

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 201  
5285914

BETWEEN                      SHAUN KEARNEY  
   Applicant  
  
AND                                SALES DYNAMICS LTD  
   First respondent  
  
AND                                RITESH MANI  
   Second respondent

Member of Authority:        James Wilson  
  
Representatives:              Jane McTavish Butler for the applicant  
   Mark Donovan for the respondent  
  
Costs submissions  
received:                        19 November 2010 from the applicant  
   5 November 2010 from the respondent  
  
Determination:                13 May 2011

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

- [1]     In a determination dated 8 October 2010 I found that:
- (i) Mr Kearney was employed by the first respondent, Sales Dynamics Ltd.*
  - (ii) As Sales Dynamics Ltd is in liquidation Mr Kearney is unable to pursue his claims against that company without the approval of the liquidator or the High Court. The liquidator has declined to give his consent.*
  - (iii) Mr Kearney was aware that he was employed by Sales Dynamics Ltd and I have declined his request that Mr Mani be personally required to pay any awards that would have been payable to Mr Kearney by his employer.*
  - (iv) The Authority has no jurisdiction to investigate or make orders in relation to moneys paid by Mr Kearney to The Percent Group Ltd for the purchase of shares in Sales Dynamics Ltd*

[2] In that determination I reserved the question of costs and established a timetable, should the parties not be able to settle that issue, for the filing and exchange of submissions.

[3] The parties have not been able to settle the question of costs and Mr Donovan has filed a submission, on behalf of the second respondent, Ritesh Mani, seeking an \$8000.00 contribution to Mr Mani's costs.

### **The Submissions**

[4] In his submission Mr Donovan says that his clients made a *calderbank* offer to Mr Kearney, on the morning of the Authority's investigation meeting, of \$30,000 to settle the issues between them. He suggests that in the light of this offer and the fact that Mr Kearney was entirely unsuccessful in his claims against Mr Mani personally, an appropriate award for costs should be \$8000.00. In support he cites the Court of Appeal judgement in *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, which the Court said:

*As this Court has previously said a "steely" approach is required. It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered.*

[5] Ms McTavish Butler in reply points out that the respondents' "calderbank" offer was made less than an hour and a half before the commencement of the Authority's investigation meeting and contained conditional terms on external factors which made the offer unreasonable. Mr Kearney in fact, she says, made a counter offer prior to the delayed commencement of the investigation meeting but no settlement was reached.

## Discussion

[6] The major focus of the Authority's determination in this case was on whether or not Mr Kearney was an employee of Sales Dynamic as he claimed. In that claim he was successful but was denied the opportunity to pursue his claims against his employer because the Company went into liquidation after the investigation meeting. Mr Mani avoided any personal liability because he was not Mr Kearney's employer.

[7] The calderbank offer made to Mr Kearney was made extremely late and had a number of conditions, including the transfer of funds being conditional on the sale of property to which Salas Dynamics and Mr Mani would receive sales commissions. I agree with Ms McTavish Butler that it was unreasonable to expect Mr Kearney to accept this offer without modification.

[8] The principles set out in the Employment Court judgement in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 include

*There is a discretion as to whether costs would be awarded and what amount.*

*The discretion is to be exercised in accordance with principle and not arbitrarily.*

*The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.*

*Equity and good conscience is to be considered on a case by case basis.*

As Ms McTavish Butler points out in her submission, Mr Mani repeatedly breached orders of the Authority and gave, and then breached, undertakings to the Authority. Mr Mani's behaviour contributed substantially to the time, and therefore costs, of all of the parties. Mr Kearney has already suffered substantial loss for which, because of his employer's liquidation, he is unable to pursue a claim to be recompensed. It would be inequitable for him to now make a contribution to Mr Mani's costs.

## **Determination**

[9] **Costs shall lie where they fall.**

James Wilson

Member of the Employment Relations Authority