IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 211
5453231

	BETWEEN	JESSE ADAM KENMARE Applicant
	A N D	FULTON HOGAN LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Anjela Sharma, Counsel for Applicant Blair Scotland, Counsel for Respondent
Submissions Received:	11 November 2014 from Applicant 7 and 13 November 2014 from Respondent
Date of Determination:	17 December 2014

COSTS DETERMINATION OF THE AUTHORITY

A **Fulton Hogan Limited is ordered to pay to Jesse Kenmare costs in the sum of $10,500 together with expert fees in the sum of $1000 and disbursements in the sum of $684.88.**

B **Jesse Kenmare is ordered to pay to Fulton Hogan Limited costs in the sum of $2000 together with expert fees in the sum of $200 for the interim application for reinstatement.**

C **Jesse Kenmare is ordered to pay to Fulton Hogan Limited costs in the sum of $500 for the application for removal to the Employment Court.**

The application for costs

[1] The Authority, in its determination dated 5 September 2014, found that the applicant was unjustifiably disadvantaged when he was suspended without pay. It did not find that there was an unjustified disadvantage grievance about the selection process of names for random drug and alcohol testing and did not award penalties. The Authority found that the applicant was unjustifiably dismissed and there were awards made for lost wages and compensation for both established grievances. There was no order made reinstating the applicant to his previous position. Costs were reserved and failing agreement a timetable set for an exchange of submissions.

[2] There was an earlier application for interim reinstatement which was successfully opposed by the respondent and an application for removal to the Employment Court which was also successfully opposed by the respondent.

[3] The Authority has now received submissions from Mr Scotland and Ms Sharma. Both parties say that they are entitled to costs for the substantive determination. The applicant because he was successful and the usual principle is that costs follow the event and the respondent, because it made *Calderbank* offers that exceeded the awards made by the Authority.

[4] There are two preliminary matters to determine.

Applicant lodged his costs memorandum outside of the timeframe to do so

[5] Mr Scotland, in his submissions, states that the respondent objects to the applicant filing submissions as they were not lodged within the timeframe set by the Authority of 24 October 2014.

[6] Ms Sharma advises in her submissions that the applicant should not be disadvantaged by what was a genuine oversight by her about the timetable for which she apologises. She wrote in her submissions:

> *… Further, representatives do not have control over when determinations are issued, and how this may impact on an already tight timeframe. Counsel has had an intensive timetable largely in the Court following the Authority's determination in this matter.*

[7] The Authority accepts Ms Sharma's submission that there was an oversight in attending to the lodging of submissions within the extended timeframe. The submissions were as Mr Scotland submits lodged some 18 days outside of this period. Given that it was an oversight on the part of counsel I am not satisfied, where there is no clear prejudice to the respondent, that the applicant should be deprived of the right to make submissions as to costs and have them considered. The Authority is prepared to consider the applicant's submissions in all the circumstances and proceed determine the issue of costs.

[8] There has been a challenge to the Employment Court of parts of the Authority determination.

Without prejudice communication attached to applicant's submissions

[9] Mr Scotland takes issue in his submissions with references in para.6 of the applicant's submissions to *without prejudice* communications between the parties for the purposes of resolving the issue of costs and all other matters between the parties.

[10] Mr Scotland's concern is that the communication from the respondent at that time was headed *without prejudice* and not *without prejudice save as to costs* and should not have been attached to submissions.

[11] I uphold Mr Scotland's concern. The email from Mr Scotland to Ms Sharma dated 8 September 2014 is to be sealed and the reference to that letter in para.6 of the applicant's submissions deleted. It has not been taken into account by the Authority.

The applicant's submissions

[12] Ms Sharma submits that the Authority has a discretionary power to award costs under the Employment Relations Act 2000 (the Act) and that the principles of costs awards in the Authority are well settled. She refers to the judgment of the full Court of the Employment Court in *PBO Ltd v. Da Cruz*[1] where the Court stated[2] that the Authority is able to set its own procedure and has since its inception held to some basic tenets when considering costs. Ms Sharma refers to some of the principles stated in *PBO* to be appropriate to the Authority including that costs generally follow

[1] [2005] 1 ERNZ 808
2 At [44]

the event and that they are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct.

[13] Having received at the time of making her submission Mr Scotland's submission, Ms Sharma observes in her submissions that it is difficult to understand how the respondent believes it has a claim for costs and disbursements. She refers to Mr Kenmare's financial situation.

[14] Ms Sharma submits that the applicant, in light of the suggestion he was a habitual drug user, had little choice but to vindicate his position. Ms Sharma submits that by the time of the 26 June *Calderbank* offer [the second offer] the reference to the applicant as a habitual drug user had reached *national and local proportions.*

[15] Ms Sharma submits that Nelson is a small provincial locality and that the applicant faced reputational issues. In all the circumstances, Ms Sharma submits the Authority cannot place any weight on the *Calderbank* offer as a means of reducing the applicant's claim for costs because he was entitled to refuse a financial settlement in the interests of vindication with a view to reclaiming his job.

[16] Ms Sharma submits that the applicant's costs in the Authority were $32,500 plus GST. She set out that for a three day investigation meeting, the daily tariff will be $10,500 but there should be some uplift as the matter was at a more technical level of complexity in relation to contract interpretation and expert witness issues. This required she submits significantly more time in document perusal, research and analysis in preparation. Further she submits that the respondent added various collective agreements to the bundle of documents which increased the hearing preparation and made changes to its evidence from that lodged at an interim stage. She submits that there should be a further uplift of the daily tariff to $5,500, that there should be no costs awarded to the respondent in relation to the successful opposition to the interim reinstatement application and that there should be a further uplift in relation to the direction to mediation of $650.

[17] Ms Sharma submits that costs in relation to both the interim reinstatement application and an unsuccessful application for removal to the Employment Court should lie where they fall.

[18] Ms Sharma seeks the following:

(a) An uplift in costs as a result of the direction to mediation in the sum of $650;

(b) $16,500 as a contribution towards the applicant's costs;

(c) Expert witness fees in the sum of $2,000;

(d) Filing fee in the sum of $71.56;

(e) Hearing fees for a three day investigation meeting;

(f) Costs incurred for a second drug test in the sum of $392; and

(g) A contribution towards the costs submission in the sum of $500.

The respondent's submissions

[19] Mr Scotland submits that the respondent was successful in respect of its opposition to the application for interim reinstatement and opposition to removing the matter to the Employment Court. He acknowledges the applicant was successful in respect of personal grievances for unjustified dismissal and unjustified disadvantage but that he failed in his other disadvantage claim and penalty claims and was not granted reinstatement.

[20] Mr Scotland submits that the respondent made two *Calderbank* offers to the applicant for amounts greater than those awarded by the Authority which were rejected and that it now applies for an award of costs.

[21] The first offer, expressed to be without prejudice save as to costs in the nature of a *Calderbank* offer, was made by letter dated 7 April 2014 on behalf of the respondent. It is expressed in the letter that the offer followed the parties attending mediation. The offer was as follows:

(a) Payment equivalent to three months' wages taxable plus Kiwisaver contributions;

(b) $8,000 under s.123(1)(c)(i); and

(c) $2,000 as a contribution towards the applicant's legal costs.

[22] The respondent advised in the letter that it did not consider the applicant's claim for interim and permanent reinstatement was likely to succeed and advised that the *Calderbank* offer would be relied upon if the applicant is awarded less than the offer. The applicant was given seven days to respond.

[23] The awards made by the Authority were considerably less than those offered. The respondent submits that had the *Calderbank* offer been accepted by the applicant then there would have been no need for the investigation meetings which took place for the interim reinstatement application on 14 April 2014 and for the substantive investigation between 29-31 July 2014.

[24] The respondent also relies on a further *without prejudice save as to costs* offer made on 26 June 2014 which offer was greater than the awards ultimately awarded by the Authority. In that offer payments under each of the three heads referred to in 20 above were increased to $15,000.

[25] Mr Scotland submits that the costs incurred by the respondent in defending the applicant's claims from the point of expiry of the *Calderbank* offer are $40,285 exclusive of GST, disbursements and costs of attending mediation. There were also additional expenses from expert witnesses in the amounts of $4,655.43 and $1,345.50.

[26] Mr Scotland submits that the effect of the *Calderbank* offer is that it reverses the presumption that costs normally follow the event. Mr Scotland submits that applying the daily tariff of $3,500 a cost award would be as follows:

(a) In respect of the interim reinstatement investigation, $1,750 (half a day);

(b) In respect of the substantive investigation meeting $10,500 (three days); and

(c) In respect of the application for removal to the Employment Court $875 (quarter of a day).

[27] The respondent, however, submits that this is a case deserving of a steely cost award because of the significant *Calderbank* offers and because the offer was made prior to the point where significant preparation for the investigation would have occurred and the costs could have been avoided if the offer had been accepted.

[28] Mr Scotland sought uplift in the daily tariff to $5000 per full day meaning a total contribution of $18,750 in costs and $6005.43 in disbursements.

[29] Mr Scotland did refer to the possibility of an argument that the applicant is in an impecunious state. He submits, however, that there is little evidence of the applicant's current financial and employment status and that the onus is on the applicant to establish his financial position.

[30] Mr Scotland recognises in his submission a potential argument that the respondent's offer did not address the issue of vindication/reinstatement although did not accept that this impacted on the reasonableness of rejection.

[31] Further, Mr Scotland notes that the applicant has continued to engage legal counsel to pursue a challenge which leads, he submits, to a conclusion that the applicant, his union or some other third party is funding the proceedings.

Determination

[32] The Authority has discretion whether to award costs and, if so, in what amount. That discretion is not to be exercised arbitrarily but in accordance with principle. Costs in the Authority are not to be used as a punishment and they are usually modest. *PBO* provides that the Authority can take account of without prejudice [save as to costs] offers.

[33] Ms Sharma correctly submits costs normally follow the event. One of the main issues for the Authority to consider in this determination is the effect of the *Calderbank* offers made by the respondent. There is no dispute that the applicant did not achieve a better result than that offered in either *Calderbank* offer in the substantive determination. Both offers were financially attractive and there was a reasonable time within them for consideration as to whether to accept the offer or not. The offers were clear and transparent.

[34] Both offers were rejected by the applicant. This was on two grounds. The first was that the applicant was seeking reinstatement and the second was that there was a claim that the applicant was a habitual drug user which the applicant denied. In the rejection of the 26 June *Calderbank* offer Ms Sharma wrote about the reputational matters. She stated as follows; *By accepting a financial settlement, he is still left with an irreparably damaging allegation of habitual drug use, which will not simply*

disappear but will instead have serious ramifications for him in terms of his future employment prospects. Nelson is a small town and smear allegations such as this which are publicly bandied around, do not dissipate easily. Ms Sharma stated in both letters rejecting the offers that the applicant wanted permanent reinstatement.

[35] At the time of the first offer the application for interim reinstatement had not been heard and there was no publicity therefore flowing from any determination of the Authority. At the time of the second offer there had been a determination of the Authority on the application for interim reinstatement and an interlocutory judgment from the Employment Court on a challenge to the Authority determination refusing to grant the applicant interim reinstatement. There was publicity at or about the time both the determination and judgment were released.

[36] Mr Scotland submits that the applicant was unsuccessful in parts of his application including the finding that the respondent's substantive decision to dismiss was open to it. Further that the applicant was unsuccessful in his application for reinstatement. He submits that the Authority should adopt a steely approach where there is a valid *Calderbank* offer and should consider the principles behind such an offer and those contained in the Employment Relations Act 2000 to encourage parties to a problem to address it themselves and reduce the need for judicial intervention.

[37] The Employment Court in *Fifita v Dunedin Casinos Limited*[3] stated that the assessment of the *Calderbank* offer becomes more difficult when non-monetary remedies, particularly reinstatement, are sought or where the plaintiff's legitimate interest in the outcome included non-monetary components, such as reputation or vindication. It is a difficult assessment in this case and I have had in the exercise of my discretion regard to all the circumstances.

[38] The Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell*[4] stated the following about vindication:

> *We accept that there may be cases where vindication through seeking a statement of principle in the employment context may be relevant to the exercise of the Court's discretion. Thus the relevance of reputational factors means that cost assessments are not confined solely to economic considerations. But equally, an offer to pay*

[3] [2013] NZEmpC 171
[4] [2010] ERNZ 446 pg 451 at [19]

> *compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the plaintiff.*

[39] Mr Scotland submits that by virtue of the offers made they contained a distinct element of vindication. He submits that if reasonable offers such as these are ignored by the Authority it removes any incentive for employers to make such offers at all.

[40] There has been some doubt expressed by the Employment Court in *Mattingly and Strata Title Management Limited*[5] about whether a *steely approach* is the right one in the Authority[6]. What is clear is that the effect of an offer is ultimately at the discretion of the Authority having regard to the circumstances of the particular case.

[41] The main remedy sought by the applicant in this case was reinstatement. When the applicant was not successful in his application for interim reinstatement he challenged to the Employment Court. The applicant's desire for permanent reinstatement and reputational concerns about being labelled a habitual drug user were the reasons put for rejecting the offers. Mr Scotland referred to a proposal which did not include reinstatement as a remedy but that was made after the release of the Authority's substantive determination. The Employment Court in *Richardson v Board of Governors of Wesley College*[7] did not accept that the desire for reinstatement entitled the applicant to disregard a *Calderbank* offer in circumstances where counter-offers were made for financial sums. That was not the situation with the applicant.

[42] I find that this matter is distinguishable from that in *Fifita* where the *Calderbank* offer was given significant weight. In that case there had been an application for reinstatement but because the Authority rejected reinstatement as *not remotely practical or reasonable* the Court did not take that into account in assessing the benefit to Mr Fifita in taking the matter to a hearing.

[43] The reasonableness of the *Calderbank* offer has to be assessed at the time it was made. In this case I find it requires some consideration as to whether at the time of the *Calderbank* offer there was no reasonable prospect or benefit in continuing to seek reinstatement. The first offer in the nature of a Calderbank was made shortly before the application for interim reinstatement. A benefit in proceeding to an investigation meeting on that interim application in all the circumstances of this case

---

[5] [2014] NZEmpC 15
[6] At [27]
[7] Unrep, AC20/03, 19 March 2003 Travis J

could not be discounted so as to conclude it was completely unreasonable for the offer to be declined. The Authority found a tenable arguable case for permanent reinstatement and a stronger arguable case for unjustified dismissal but that the balance of convenience and overall justice meant interim relief was declined.

[44] The Employment Court in its judgment of the challenge to the interim determination of the Authority[8] did not grant interim reinstatement. The Court concluded when it considered whether there was an arguable case for permanent reinstatement that it was arguable although not strongly that the applicant was not a habitual user of drugs and that the expert evidence would be important if the Authority were to conclude the applicant should be reinstated. The Court concluded there was a strongly arguable case that the dismissal was unjustified. It was also stated at [48] that the main point of contention between the parties relates to whether the applicant is a habitual user of cannabis. In relation to the latter point I have noted Mr Scotland's submission about this matter but whether the applicant was a habitual user of cannabis or not was a central issue before the Authority.

[45] After the Employment Court judgment the second offer in the nature of a *Calderbank* offer was made by the respondent and rejected for the reasons set out earlier.

[46] The applicant wanted interim reinstatement and neither the Authority nor the Court concluded that permanent reinstatement was not arguable. To a lesser degree there were reputational issues about his use of cannabis. The primary motivation for the applicant in proceeding to a hearing was not addressed by the *Calderbank* offers and goes to the reasonableness of the applicant rejecting the offers.

[47] The applicant was not successful though in his application for reinstatement and had only limited success for vindication. I do need to balance in the exercise of my discretion that the offers to settle were sensible and needed careful consideration. Rejection of them carried some risk. Some weight should be given to the *Calderbank* offers but not to the extent that it may justify departing from the general principle that costs follow the event. I do recognise though that these were significant and sensible financial offers to settle in the circumstances and the only way for the respondent to limit potential costs. The reasons why the *Calderbank* offers have not been taken into

[8] Kenmare v Fulton Hogan Limited [2014] NZEmpC 96

account to a greater extent in the exercise of my discretion is that reinstatement was sought in this case and was a primary motivation in declining the offers which did not address that remedy. The reputational motivation to continue to establish that the applicant was not a habitual drug user was aligned to the remedy of reinstatement.

Substantive determination

[48] I intend to limit the costs payable to the applicant for the substantive investigation meeting to the daily tariff of $3500 for the three days of investigation. This is in circumstances where Ms Sharma considered uplift to $5500 per day should be made to reflect the more technical level of complexity with expert evidence and more time in document perusal, research and analysis.

[49] I am unable to find in my perusal of the file any direction to mediation in this matter. It appears that the respondent was agreeable to mediation after the application for interim reinstatement was lodged. I make no uplift to costs for that reason.

[50] The applicant is entitled to reimbursement of the hearing fee in the sum of $613.32 and the filing fee of $71.56.

[51] Ms Sharma has asked that Mr Kenmare be reimbursed for a second drug test that he paid for himself. This is on the basis that the respondent used these results to advance its own case without his consent. The information about that test was put before the Authority by the applicant when it dealt with the application for interim reinstatement. The respondent is not responsible for the costs associated with the test. It did not ask for or require that test to be undertaken. It did use the results from that test but after the applicant had put those results before the Authority.

[52] The Authority preferred the evidence of the respondent experts to that of Dr Nixon. I do agree though that the applicant was entitled to call his own expert in response to the expert witnesses called by the respondent. Full reimbursement in all the circumstances is not appropriate or reasonable. I limit reimbursement to $1000.

[53] I do not make any adjustment upwards for preparation of the cost submissions.

[54] In conclusion therefore the applicant is entitled to costs in the sum of $10,500, reimbursement of expert fees in the sum of $1000, filing fees in the sum of $71.56 and hearing fees in the sum of $613.32.

[55] Fulton Hogan Limited is ordered to pay to Jesse Kenmare costs in the sum of $10,500 together with expert fees in the sum of $1000 and disbursements in the sum of $684.88.

Interim application for reinstatement

[56] The respondent was successful in defending this application and there is no good reason why costs should not follow the event. Mr Scotland has claimed uplift from the half day tariff of $1750 to $2500 because of the *Calderbank* offers. I take into account that the applicant did not accept a very early investigation meeting date which would have saved the cost of preparing and attending an investigation meeting for the interim application. There should in the circumstances be uplift to $2000. I find that it is appropriate that costs be assessed at $2000 for half a day.

[57] Dr Fitzmaurice provided an affidavit for the interim application. I have allowed reimbursement for one hour at $200 which is his charge out rate.

[58] Jesse Kenmare is ordered to pay to Fulton Hogan Limited costs in the sum of $2000 together with expert fees in the sum of $200 for the application for interim reinstatement.

Application for removal to the Employment Court

[59] The respondent was successful in opposing this application which was dealt with by way of submissions at a telephone conference with the Authority. I find that a fair and reasonable contribution toward costs for this matter would be the sum of $500.

[60] Jesse Kenmare is ordered to pay to Fulton Hogan Limited costs in the sum of $500 for the unsuccessful application for removal to the Employment Court.

Helen Doyle
Member of the Employment Relations Authority