

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 287
5160416 & 5370154**

BETWEEN JANE COX
Applicant

AND SILVER FERN FARMS LIMITED
Respondent

Member of Authority: Eleanor Robinson

Costs Submissions 22 August 2012 from Applicant
2 August 2012 from Respondent

Determination: 23 August 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2012] NZERA Auckland 242 the Authority found that Ms Cox had been justifiably dismissed by the Respondent, Silver Fern Farms Limited (SFF).

[2] In that determination 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 parties have filed submissions in respect of costs.

[3] This matter involved approximately half a day of Investigation Meeting, with written submissions being submitted subsequent to that. Mr Cleary, on behalf of SFF, is seeking a contributory costs award of \$4,000.00 .

[4] In support of the level of claim, Mr Cleary submits that SFF made a ‘Calderbank’ offer (the Offer) to Ms Cox, the basis of which was that the parties ‘walk away’ and let costs lie where they fall; and further that Ms Cox’s claims lacked substantial merit.

[5] Ms Watson on behalf of Ms Cox, highlighting that the Investigation Meeting took less than 4 hours, submits that account should be taken of Ms Cox’s financial situation in that Ms Cox is on a WINZ benefit.

Principles

[6] 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.*

[7] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[8] The principles and the approach adopted by the Authority on which an award of costs is made are well settled: *PBO Limited (formerly Rush Security Ltd) v Da Cruz*²

[9] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁴ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.

[10] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a 1 day Investigation Meeting this would normally equate to an award of \$3,500.00.

Determination

[11] Mr Cleary had provided a copy email dated 28 May 2012 as evidence that a ‘Calderbank’ offer (the Offer) had been made. The Investigation Meeting took place the following day, 29 May 2012, and Ms Watson, on behalf of Ms Cox, submitted that Mr Cleary had telephoned Mr Watson in reference to the Offer on 28 May 2012 after she had already left to travel to the Investigation Meeting which was held in Whangarei.

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

[12] A ‘Calderbank⁵ offer is a without prejudice save as to costs offer. I note that the email dated 28 May 2012 is not headed ‘Without Prejudice’, additionally it had been sent just one day prior to the Investigation Meeting, which would not normally be considered sufficient time for the offeree to consider the offer.

[13] I note however that the email states: “*I refer to previous discussions and a message left with Maevis last week ...* and on this basis I am prepared to accept that the email is evidence of timely previous attempts to settle the matter on the basis that SFF would seek no costs against Ms Cox if the claim was withdrawn.

[14] In considering the effect the Offer should have upon the award of costs in this matter, I take into consideration the Court of Appeal decision in *Aoraki Corporation Ltd v McGavin*⁶ in which the Court 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.

[15] Additionally 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*.⁷

[16] In the present case I take the notional daily rate of \$3,500.00 as the starting point for costs which should be awarded to SFF. On the basis that the Investigation Meeting lasted approximately half a day, I have adjusted this starting figure to \$1,750.00. The following factors suggest that rate should be adjusted upward:

- Ms Cox rejected the Offer which was made prior to the Authority Investigation Meeting;
- Ms Cox was wholly unsuccessful in her claim before the Authority

⁵ *Calderbank v Calderbank* [1976] Fam 93 (CA)

⁶ [1998] 1 ERNZ 601

⁷ [2004] 1 ERNZ 172 (CA) at [53]

[17] Factors suggesting that the rate should be reduced or remain the same are:

- The principle that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct; and
- The principle that costs awards are to be modest and reflect what is reasonably required in preparing an Authority investigation.
- Ms Cox's financial situation.

[18] Weighing those factors in the discretionary exercise of awarding costs, I consider that it is reasonable to increase the notional starting rate by \$250.00.

[19] Accordingly, Ms Cox is ordered to pay SFF \$2000.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority