15] Mr Harrison is seeking costs of either:

- a. \$15,600.00 based on a non-tariff approach and using the 66% formula of actual and reasonable costs adopted regularly by the Employment Court, or
- b. \$12,000.00 on a tariff basis allowing for \$3,500.00 per hearing day plus a half day at \$1,500.00 for further submissions.

[16] The principles governing an award of costs as set out by the Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* include:⁷

Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.

It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

⁷ [2005] 1 ERNZ 808 at Para [44]

[17] The Offer was a genuine attempt to resolve the matter without further expenditure on litigation made at an early stage in the proceedings. Whilst the Offer amount fell slightly short of the sum awarded by the Authority, I consider that it was a reasonable settlement offer. I find that it is relevant and a significant factor in relation to costs in the context of the observation of the Court of Appeal in *Health Waikato Limited v Helmsley*⁸ of the need for a “*more steely*” approach to costs where reasonable settlement proposals have been rejected.

[18] I note that this approach had been followed by the Employment Court in *Watson v New Zealand Traders Ltd t/a Bray Switchgear*⁹. In that case, Chief Judge Colgan increased an award of costs in favour of a successful employee where the employer had rejected a reasonable settlement offer viewed in light of the fact that the proposed amount for settlement had been very close to amount subsequently awarded by the Authority and after significant further expenditure by the parties on costs. The Chief Judge commented:¹⁰

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 obligational base which can 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.

[19] Having given the submissions full consideration, I determine that the Offer should be given full weight.

[20] The Investigation Meeting took 2.5 days including the hearing of submissions. I see no reason for departing from the usual method of awarding costs in the Authority in this case. Accordingly, Dr Barton is ordered to pay the Board \$8,750.00 costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority

⁸ [2004] 1 ERNZ 172 (CA) at [53]

⁹ [2006] 4 NZELR 59

¹⁰ Ibid at para [8]