

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 132
5581091

BETWEEN ANTHONY COCKBURN
Applicant

AND MORNING DANCE FISH CO LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Mike Harrison, Advocate for the Applicant
John Farrow and Sarah McClean, Counsel for the Respondent

Costs submissions: From the Respondent on 22 May 2017
No submissions from the Applicant

Determination: 27 July 2017

COSTS DETERMINATION OF THE AUTHORITY

Within 28 days of the date of this determination, Anthony Cockburn is to pay Morning Dance Fishing Co Limited \$3,000.00 towards its legal costs.

Employment relationship problem

[1] Anthony Cockburn claimed that he was unjustifiably dismissed from his role as a deck hand for Morning Dance Fish Co Limited (Morning Dance) in August 2015. Morning Dance said that Mr Cockburn was an independent contractor, and never an employee.

[2] On 24 April 2017, I found that Mr Cockburn had not been an employee, and therefore I had no jurisdiction to consider his claim of unjustified dismissal. I reserved my determination on costs and set a timetable for submissions.

[3] I received submissions from Morning Dance on 22 May 2017 seeking its actual costs of \$7,820.

[4] Mr Harrison, who had acted for Mr Cockburn at the investigation meeting, advised Mr Farrow that Mr Cockburn was able to commit to paying \$2,000.00 towards Morning Dance's costs but could only pay \$20.00 per week. He advised that Mr Cockburn was in debt and was paying those debts. Mr Cockburn had some work as a contractor on a fishing vessel. However, the vessel did not go out regularly.

[5] Mr Harrison also advised that all further contact with Mr Cockburn should be directed to Mr Cockburn's father's address or Mr Cockburn's personal email address.

[6] On 5 May 2017, Mr Farrow wrote to Mr Cockburn at the address given stating that Morning Dance could not accept the offer conveyed by Mr Harrison. He asked for evidence of Mr Cockburn's limited financial means. He asked for a sworn statement of Mr Cockburn's financial means, and enclosed a form that Mr Cockburn could use. He asked for response by 22 May 2017.

[7] Mr Cockburn did not contact Mr Farrow. Once I received Mr Farrow's submissions, I asked the Authority Officer to email Mr Cockburn and give him 14 days to make any submissions he wanted to make. She did so on 24 May 2017. Having not heard from Mr Cockburn by 16 June 2017 I instructed the Authority Officer to write to Mr Cockburn again inviting him to let me know of any financial problems he had and giving him an opportunity to ask to pay costs by way of instalments.

[8] The Authority has had no response from Mr Cockburn. I consider that he has had a reasonable opportunity to make his views known and to supply information that I could have taken into account in my consideration of what costs he should pay to Morning Dance. I have proceeded to make my determination after only hearing from one party because I am confident that Mr Cockburn has had an adequate opportunity to respond and has chosen not to do so.

The law

[9] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[10] The principles the Authority applies are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.¹ In *Fagotti v Acme & Co Limited*,² the Employment Court recently affirmed these principles.

[11] The Authority must exercise the discretion to award costs in accordance with principle and not arbitrarily, and consistently with its equity and good conscience jurisdiction.

[12] Generally “costs follow the event”, which means that a successful party should ordinarily be able to expect a reasonable contribution to its legal costs from the unsuccessful party. Therefore, the starting point for my consideration of what costs Mr Cockburn should pay is the daily tariff amount of \$4,500 for a full day. However, the investigation meeting took only four hours out of a possible six hours. Therefore, the appropriate starting point is \$3,000.

Determination

[13] Mr Farrow submits that this is an appropriate case to order Mr Cockburn to pay his client’s actual costs of \$7,820 (including GST), which includes a fee of \$690.00 for Mr Turner’s accountancy evidence.

[14] On 7 March 2017, Morning Dance made what Mr Farrow calls a “without prejudice save as to costs”, or a *Calderbank*, offer to Mr Cockburn. Mr Farrow submits that because Mr Cockburn did not accept the offer and was unsuccessful he should pay more than the daily tariff and meet all costs incurred by Morning Dance from 14 March 2017, the date Mr Harrison rejected the offer on Mr Cockburn’s behalf.

[15] The Authority can take *Calderbank* offers into account in considering costs. However, in this case I do not consider the 7 March 2017 offer to have been a true *Calderbank* offer. The letter did not offer Mr Cockburn anything at all other than an opportunity not to proceed with his claim. It was essentially a request for him to drop his claim. I do not consider the letter of 7 March 2017 is relevant to costs in this case.

[16] There are no other factors that require uplift or reduction of the daily tariff.

¹ [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

² [2015] NZEmpC 135

[17] Mr Harrison raised Cockburn's ability to pay with Mr Farrow and made an offer to pay \$2,000 only by way of \$20 per week instalments. Mr Farrow and the Authority have attempted to get evidence from Mr Cockburn as to his financial situation. He has failed to supply any such information.

[18] In a recent Employment Court decision³, Judge Smith wrote:

[52] The ability of the liable party to pay has been taken into account in costs judgments previously. However, some caution is required as is illustrated by *Scarborough v Micron Security Products Ltd*.⁴ In that case the plaintiff was unemployed and in a compromised financial situation. Judge Inglis said:

[36] I proceed on the basis set out in *Tomo v Checkmate Precision Cutting Tools Ltd*, namely that Miss Scarborough's financial position is relevant to determining a just award of costs but it is not decisive and must be weighed against other relevant factors, including the interests of the defendant, the broader public interest, and the aggravating way in which she has pursued her claim.

[53] The decision also included the following observation:

[38] There may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action, or may wish to wait and see whether at some stage in the future the opposing party's personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party's financial position at that particular point in time, denies the successful party the ability to make decisions as to whether, and when, to seek to enforce an award it would otherwise be entitled to.

[19] My equity and good conscience jurisdiction requires me to consider both parties' interests, not just Mr Cockburn's current difficult financial situation, about which I have limited information, but also Morning Dance's interests and the broader public interest.

[20] Morning Dance is entitled to expect some recognition of the costs that Mr Cockburn's application put it to, and it is in the general public interest that unsuccessful parties should make some financial contribution to the successful party's costs.

³ *Nelson Marlborough District Health Board v Robyn Henderson* [2017] NZEmpC 81.

⁴ *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105.

[21] Having considered all the relevant principles and both parties' submissions, I consider the amount of \$3,000.00 is a fair and reasonable amount for Mr Cockburn to pay towards Morning Dance's legal costs, even if it may take some time for him to arrange to make that payment.

Christine Hickey
Member of the Employment Relations Authority