

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 153
5424222

BETWEEN CTC AVIATION (NZ) LIMITED
Applicant

AND RICHARD SINTON
Respondent

Member of Authority: Trish MacKinnon

Representatives: Erin Burke, Counsel for the Applicant
Richard McCabe, Counsel for the Respondent

Submissions received: 12 and 25 March 2014 from the Applicant
24 March 2014 from the Respondent

Determination: 23 April 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 11 February 2014¹ I upheld CTC Aviation Training (NZ) Limited's claim of entitlement to payment of relocation and training bonds. I ordered Mr Sinton to pay to his former employer the outstanding amounts of those bonds as at the date of termination of his employment, plus interest.

[2] CTC Aviation Training (NZ) Limited (CTC) now seeks reimbursement of its costs in full, totalling \$14,564.56, in effect indemnity costs. These include the costs it incurred in relation to a preliminary matter raised by Mr Sinton which was decided in the respondent's favour.

[3] Ms Burke submits on behalf of CTC that full indemnity costs on a solicitor/client basis are justified because of the behaviour of the respondent in raising meritless arguments against repayment; his refusal of a *Calderbank* offer made some

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six months before the Authority's investigation meeting; the reasonableness of CTC's legal costs; and the floodgate principle.

[4] In relation to the "floodgate" principle, Ms Burke says the applicant had approximately 35 other employees subject to the same bonding arrangements as Mr Sinton at the time it made the *Calderbank* offer to him. It could not contemplate discounting or waiving the amounts owed by Mr Sinton as that "*would have opened a floodgate of employees refusing to abide by their bond agreements or seeking to have them set aside.*"

[5] Mr Sinton was represented by the New Zealand Airline Pilots Association (NZALPA). Ms Burke says the union made it clear in discussions that it would seek an order from the Authority that Mr Sinton's bonds were unenforceable. It intended all NZALPA members to benefit subsequently from the order it sought to obtain.

[6] If the Authority did not agree to full solicitor-client costs, Ms Burke submits in the alternative that a substantial uplift on the Authority's normal daily tariff is warranted.

[7] Mr Sinton, through Mr McCabe, rejects the appropriateness of indemnity costs and submits that the Authority's normal daily tariff of \$3,500 should be awarded as costs. He notes that Mr Sinton has challenged the Authority's determination and applies for a stay on the Authority decision on costs until that challenge has been determined.

[8] Mr McCabe submits that CTC's costs are excessive and resists the inclusion of the preliminary matter in the determination of costs. In relation to the *Calderbank* offer, he notes that Mr Sinton's claim that misrepresentation by CTC induced him to accept employment with that organisation needed to be investigated and determined by the Authority. He rejects the "floodgates" argument, submitting that Mr Sinton's situation, particularly with relation to the misrepresentation claim, was unique to him.

[9] In CTC's response to Mr McCabe's submissions it opposes Mr Sinton's application for a stay. Ms Burke cites "*widely accepted practice*" for the successful

party to be “*entitled to anticipate a closure to the Authority’s investigation*”². I agree with Ms Burke. As has been noted previously in the Authority:

*....it is usual to determine costs even if a challenge is pending, and when asked to do so. If the parties want to revisit the matter in the Court then no doubt they will be able to*³.

[10] Mr McCabe has advanced no reason to deviate from normal practice and his application on behalf of Mr Sinton for a stay of the Authority’s decision on costs is declined.

Discussion

[11] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000, which is set out below:

- (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.*

[12] Underpinning the award of costs are principles which have been developed and applied over time. The principles were referred to with approval by the Full Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.⁴

[13] One of those principles is that costs normally follow the event. It is appropriate that they do so in this instance, as Mr McCabe has acknowledged. The issue is over the quantum to be awarded. Other principles are that cost awards should be moderate and not used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

[14] CTC submits that, despite the fact that Mr Sinton’s arguments against repayment of the outstanding amounts of his relocation and training bonds were dismissed by the Authority in a preliminary matter, he repeated those arguments in the investigation meeting and in submissions. This required CTC to incur increased legal

² *Sandilands v Chief Executive of the Department of Corrections* WA 67A/09 which, in turn, cites 19 other Authority determinations in which the same approach has been taken.

³ *Carter v Southpark Corporation Limited* AA 108/06

⁴ [2005] ERNZ 808 (EmpC)

fees for defending the claims that had already failed. There is some merit to that submission, although I do not consider that the repetition prolonged the Authority's investigation significantly. I also note that the arguments had already been rehearsed in submissions on the preliminary matter, so it is unlikely that CTC incurred substantial additional legal costs as a result of their repetition.

[15] CTC made a *Calderbank* offer by letter dated 31 May 2013 addressed to Mr Sinton's counsel. The offer consisted of an instalment plan for repayment of the full outstanding bond amounts over three consecutive months. It was open for acceptance by Mr Sinton until 4 p.m. Wednesday 5 June 2013.

[16] This meant the offer was open for acceptance for only three working days. I consider this to be unreasonably brief in the overall time frame. Additionally, while the offer may have been genuinely meant as an attempt to resolve the matter, it appears to offer only a modest incentive to Mr Sinton to accept. I therefore decline to take the *Calderbank* offer into account in considering the appropriate costs award.

[17] I understand CTC's concerns regarding the "floodgates" argument but do not find that persuasive in the context of its claim to full client-solicitor costs. A significant part of Mr Sinton's arguments related to the relocation bond, and the misrepresentations that he claimed had led him to accept employment with the applicant. Those matters were individual to Mr Sinton.

[18] I decline to award full client-solicitor costs. However, I consider an increase in the normal daily tariff of \$3,500 to be warranted because of the preliminary matter raised by Mr Sinton. This was an application to the Authority for an order that CTC provide a breakdown of the actual and reasonable costs it incurred in providing him training in two areas of aviation instruction.

[19] On behalf of Mr Sinton, Mr McCabe raised arguments of unjust enrichment, semantics, and a breach of s. 12A of the Wages Protection Act. After the parties had made written submissions on the matter I declined to order CTC to provide the information sought by Mr Sinton and reserved the issue of costs.

[20] I note that a significant amount of research and preparation was required for CTC to respond to counsel for Mr Sinton's submissions on the preliminary issue. I find it reasonable that Mr Sinton contribute \$1,000 to the costs incurred by CTC and accordingly uplift the daily tariff by that amount.

Orders

[21] I order Richard Sinton to pay to CTC Aviation Training (NZ) Limited the sum of \$4,500 in costs.

Trish MacKinnon
Member of the Employment Relations Authority