

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 156
5628381

BETWEEN SUSETTE BROWN
 Applicant

A N D YOUR SUCCESS LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Graeme Downing, Counsel for Applicant
 Kay Chapman, Advocate for Respondent

Submissions Received: 5 September 2017 from Applicant
 28 August 2017 from Respondent

Date of Determination: 21 September 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] I have issued two determinations in this matter. In the first,¹ I declined Your Success's application to dismiss Ms Brown's claim. In the second,² I declined Ms Brown's claims for personal grievances, payment of holiday pay and a penalty for breach of the duty of good faith. I also declined Your Success's claim that Ms Brown repay to it overpaid holiday pay.

[2] In both determinations, I reserved costs in the hope that the parties would be able to reach agreement. The parties have not been able to agree and Your Success now seeks costs.

[3] Your Success says:

- a. I should award costs to it as it successfully defended Ms Brown's claims.

¹ [2017] NZERA Christchurch 35

² [2017] NZERA Christchurch 134

- b. I should apply the daily tariff but increase it as Ms Brown failed to beat a Calderbank offer made by it that Ms Brown did not accept.
- c. Ms Brown's expectations were unrealistic and the grievances she pursued were ill-conceived and without merit - this supports increasing the daily tariff.

[4] Ms Brown says costs should lie where they fall as Your Success failed in its application to dismiss Ms Brown's claims and it failed in its counter-claims. Whilst she accepts that she failed in her claims, she is effectively saying each party's losses balances out the ledger such that no costs should be awarded. She also says the Calderbank offer does not apply in this case, primarily because it was made prior to the statement in reply being lodged and therefore she was not fully aware of Your Success's defence.

Costs

[5] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The principles and approach adopted by the Authority in respect of this power are well settled³. Based on clause 15 and the relevant case law⁴, the approach to be adopted by the Authority includes:

- a. An award of costs is discretionary and the exercise of that discretion should be made in accordance with principle and not arbitrarily;
- b. The decision to award costs is consistent with equity and good conscience jurisdiction of the Authority but equity and good conscience should be considered on a case-by-case basis in terms of the award of costs;
- c. Costs will generally follow the event but in some instances this will not be the case where, for example, the nature of the case is such that costs should lie where they fall or alternatively where an applicant has not

³ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808, reaffirmed by the Full Court in *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135

⁴ See also *Victoria University of Wellington v. Alton-Lee* [2001] ERNZ 305, *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28

bettered the terms of a *Calderbank* offer which he or she unreasonably rejected prior to the investigation meeting;

[6] Once a decision has been made by the Authority to award costs in favour of one party then the starting point for quantum is the daily tariff. It is open to the Authority to depart from applying the daily tariff in appropriate circumstances where, for example, indemnity costs may be appropriate or actual costs incurred since the rejection of a *Calderbank* offer are more appropriate. However, the standard approach is to start with the daily tariff and then consider whether that tariff should be applied on an increased, decreased or standard basis dependent on a number of factors. The factors relevant to the consideration of the increase or decrease of the daily tariff include:

- a. Costs awards in the Authority will be modest;
- b. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- c. Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;
- d. Without prejudice offers can be considered;
- e. Impecuniosity of the other party may be relevant;
- f. A decision on quantum should be also in line with principle and not determined arbitrarily bearing in mind the equity and good conscience jurisdiction of the Authority.

Discussion

[7] This is not a situation where costs should lie where they fall. Costs should follow the event and Your Success is entitled to costs for successfully defending Ms Brown's claims.

[8] My starting point for quantum is to apply the daily tariff of \$4,500.00 for a one day investigation meeting.

[9] There are however, factors that mean I should both increase and decrease the daily tariff.

[10] First, Your Success made a Calderbank offer on 28 October 2016. This was a valid Calderbank offer.⁵ Ms Brown did not accept it and she did not provide any explanation for this. Therefore, I cannot determine that it was reasonably rejected by her.

[11] Ms Brown failed to beat this Calderbank offer in my determination. The effect of this is not to establish a basis to award costs, which may occur if an applicant is successful yet a respondent seeks costs, as Your Success is entitled to costs that follow the event. The offer is however relevant to whether I should increase the daily tariff.

[12] Whilst the Court of Appeal⁶ and the Employment Court⁷ advocate adopting a “steely approach” to Calderbank offers, this does not necessarily apply to quantum. A number of factors must be considered in terms of quantum (as set out above) and Judge Inglis observed in *Stevens v. Hapag-Lloyd (NZ) Ltd*⁸ that it would be inconsistent with the statutory imperatives for significant costs awards to be imposed on unsuccessful litigants in the Authority.

[13] In *Fagotti* the Full Bench of the Employment Court’s analysis was that a \$1,000.00 uplift in respect of the daily tariff against a party who unreasonably rejected a Calderbank offer was appropriate. I think this is particularly persuasive and instructive and therefore, in this case, I believe the unreasonable rejection of the Calderbank offer justifies uplifting the daily tariff by \$1,000.00.

[14] Second, Your Success failed in its application to dismiss Ms Brown’s claims. This warrants reduction in the daily tariff to reflect the cost incurred by Ms Brown in successfully defending the application. The application was determined on the papers and given the work involved on the evidence and the submissions I assess the quantum of reduction to be \$1,500.00.

⁵ *Ogilvie & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943

⁶ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385

⁷ *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135

⁸ [2015] NZEmpC 28

[15] Third, Your Success was unsuccessful with its counterclaim. In assessing the amount of any reduction for this I am persuaded by Your Success's submission that, whilst I did not award it any sum of money for the alleged overpayment of holiday pay, I did find there was an overpayment. In the circumstances I reduce the daily tariff by a further \$500.00.

Determination

[16] Ms Brown is to pay Your Success Limited \$3,500.00 as a contribution to its costs for successfully defending her claims.

Peter van Keulen
Member of the Employment Relations Authority