

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 180
5354102

BETWEEN

MICHAEL
CRACROFT-WILSON
Applicant

A N D

MOUNT HUTT STATION
LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Tiresa Brito, Counsel for Applicant
Paul Brown, Counsel for Respondent

Submissions Received: 30 July and 22 August 2013 from Applicant
21 August 2013 from Respondent

Date of Determination: 29 August 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] On 4 February 2013 I issued a determination concluding Mr Cracroft-Wilson had a personal grievance in that he was unjustifiably dismissed. Costs were reserved and Mr Cracroft-Wilson, as the successful party, now seeks a contribution toward those he incurred in pursuing his claim.

[2] Normally the Authority will use a daily tariff approach when addressing a costs claim (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[3] Mr Cracroft-Wilson seeks the greater amount of \$6,699.37 (though his actual costs were significantly higher). The claim comprises:

- a. \$5,627.81 being the costs incurred after Mt. Hutt rejected a Calderbank offer;

- b. An additional \$1,000 for the expense of successfully defending a counterclaim which was supported with reference to *Glen v Wilfred Investments Limited* [2013] NZERA Christchurch 23; and
- c. The Authority's filing fee (\$71.56).

[4] Mr Cracroft-Wilson's Calderbank was proffered as a counter to one from Mt. Hutt which offered \$2,000. It was rejected on 28 November 2012.

[5] While Ms Brito's submission says the Caldrebank sought \$11,480.76, the amount in the letter is different. It specified:

- a. \$5,000 plus GST as a contribution toward costs;
- b. \$6,000 compensation (s.123(1)(c)(i)); and
- c. 6 weeks pay.

[6] Mr Brown calculates the proposal amounted to some \$16,769 which, he argues, is significantly more than the \$12,307.69 awarded. He submits the Calderbank should therefore be disregarded. Mr Brown also argues *Glen v Wilfred Investments Limited* is distinguishable and there should be no accounting for the counterclaim. He submits the matter was a straightforward claim disposed of in one day and that I should award \$3,500 in accordance with principles referred to in 3 above.

[7] Ms Brito responds by advising she calculated 6 weeks wages as \$5,480.76 and took no account of the cost component as the issue was yet to be determined.

[8] The principle behind a Calderbank is the offer would have led to a more beneficial outcome for the successful party than that ultimately obtained, thus putting the parties to cost that (albeit with the benefit of hindsight) could have been avoided. This principle is flexible with proposals which are less beneficial but close also considered valid (*Watson v NZ Electrical Traders t/a Bray Switchgear* (unreported) EC Auckland, AC 64/06, 24 November 2006).

[9] Having considered the issues I conclude this Calderbank should be recognised as valid. While Mr Cracroft-Wilson got less under the compensation head, the award in respect to lost wages exceeded that sought in the Calderbank.

[10] There is then the issue of costs which Ms Brinto disregarded. Applying Mr Brown's concession in this respect and adding it to the amounts awarded in the substantive determination the remedies would total \$15,807.69. That, I conclude, is not vastly dissimilar to Mr Cracroft-Wilson's proposal which Mr Brown put at \$16,769 as I note that when the totality of the packages is considered (ie: costs included) the level of attainment vs offer is greater in percentage terms here than it was in *Watson* (94% v 78%). It is also vastly more realistic than Mt Hutt's \$2,000.

[11] I also note the Court appears to have disregarded the cost element in *Watson*. Applying that approach there can be no argument Mr Cracroft-Wilson bettered his Calderbank (\$12,307.69 awarded vs \$11,480.76 sought).

[12] The Courts have urged a more steely approach in recognising and increasing costs awards where valid Calderbanks are present (*Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 CA) and where a practical approach by the parties might have alleviated cost. This call was referred to and reflected by the Employment Court in *Watson*.

[13] Often offers of a realistic, but rejected, attempt at settlement are recognised with an award of the costs incurred after rejection. In this instance that is just over \$5,600.

[14] I consider reimbursement of the filing fee a given though cannot agree with an increase in respect to the counterclaim. There appears to be an element of double dipping as settlement would have resolved both claims. The additional cost incurred after rejection of the Calderbank would not have altered.

[15] For the foregoing reasons I order the respondent, Mt Hutt Station Limited, to pay the applicant, Mr Michael Cracroft-Wilson, \$5,700 (five thousand, seven hundred dollars) as a contribution toward the costs he incurred in pursuing his claim.

M B Loftus
Member of the Employment Relations Authority