

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Allan McNeill (Applicant)  
**AND** Barry James Pilcher (First Respondent)  
**AND** Barry Pilcher Financial Planning Limited (Second Respondent)  
**REPRESENTATIVES** Geoff O'Sullivan for Applicant  
Katherine Burson for Respondents

**MEMBER OF AUTHORITY** G J Wood

**SUBMISSIONS RECEIVED** 16 May 2005  
**BY**  
**DATE OF** 13 June 2005  
**DETERMINATION**

**COSTS DETERMINATION OF THE AUTHORITY**

1. The first respondent, Mr Barry Pilcher, breached several express and implied duties of his employment agreement with the applicant, Allan McNeill, chartered accountants, in establishing his own business, as an agent for New Zealand Funds Management Ltd, under the auspices of the second respondent, Barry Pilcher Financial Planning Limited. Had Allan McNeill been aware of these breaches before Mr Pilcher left it may well have dismissed him, meaning that Mr Pilcher would have lost the \$50,000 redundancy payment he received. On the other hand, Allan McNeill could not demonstrate that any financial losses actually occurred directly to it as it had sold the financial planning arm of its business to Spicers Ltd, a competitor of NZ Funds Management.
2. I ordered Mr Pilcher to pay penalties in the sum of \$4,000 to the Crown for these breaches and dismissed all claims against Barry Pilcher Financial Planning Limited. I do not intend to differentiate between the first respondent, Mr Pilcher, and the second respondent, Barry Pilcher Financial Planning Limited, in this costs determination, on

the grounds that the involvement of the latter in these proceedings was minimal to non-existent.

3. On behalf of Mr Pilcher, Ms Burson claimed \$46,689.24, consisting of 80% of his legal fees, plus disbursements of \$986.38. In doing so, Mr Pilcher relies on two *Calderbank* offers of \$5,000 each - one eight days before the investigation meeting and one after the meeting, while the issue of further evidence was considered. The first offer was declined; the second never received the courtesy of a response. Ms Burson relied in particular on the following points:
  - There was a lengthy and somewhat protracted history to the matter;
  - A 1½ days' investigation meeting was required;
  - There were complex and factual legal disputes;
  - Reputations were on the line;
  - Damages of over \$350,000, plus penalties, were claimed against Mr Pilcher.
4. In response, Mr O'Sullivan claimed costs on behalf of Allan McNeill. He left the sum up to the Authority's discretion but noted that Allan McNeill's legal costs had exceeded \$20,000 and that executive time in the sum of \$19,800 had been lost. He claimed executive time because of Mr Pilcher's dishonesty, including his misleading Allan McNeill about his intentions, which had significant financial implications for it. He also noted that Spicers, who had purchased the business from Allan McNeill, which led to Mr Pilcher's breaches of contract, had incurred costs of \$4,820.
5. In respect of the *Calderbank* offer, Mr O'Sullivan did not accept that any valid *Calderbank* offer was ever received, as only three days was given for consideration to the first and yet it was made only 10 days before the investigation meeting, when Allan McNeill had already spent \$20,000 (inclusive of executive time) on the matter. In fact by that time, Mr Pilcher's witness statements had already been received by Allan McNeill and the Authority.

6. It was also noted that the second offer was made after even a higher amount of costs had been incurred and that Mr Pilcher never admitted or accepted that he had done anything wrong as part of either *Calderbank* offer.
7. In response to the costs said to be incurred by Mr Pilcher, Allan McNeill did not accept that Mr Pilcher had paid any legal costs, as the invoices were sent instead to NZ Funds Management. It was also submitted that the costs incurred were too high.
8. In response, Ms Burson submitted that Mr Pilcher's breaches of contract were relatively minor; that Allan McNeill attempted to withhold part of Mr Pilcher's redundancy compensation; that the *Calderbank* letter clearly indicated that the claim for damages would not succeed because no losses could be proved; that sufficient time was given to consider the *Calderbank* offer as the recipients were experienced business people; that there was no response to the *Calderbank* offer in terms of a counter-offer; that Mr Pilcher is indebted to New Zealand Funds Limited; that executive time is normally considered part of the overheads of the business; and that Allan McNeill's involvement did not extend to advocacy activities.
9. *Health Waikato Ltd v. Elmsly* (unreported, Court of Appeal, CA69/03, 25 March 2004) is a case of some relevance on the issue of costs. It shows that vindication of a party's reputation is an acceptable factor to take into account in setting costs. In that case, the Court of Appeal also commented that the claim for a little over \$100,000 hardly warranted nine hearing days and the laying out of \$150,000 in legal fees, particularly when compared with an award of only \$15,000. The Court of Appeal held at Para.[53]:

*“Access to justice and reputational considerations mean that a costs benefit analysis of litigation of this sort cannot be consigned solely to economic considerations. Nonetheless, we think that a more sensible approach by defendants to the making of Calderbank offers and steely responses by the Courts where plaintiffs do not beat Calderbank offers would be in the broader public interest.”*
10. All factors need to be taken into the mix when considering the discretions involved in fixing costs. In this case the reputation of Allan McNeill concerning its conduct over the sale was important to it. It wanted to show Spicers in particular that problems that occurred with the sale were the fault of Mr Pilcher and not it. It succeeded in demonstrating this in part and that resulted in the penalties awarded.

11. I find that the first *Calderbank* letter was effective in the sense that there was sufficient time for proper consideration. The claim for damages was never made out or even specified, other than the \$50,000 said to be money payable to Mr Pilcher to assist Spicers. In fact, that money was found to be a redundancy compensation payment, as Mr Pilcher claimed throughout. Furthermore, all claims for damages were withdrawn. It could be said that Allan McNeill was entirely unsuccessful because it gained no financial remedies of any sort directly. Similarly, Mr Pilcher was required to pay penalties totalling \$4,000, which was less than the *Calderbank* offer made. Mr Pilcher can thus claim that on any reading of the situation, his offer to Allan McNeill by way of *Calderbank* letter was more than Allan McNeill was awarded. This certainly means that I am not in a position to order Mr Pilcher to meet any of Allan McNeill's costs.
12. On the other hand, the offer came after considerable costs had been incurred by Allan McNeill. Furthermore, the offer included a confidentiality clause, which would have meant that Allan McNeill's allegations against Mr Pilcher would remain unproven.
13. This case is thus complicated by the successful claims for penalties. I do not accept in equity and good conscience that a party who has been required to pay penalties to the Crown should be able to utilise a *Calderbank* offer to gain substantial costs against the party which was the subject of the behaviour penalised.
14. Another important factor is the length of time unnecessarily spent on ascertaining Mr Pilcher's actual activities. This required extensive disclosure of material and questioning, because Mr Pilcher was not frank and open with the Authority. It also necessitated gaining affidavit evidence from a senior executive of NZ Funds Management Limited, after the investigation meeting had run for a day and a half. I conclude that had Mr Pilcher been upfront in his evidence, the matter could have been dealt with easily within a day.

15. Taking all these matters into consideration, I determine that all parties should bear their own costs.

**G J Wood**  
**Member of Employment Relations Authority**