

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 426
3148384

BETWEEN ROBERT ELLER
Applicant

AND COASTAL CABINS LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Kirby Kleingeld, counsel for the applicant
Jeremy Ansell, counsel for the respondent

Submissions received: 28 July 2022 from the applicant
15 August 2022 from the respondent

Date of determination: 30 August 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] Robert Eller’s employment relationship problem with his former employer Coastal Cabins Limited (Coastal Cabins or the company) was resolved via a determination of the Authority.¹

[2] Mr Eller’s unjustified dismissal claim was established. The sole remedy awarded was \$20,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[3] The parties were to attempt to resolve the costs issue between themselves but have not been able to reach agreement.

¹*Robert Eller v Coastal Cabins Limited* [2022] NZERA 328.

[4] Mr Eller now seeks costs. Submissions were received from both parties.

What principles apply to costs?

[5] The Authority's power under to award costs is set out in clause 15 of Schedule 2 of the Act. The power is discretionary with its use governed by principles.² These include that costs will usually follow the event and the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience.

What costs should be awarded here?

[6] Mr Eller succeeded in one of his grievance claims as well as in establishing that his employment agreement was breached and Coastal Cabins breached its good faith obligations. A claim that Mr Eller was disadvantaged by Coastal Cabins' unjustifiably failing to provide him reasonable time off work to recover from an injury was not upheld. No penalties were imposed on the company regarding the breaches.

[7] In summary, Mr Eller had partial success but did establish significant parts of his claim. He is entitled to a contribution towards his costs.

[8] When assessing costs, the starting point is the Authority's daily tariff. Here the investigation meeting took one day. The tariff for the first day of a meeting is \$4,500.

[9] Mr Eller seeks costs and disbursements of \$8,571.56, being a substantial uplift to the daily tariff, on the basis of *Calderbank* offers being in place and Coastal Cabins' conduct which has unnecessarily contributed to the costs incurred. The sum is made up of \$8,500 costs and the Authority's filing fee.

[10] An invoice has been provided indicating that Mr Eller has incurred around \$18,000 costs inclusive of GST. The time records provided include the costs of preparation for and attendance at mediation which are usually not the subject of a costs award. In any event Mr Eller incurred legal fees without the mediation component well over the amount of \$8,500 sought.

[11] Submissions for Coastal Cabins emphasise that its former general manager did not notify the directors of one of the *Calderbank* offers and that it was significantly

² *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.

disadvantaged by that manager's actions. Whilst that is unfortunate, Mr Eller should not have to shoulder responsibility for that.

[12] Also, the company is reported to be experiencing significant financial difficulties, including due to Covid-19's impact. There has had to be changes in the control of the company for reasons which are described in some detail. I have taken that factor into account in terms of allowing a longer than usual period for payment of costs.

Calderbank offers

[13] On 21 December 2021, subsequent to the parties attending mediation, a *Calderbank* offer was made by email. It was clearly marked "Without Prejudice Save as to Costs", refers to it being a *Calderbank* offer and spells out the effect of that. Mr Eller's offer to settle was made well before substantial costs were incurred in preparation for and attendance at the investigation meeting. Coastal Cabins was permitted adequate time for consideration and acceptance of the offer.

[14] Via its manager, Coastal Cabins made an offer the following day in response which was a quarter of Mr Eller's offer and about a seventh of the size of what Mr Eller was awarded by the Authority. The company's offer was rejected with a suggestion that if a sensible offer was made it would be considered.

[15] About a week after the original investigation meeting date Coastal Cabins, by now represented by counsel, made a without prejudice save as to costs offer to settle for \$10,500. A week later another such offer of settlement for \$15,000 was received. Mr Eller rejected it but counter-offered for \$5,000 under s 123(1)(c)(i) of the Act and legal fees of \$13,000 plus GST.

[16] All of these offers were relatively close to the next investigation meeting date of 20 May 2022 with further costs having been incurred by Mr Eller in the provision of witness statements and hearing preparation. The final offer from Mr Eller was still less than he has been awarded, even without consideration of a costs award.

[17] The company says that by the time of Mr Eller's 17 May 2022 settlement offer it considered the process had gone too far, with it incurring its own legal costs. I accept that that offer was only a few days before the investigation meeting but there is no

argument raised that the company did not have time to adequately consider it. The parties were represented and in a string of settlement communications.

[18] Coastal Cabins acted unreasonably on several occasions by not accepting *Calderbank* offers. Particularly the first offer, would have resulted in Mr Eller incurring considerably less costs. Although Mr Eller has not been entirely successful, proceeding to the investigation meeting was the only way he could have achieved the result he did. His rejections of Coastal Cabins' offers were this reasonable.

[19] The company's rejection of Mr Eller's reasonable *Calderbank* offers warrants a significant uplift from what would otherwise have been awarded in costs.

Conduct contributing to cost

[20] Conduct which adds unnecessarily to the time taken for a matter may be taken into account although this is not to punish a party.

[21] Here Coastal Cabins:

- (a) failed to provide its witness statements on time;
- (b) did not respond to requests on behalf of Mr Eller for further information and to agree the bundle of documents; and
- (c) requested an adjournment three working days before the original investigation meeting was to take place, with Mr Eller's counsel then filing a memorandum objecting to the adjournment and being required to attend a further case management conference.

[22] Coastal Cabins failed to engage with Mr Eller's counsel despite four requests. In fact there was a complete lack of communication for three months from immediately after the first case management conference, despite the company having obligations under the Authority's timetable during that period.

[23] Coastal Cabins puts responsibility for these actions on its former manager. However, the directors entrusted the manager to deal with the case and should have kept abreast of his progress with it.

[24] An increase in costs is warranted on this basis.

Orders

[25] Coastal Cabins Limited is ordered to pay Robert Eller \$8,500.00 as a contribution to his costs and \$71.56 for the Authority's filing fee within 50 days of the date of this determination.

Nicola Craig

Member of the Employment Relations Authority