

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 203
3000100

BETWEEN

MARIE MCNABB
Applicant

AND

SILVER FERN FARMS BEEF
LIMITED
Respondent

Member of Authority: Vicki Campbell
Representatives: Simon Mitchell for Applicant
Tim Cleary for Respondent
Submissions received: 12 July 2017 from Applicant
27 June 2017 from Respondent
Determination: 12 July 2017

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS
AUTHORITY**

A. Ms McNabb is ordered to pay to Silver Fern Farms Beef Limited the sum of \$4,500 within 28 days of the date of this determination.

[1] In a determination dated 31 May 2017¹ I found Ms McNabb to have been justifiably dismissed from her employment with Silver Fern Farms Beef Limited (SFF).

[2] I reserved costs, indicating that if the parties were unable to resolve that issue, both parties would have the opportunity to file cost memoranda and evidence. These have now been received by the Authority for consideration.

Determination of costs

[3] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. Under normal

¹ [2017] NZERA Auckland 159.

circumstances the Authority would apply a starting point of a notional daily tariff for quantifying costs. This matter was lodged on 14 November 2016. The daily tariff applicable to this matter is \$4,500.

[4] As held by the Employment Court, the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.² As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*,³ awards in the Authority will be modest taking into account conduct which increases costs unnecessarily.

[5] SFF seeks a total of \$7,668 as a contribution to its costs. The amount has been calculated on the basis of the daily tariff of \$4,500 plus an uplift of \$3,960 on the basis that a Calderbank offer was made to Ms McNabb and unreasonably rejected.

Calderbank

[6] The Authority will take into account any offers made by the parties to settle matters. As stated by the Court of Appeal:⁴

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.

[7] As was held by the Employment Court in *Mattingly v Strata Title Management Limited*:⁵

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a “steely approach” ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court’s observation in *Da Cruz* that Authority awards will be “modest”. What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a de novo challenge, having regard to the circumstances of the particular case.

[8] SFF issued a Calderbank offer to Ms McNabb on 5 April 2016 at 4.00pm which was open for acceptance until 11.00am on 11 April 2017.

² *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

³ (2006) 7 NZELC 98,128; [2005] ERNZ 808; (2005) 3 NZELR 1 (EMC).

⁴ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

⁵ [2014] NZEmpC 15; [2014] ERNZ 1 at [27].

[9] The investigation meeting was held on 3 April 2017. A second day was needed to interview a witness giving evidence on behalf of SFF who was unable to attend the investigation meeting on 3 April 2017. Had the witness been available the second day would not have been necessary.

[10] By the time the Calderbank offer was made both parties had completed all preparation work necessary and had attended an investigation meeting. With the exception of one witness, all evidence had been investigated.

[11] I find Ms McNabb's rejection of the Calderbank offer was reasonable in all the circumstances. The offer was made after both parties had already expended considerable costs. The majority of the evidence had been heard and it was for the benefit of SFF that the second day was necessary.

Conclusion

[12] In all the circumstances an appropriate contribution to costs is \$4,500. I have taken into account that I had indicated to the parties that if it was practicable an oral determination would be issued on the day (being 3 April 2017). That is not what eventuated due to having to resume for a second day to hear evidence from the SFF witness. It is highly likely, had I not reconvened on 12 April 2017, an oral determination would have been possible and the matter fully determined on 3 April 2017.

[13] Ms McNabb is ordered to pay to Silver Fern Farms Beef Limited the sum of \$4,500 within 28 days of the date of this determination as a contribution to its costs.

Vicki Campbell
Member of the Employment Relations Authority