

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 193
5639739

BETWEEN PHILIP LOO
Applicant

AND VIRCOM ENERGY
MANAGEMENT SERVICES
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Rachelle Boulton, counsel for the applicant
Angela Hansen, counsel for the respondent

Costs submissions
received: From the applicant on 28 July 2017
From the respondent on 25 August 2017

Determination: 9 November 2017

COSTS DETERMINATION OF THE AUTHORITY

**A. Philip Loo must pay Vircom Energy Management Services Limited
\$3,500 towards its legal costs.**

[1] On 28 June 2017, I issued a determination¹ that Mr Loo was not an employee of Vircom Energy Management Services Limited (Vircom). I dismissed Mr Loo's personal grievance claim because the Authority did not have jurisdiction to determine it. I reserved the matter of costs.

The law on costs in the Authority

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

¹ [2017] NZERA Christchurch 101

[3] The principles the Authority applies are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.² In *Fagotti v Acme & Co Limited*,³ the Employment Court affirmed these principles.

[4] Costs principles include:

- a. A discretion on whether to award costs and if so what amount.
- b. The discretion must be exercised in accordance with principle and not arbitrarily.
- c. The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- d. Equity and good conscience must be considered on a case-by-case basis.
- e. Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct that increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. 'Without prejudice' offers can be taken into account.
- h. Awards of costs will be modest, and must be reasonable.
- i. Frequently costs are judged against a notional daily rate.
- j. Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.
- k. The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

² [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

³ [2015] NZEmpC 135

[5] The starting point for my consideration of costs is that Mr Loo, as the unsuccessful party, can be expected to make a contribution to Vircom's costs. That contribution is based on the daily tariff of \$4,500. The investigation meeting lasted more than half a day but did not take a full day. The starting point for my consideration of costs is \$3,500.00.

Vircom's submissions

[6] Ms Hansen for Vircom has made submissions in support of Vircom's claim that Mr Loo should pay costs on an increased basis. It seeks \$17,360 exclusive of GST and disbursements of \$1,399.11. It has applied for costs on the basis that they are two-thirds of the actual costs of \$26,040 excluding GST, incurred since the expiry of a Calderbank offer.

[7] Vircom says its application for increased costs is appropriate because of two factors related to how Mr Loo approached the proceedings.

Mr Loo's approach to the case

[8] Vircom submits that the way Mr Loo approached his claim prior to the investigation meeting unnecessarily increased its costs. It says his claim was plainly unmeritorious from the start.

[9] Specifically, Vircom says that Mr Loo took unnecessary and unreasonable steps before the investigation meeting that increased its costs. It criticises his attempts to get an agreed statement of facts and to get the respondent to answer questions and produce certain documents he considered relevant before the investigation meeting. Vircom says its counsel undertook unnecessary work preparing evidence in reply and preparing to cross-examine a witness for whom Mr Loo produced an affidavit, but who was not called to give evidence. It also criticises his attempt to file further evidence after the investigation meeting.

[10] Mr Loo is not legally qualified. He had help from another non-legally qualified person. Although Mr Loo and his assistant's approach to preparing for the case was unorthodox, I managed the process of the parties' preparation for the investigation meeting. I do not consider that Mr Loo's attempt to get an agreed statement of facts, answers to questions and access to documents prior to the investigation meeting greatly increased the amount of work Vircom's lawyers had to perform on its behalf. That is because I was very clear with Mr Loo what I required and was clear with Vircom that I did not require it to respond to Mr Loo's requests.

[11] I accept that Vircom's counsel had to prepare as if Mr Loo's witness was going to give evidence, when he did not. However, I do not consider this was sufficient to require an increase in the amount of the daily tariff.

Calderbank offer

[12] Vircom submits that Mr Loo refused a Calderbank offer it made to him on 26 January 2017, and repeated on 12 April 2017. This offer suggested that both parties "walk away" and drop their respective claims against one another. Vircom had a claim outside the Authority for costs it asserts lie with Mr Loo. Because of Mr Loo's refusal of the Calderbank offer and his lack of success Vircom submits Mr Loo should pay a higher proportion of its costs than if it had never made such an offer.

[13] Vircom says that its invitation to Mr Loo to withdraw his proceedings in return for it withdrawing its proceedings against him was a valid Calderbank offer. In the case of *Ogilvy & Mather (NZ) Ltd v Darroch*⁴ the Employment Court explained a Calderbank offer as:

...an offer, invariably in writing, made by one party to the other and expressed to be without prejudice except as to costs. It is an offer to compromise the action by some payment. Unless the offer is accepted, the letter is intended to be produced after the Court has dealt with the merits of the case but before it has dealt with costs.

...

It is intended to put pressure on plaintiffs and discourage them from proceeding with litigation that may turn out to be unproductive simply for the sake of the cathartic day in Court.⁵

⁴ [1993] 2 ERNZ 943

⁵ At page 952.

[14] Vircom's without prejudice save as to costs offer was not an offer to compromise the action by making a payment to Mr Loo. Instead, it purported to give Mr Loo advice about the risk of proceeding with his claim and offered not to proceed with a claim that it had against him outside of the Authority's jurisdiction.

[15] Mr Loo had a different view of the riskiness of his claim. I am not prepared to agree with Vircom's stance that his claim was entirely without merit. In addition, Mr Loo held public liability insurance that he understood he could call on to meet Vircom's contractual claim.

[16] I do not consider Vircom's suggestion that Mr Loo withdraw his claim, and that it would not prosecute its claim against him, as a true Calderbank offer. In the circumstances, although Mr Loo was not successful in the Authority, it was reasonable that he did not accept Vircom's offer. I do not consider Vircom's offer can increase the amount of costs Mr Loo should pay.

Mr Loo's submissions

[17] Ms Bolton, for Mr Loo, submits that Mr Loo's case was not so obviously unmeritorious as Vircom submits or set out in its Calderbank letter. I agree.

[18] She also submits that Mr Loo's financial situation is very constrained, and that his personal family situation is also difficult. Both of these factors mean that he cannot afford to pay costs. Mr Loo submits that costs should lie where they fall, or that reduced costs be awarded to Vircom.

[19] The submissions are accompanied by a detailed affidavit from Mr Loo outlining his assets, income and expenditure. Attached to the affidavit is the negative outcome of Mr Loo's attempt to secure a loan from his bank to pay costs to Vircom. Mr Loo is in receipt of legal aid for the purpose of making costs submissions.

Determination

[20] Recent Employment Court cases have set out the principles for considering the losing party's impecuniousness in relation to whether they should pay costs. In *Tomo v Checkmate Precision Cutting Tools Limited*⁶ Judge Inglis acknowledged that there was an established practice in the Court:

... of having regard to undue financial hardship in assessing costs. This is not altogether free from difficulty, including in terms of application.⁷

[21] Judge Inglis held that countervailing interests needed to be balanced. On the one hand is the interest of the successful party, who has been put to cost by the unsuccessful party. On the other hand, is the possibly undue financial hardship that might be imposed on the unsuccessful party by requiring them to pay the other party's costs. So, while undue hardship is a relevant consideration, it is not decisive.

[22] Public interest considerations are also important. It is important that an impecunious litigant cannot embark on what may be doomed proceedings free from the expectation of any costs liability. In *Victoria University of Wellington v Alton-Lee*⁸ the Court of Appeal said:

...litigation is expensive, time-consuming and distracting and the requirement that a losing party not only pays his or her costs but also makes a subsequent contribution to those of the successful party undoubtedly acts as a disincentive to unmeritorious claims or defences.⁹

[23] Mr Loo's financial circumstances are difficult, and it is not in the public interests that the imposition of costs should force him into having to sell his home, especially when his wife's health is delicate. However, I consider that Vircom is entitled to be paid costs. There are no factors requiring an increase or a decrease in the amount calculated on the daily tariff basis.

[24] I make an order for costs in the amount of \$3,500.

⁶ [2015] NZEmpC 2.

⁷ At paragraph [2].

⁸ [2001] ERNZ 305 (CA).

⁹ At paragraph [48].

[25] How Vircom decides to enforce this determination is their decision. It may be that Mr Loo's circumstances currently make it impossible to pay the costs. However, his circumstances may not remain so constrained. He may be able to pay costs at a later date, or be able to enter into a time payment agreement with Vircom.

Christine Hickey
Member of the Employment Relations Authority