



New Zealand Employment Relations Authority Decisions

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Mulligan v Kelly CA 57A/06 (Christchurch) [2006] NZERA 854 (3 October 2006)

Last Updated: 6 December 2021

Determination Number: CA 57A/06 File Number: CEA 145/05

Under the [Employment Relations Act 2000](#)

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE

BETWEEN Jess Lawrence Mulligan (Applicant)

AND Philip Michael Kelly (Respondent)

REPRESENTATIVES Hamish Russ, Advocate for Applicant

Keri Kereru, Counsel for Respondent

MEMBER OF AUTHORITY Paul Montgomery

SUBMISSIONS RECEIVED 19 May 2006

9 June 2006

DATE OF DETERMINATION 3 October 2006

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] The Authority resolved the employment relationship problem between these parties by determining that Mr Mulligan was unjustifiably dismissed by Mr Kelly and by making various other ancillary orders in favour of Mr Mulligan.

[2] Costs were reserved.

The claim for costs

[3] Mr Mulligan, through his representative, as the successful party, seeks full representative/client costs in the sum of \$6,023.53. This amount is helpfully broken down in the submissions filed for Mr Mulligan and comprises significant disbursements (in the order of

\$2,000.00 of which the most significant item is airfares) but the actual elapsed time charged by Mr Mulligan's representative of \$4,110 seems reasonable for a matter of this kind.

[4] Mr Mulligan, through his representative, alleges that the respondent, Mr Kelly was unhelpful and

uncooperative in early attempts to try to resolve matters by agreement and there is reference to a *Calderbank* letter.

[5] Counsel for Mr Kelly in her submissions on behalf of the respondent acknowledges that costs are a discretionary item but draws the Authority's attention to one of the factors to be considered in setting an award of costs and that is the ability to pay. It is alleged that Mr Kelly is of limited means, has significant legal costs to meet after the Employment Relations Authority hearing and would not be in a position to pay an award of costs without suffering financial hardship. It is said that Mr Kelly has an income of \$27,000 per annum and is supporting a wife and four children on that sum.

The Calderbank offer

[6] Mr Mulligan's submissions refer to a so-called *Calderbank* letter dated 25 September 2005 and contend that that *Calderbank* letter which proposes a payment by Mr Kelly to Mr Mulligan of

\$6,000 be taken into account in the setting of costs.

[7] Presumably that figure of \$6,000 is, although it is not specified as such, to be treated as compensation under [section 123](#) (1)(c)(i) of the [Employment Relations Act 2000](#). In the determination on the substantive matter issued by the Authority, Mr Mulligan was awarded \$7,000 so acceptance by Mr Kelly of the lesser sum of \$6,000 would clearly have advantaged both parties.

[8] As the Authority has remarked before, the purpose of *Calderbank* offers is to facilitate settlement agreements and to ensure, as far as is possible, that a party that does not accept a reasonable settlement offer carries the full cost of litigating the claim which does not realise a better result for that party than the *Calderbank* offer would have.

[9] However, this is a situation where the so-called *Calderbank* letter cannot bear on the matter of costs. A *Calderbank* offer would only be relevant to the costs setting where the party offered it was successful. Here of course Mr Kelly was unsuccessful.

The legal principles

[10] The recent decision of the full bench of the Employment Court in *PBO Limited v Da Cruz* AC 2A/05 sets out the relevant principles.

[11] Giving the judgment of the Court, Judge Shaw identifies the basic tenets which the Authority has applied to costs decisions since its inception and she makes clear that those principles are *appropriate ... and consistent with [the Authority's] functions and powers*.

[12] In the following paragraph, Her Honour observes that *there is nothing wrong in principle with the Authority's tariff based approach so long as it is not applied in a rigid manner without regard to the particular characteristics of the case*.

[13] One particularly relevant consideration is the movement in average costs with the passage of time. In one of the earlier decisions of the Employment Court frequently relied upon in the Authority, *Harwood v Next Homes Ltd* [\[2003\] 2 ERNZ 433](#), the Court refers to average awards of costs for a one day investigation in the Authority as being between \$1,000 and \$1,500. However, in *Da Cruz* Judge Shaw notes that the figures for costs awards maintained by the Department of Labour for the six months ending 30 June 2005, show the majority of costs awards for one day investigation meetings are in a range between \$2,000 and \$2,500.

[14] The principles enunciated by the Employment Court in *Da Cruz* include the following matters:

- The Authority has a discretion on whether to award costs and on quantum.
- That discretion has to be exercised in a principled way and not arbitrarily.
- The Authority may enquire into and determine the reasonableness of a party's costs.
- Costs will generally follow the event.
- Without prejudice offers can be taken into account.
- Costs will generally be modest in the Authority.

- Costs are frequently judged in the Authority against a notional daily rate.

Discussion

[15] Mr Kelly declined to resolve matters on the basis of a *Calderbank* offer which would have been more advantageous to him than the effect of the decision of the Authority. Mr Mulligan seeks full representative/client costs on the somewhat ephemeral basis that the Authority's determination was in favour of Mr Mulligan and Mr Mulligan made settlement efforts which Mr Kelly rebuffed. It is also contended that after the so-called *Calderbank* letter, there was an exchange between the parties which resulted in an agreement being reached at a different figure which Mr Kelly subsequently resiled from.

[16] I certainly think there is no basis whatever for the reimbursement of full costs. That would be a most unusual situation in the Authority and nothing in the submissions received from the parties' advisors or in the nature of the particular matters before the Authority suggest that full costs should be awarded in this case. All that Mr Mulligan can expect is a contribution to his costs as is the Authority's common practice.

[17] I am also not minded to take into account the so-called *Calderbank* letter if only because it is difficult to see how it might be relevant. Certainly it would have been in Mr Kelly's interests to accept the so-called *Calderbank* offer but the fact that he chose not to is neither here nor there. Given that he was unsuccessful, he has an obligation, on general principles, to make a contribution to the successful party's costs. That obligation exists irrespective of this *without prejudice except as to costs offer*.

[18] However, I am prepared to take into account in assessing a costs award the fact that Mr Kelly apparently was difficult to deal with and seems to have been reluctant to deal with the matter in a businesslike fashion.

[19] On the other side of the coin, Mr Kelly's counsel urges on me the fact that Mr Kelly is financially embarrassed and, if the income he allegedly lives on is as counsel states, then he will already be having some difficulty in meeting his own legal costs.

[20] However, I would have expected to be provided with evidence of Mr Kelly's inability to meet his obligations given that that is effectively the only basis on which Mr Mulligan's application for costs is resisted. And in the absence of anything other than counsel's bald assertion of an inability to pay and an indication of Mr Kelly's income and family circumstances, it is difficult for the Authority to take that particular aspect much further.

Determination

[21] This was a matter that was dealt with by the Authority in an investigation meeting of approximately three and a half hours. The notional daily rate presently is between \$2,000-\$2,500. Although this investigation meeting was dealt with in under a full day, I think the appropriate contribution from Mr Kelly to make to Mr Mulligan is the sum of \$2,000.

[22] If Mr Kelly is financially embarrassed, no doubt Mr Mulligan will agree to him making that payment on a time basis.

Paul Montgomery

Member of Employment Relations Authority