

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 212
5593380

BETWEEN MALCOLM CAMPBELL
Applicant

AND IDEA SERVICES LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Malcolm Campbell represented himself
Paul McBride, counsel for the respondent

Costs submissions received: From Idea Services Limited on 5 August 2016
No submissions on costs from the Applicant, although he was given until 27 October 2016 to make submissions

Determination: 2 December 2016

COSTS DETERMINATION OF THE AUTHORITY

The claim for costs and relevant background facts

[1] On 26 January 2016, Malcolm Campbell made an application to the Authority alleging his former employer, Idea Services Limited (Idea Services), constructively dismissed him and that it substantially disadvantaged him in his employment relationship. He also alleged breach of contract and claimed compensation for hurt and humiliation.

[2] On 11 February 2016, Idea Services filed its statement in reply. I granted it leave to file its supporting documents on 19 February 2016. Idea Services denied that it had disadvantaged Mr Campbell and denied that it had constructively dismissed him.

[3] On 6 April 2016, I held a case-management telephone conference and set the date of 2 August 2016 to hold the investigation meeting. I also set a timetable for the

parties to file and serve statements of evidence. Mr Campbell was directed to file his evidence by 24 June 2016 and Idea Services was to file its evidence by 14 July 2016.

[4] After the teleconference on 6 April 2016, Mr McBride sent Mr Campbell a Calderbank letter offering Mr Campbell \$500 in full and final settlement of his claims.

[5] The letter was open for 10 days and explicitly encouraged Mr Campbell to seek legal advice.

[6] The letter clearly stated that if Mr Campbell did not accept the offer and proceeded to the investigation meeting but was not successful, or received “only a comparable amount to that offered to you”, then the letter would be presented to me. He was told the letter was “likely to substantially increase the amount of costs awarded against” him.

[7] On 18 April 2016, Mr Campbell replied by email rejecting the offer and stating he would see Mr McBride at the investigation meeting.

[8] On 18 April 2016, Mr McBride again suggested Mr Campbell should take legal advice.

[9] On 24 June 2016, Mr Campbell enquired whether the Calderbank offer was still open.

[10] On 27 June 2016, Mr McBride responded that if Mr Campbell immediately withdrew his claims, in full and final settlement, Idea Services would not seek costs, but if he did not do so it would seek costs. The timeframe for acceptance of that offer was 30 June 2016.

[11] On 27 June 2016, Mr Campbell emailed the Authority officer and asked how he could withdraw his case against Idea Services. He said he wished to do so because of ill health.

[12] The Authority officer replied that if he wished to withdraw his claim he had to let the Authority know in writing and that by email was sufficient. The Authority officer also told Mr Campbell that he could request the matter be put “in abeyance”,

because of his ill health. Mr Campbell was advised an investigation meeting could be rescheduled when he was in better health.

[13] There was further correspondence, including an objection on 1 July from Mr McBride to any adjournment. On 5 July 2016, Mr Campbell sent an email to the Authority officer with a copy to Mr McBride withdrawing his application.

[14] Idea Services seeks legal costs of \$2,000 from Mr Campbell. Its submissions on costs were provided to the Authority and Mr Campbell on 5 August 2016.

[15] On 23 August 2016, the Authority officer asked Mr Campbell if he wanted the opportunity to lodge any response to the submissions.

[16] On 24 August 2016, Mr Campbell informed the Authority officer he would put in a submission “before the weekend”. However, by 31 August 2016 the Authority officer had not received any submissions from Mr Campbell and again emailed him asking when the Authority could expect to receive his submissions.

[17] On 1 September 2016, Mr Campbell replied. He apologised and wrote that he “would work on these tomorrow”. He also wrote that he no longer had Idea Services submissions, but indicated he did not think that the submissions would be necessary for him to respond to “essentially bullies”.

[18] On 2 November 2016, the Authority officer had received no response from Mr Campbell so gave me the file to make a determination.

Determination

[19] The Authority’s general power to award costs is set out in clause 15(1) of Schedule 2 to the ERA as follows:

[20] 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.

[21] The Employment Court judgments in *PBO Ltd v Da Cruz*¹ and *Fagotti v Acme & Co Ltd*² set out the broad principles to be applied in determining costs in the Authority.

[22] Generally, costs follow the event. That is, the successful party is able to claim a reasonable contribution towards their costs from the unsuccessful party. This case did not proceed to a determination so it is not possible to say whether Mr Campbell was likely to have succeeded had it done so.

[23] However, due to his decision to withdraw his claim, it is clear that he did not “succeed” at all. The purpose of Calderbank offers is to encourage parties to settle proceedings between them without having to incur the increased costs to both sides, and to the justice system, if they need to proceed to a hearing and determination.

[24] Mr McBride submits that Idea Services incurred a bill of \$1,600, plus GST totalling \$1,840, for his services related to Mr Campbell’s claims. The evidence supports that the majority of those costs were incurred after Mr Campbell rejected the Calderbank offer while Mr McBride was preparing for the investigation meeting.

[25] If Mr Campbell had accepted the Calderbank offer he would have been \$500 better off and Idea Services’ legal costs would have been much smaller. In addition, if he had accepted Idea Services second offer by 30 June 2016 he would not be facing the issue of costs now.

[26] Mr Campbell should make a reasonable contribution towards Idea Services costs, particularly since he rejected the Calderbank offer. However, in all the circumstances, I do not agree that \$2,000 is a reasonable amount for him to pay. I base that conclusion, in part, on the fact that if this had proceeded to a full day investigation meeting and Mr Campbell was unsuccessful my starting point for consideration of costs would have been \$3,500. I acknowledge that the Calderbank offer may have had the effect of increasing that amount. However, a Calderbank offer is only one relevant consideration.

¹ [2005] ERNZ 808

² [2015] NZEmpC 135

Order

[27] Having taken all the relevant considerations into account, I order **Malcolm Campbell to pay Idea Services Limited \$1,200.00 towards its legal costs.** I am not aware of Mr Campbell's financial circumstances. However, he may wish to discuss payment arrangements, such as paying by instalment, with Idea Services Limited.

Christine Hickey
Member of the Employment Relations Authority