

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 69
5417429

BETWEEN MELISSA NGATAI
 Applicant

A N D WARD DEMOLITION
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Kathryn Dalziel, Counsel for Applicant
 Ben Molloy, Counsel for Respondent

Submissions Received: 12 March 2014 from Applicant
 18 March 2014 from Respondent

Date of Determination: 1 May 2014

COSTS DETERMINATION OF THE AUTHORITY

I order that each party be responsible for its own costs

[1] By way of a determination dated 28 January 2014, the Authority found that Ms Ngatai had been unjustifiably dismissed. She was awarded the sum of \$5,000 in respect of compensation pursuant to s. 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[2] Costs were reserved by the Authority in the hope that the parties would be able to agree how they would be disposed of between them. Unfortunately, the parties have been unable to do so and, accordingly, they have served and lodged submissions on costs by way of memoranda of counsel.

[3] Ms Dalziel submits on behalf of Ms Ngatai that she should receive a contribution of \$5,000 towards her legal costs, applying the normal daily tariff of

\$3,500. She also seeks reimbursement of the Authority's lodgement fee of \$71.56 and the hearing fee of \$153.33 in respect of the second day.

[4] The respondent relies upon an offer to settle expressed as *without prejudice save as to costs*, hereinafter referred to as a *Calderbank offer* for ease of reference. The respondent in fact made two Calderbank offers, the first being contained in a letter to Ms Dalziel dated 11 June 2013, which offered to settle Ms Ngatai's dispute for \$4,500. That offer was left open for eight days. It was rejected by Ms Ngatai on the eighth day, and a counter offer made by Ms Dalziel on Ms Ngatai's behalf of \$8,000, also on a Calderbank basis.

[5] This counter offer from Ms Dalziel was rejected and the respondent made its second and final Calderbank offer by way of an email from its lawyers dated 21 June 2013. It was for \$6,000 and was expressed to be open until 4.00 pm on 26 June 2013. Ms Dalziel rejected that offer on behalf of Ms Ngatai. Ms Ngatai's statement of problem was lodged with the Authority on 16 July 2013.

[6] In reliance on the second Calderbank offer made by it, the respondent seeks a contribution towards its costs in the sum of \$5,250 to compensate it for one and a half days of investigation time which its says were unnecessarily incurred and which could have been avoided had its offer of \$6,000 been accepted.

[7] Anticipating this argument from the respondent, Ms Dalziel submits that the Calderbank offer made on behalf of the respondent was inadequate as it did not address Ms Ngatai's costs as at the time the offer was received. Ms Dalziel states that Ms Ngatai had incurred legal costs in the sum of \$4,010 by June 2013, *which was higher than usual given the necessity to repeatedly engage with the Respondent over its failure to disclose relevant documents to the restructuring process.*

[8] Mr Molloy, on behalf of the respondent, submits that the respondent's successful Calderbank offer was carefully considered, that the respondent bore additional costs compared to Ms Ngatai (as it produced the common bundle of documents and had to incur travel and accommodation in Christchurch) and Ms Dalziel's request for documentation repeated a request that had previously been (partially) complied with. Mr Molloy also emphasises that the respondent's substantive reasons for dismissing Ms Ngatai for redundancy were not impugned.

Determination

[9] Paragraph 15 of Schedule 2 of the Act provides as follows:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[10] The starting point in determining how legal costs and expenses should be dealt with in an Authority matter requires an application of the principles set out in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808. The principles governing the setting of costs awards in the Authority as promulgated in *Da Cruz* include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which 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. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.

- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[11] *Ogilvy & Mather (NZ) Limited v Darroch* [1993] 2 ERNZ 943 sets out the two principal criteria that Calderbank offers must satisfy so as not to unfairly prejudice the recipient of the offer by exerting undue pressure. These safeguards have been identified as including:

- a. A modicum of time for calm reflection and the taking of advice before a decision has to be made to accept the offer or reject it;
- b. The offer must be transparent if the offeror is later to be given the protection that a Calderbank offer furnishes.

[12] The Court of Appeal has advocated that a *steely approach* be adopted when determining costs in circumstances where a valid Calderbank offer has been made; *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385, citing *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA). However, the Employment Court has recently expressed doubts about such an approach in relation to costs awards in the Authority in *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 and in *Harvey Norman Stores (NZ) Pty Ltd v Boulton* [2014] NZEmpC 28.

[13] Ms Dalziel refers me to the Authority's case of *Woodward v Totally Boating 2004 Limited* [2014] NZERA Christchurch 21, which cited the Employment Court's judgement in *Jackson v Moyes Motor Group Ltd* [2005] ERNZ 504, which held at [31] as follows:

The factors that are relevant to the plaintiff's claim for costs are these:

- (1) *The plaintiff was wholly successful in his claim of constructive dismissal which, but for a qualifying Calderbank offer, would entitle him to a contribution to his reasonably incurred costs.*
- (2) *A defendant who makes a Calderbank offer which is silent as to pre-offer costs bears the burden of persuading the Court that the offer is adequate to disentitle a successful plaintiff from recovering costs.*

(3) *The closer an offer is made to trial the more pre-trial costs are likely to have been incurred.*

[14] Examining the two offers made to Ms Ngatai by the respondent's lawyers on its behalf, I am satisfied, first, that they both gave adequate time for Ms Ngatai to consider them. I am also satisfied that, in general terms, their terms were clear and transparent. The first letter set out the sum offered, the rationale for making the offer and also spelled out the consequences of not accepting the offer. The second offer made on behalf of the respondent, contained in an email, was expressed in much more brief terms, but when read against the context of the first offer, also fulfilled the tests in *Darroch*.

[15] However, as stated by Ms Dalziel, neither Calderbank offer from the respondent dealt with Ms Ngatai's costs expressly. Despite this, I believe that the circumstances under which these offers were made can be distinguished from those contemplated in *Jackson v Moyes Motor Group Ltd*, and in *Woodward*, as the respondent's Calderbank offers were made before Ms Ngatai's application to the Authority was lodged, whereas *Jackson* contemplated costs mounting up as the trial (or in the Authority's case, the investigation meeting) drew closer.

[16] I note that the terms of both the first and second Calderbank offers from the respondent's lawyers state that the sums offered were expressed to be *in full and final settlement*. Although this is a formula that is almost invariably used in settlement offers from lawyers, it does indicate, in the absence of any mention of costs, that the sum offered by the respondent was all inclusive of all outstanding issues, including costs.

[17] I also note that the email from Ms Dalziel which rejected the first Calderbank offer from the respondent and which preceded the respondent's second offer, made no mention of Ms Ngatai's costs to that date, but simply counter-offered \$8,000 *to resolve this matter*. In light of this, I consider that the two Calderbank offers from the respondent's lawyers were adequate at the time that they were made and in the light of the information that was available to them. I do not accept that, unless Ms Dalziel had advised them of Ms Ngatai's costs as at June 2013, of which there is no evidence, that the respondent's lawyers could have been expected to have guessed that they were already in the region of \$4,000.

[18] Having satisfied myself that the two Calderbank offers from the respondent were adequate in terms of the elements referred to in *Darroch* and *Jackson*, and that Ms Ngatai failed to recover in remedies as much as was offered in the second Calderbank offer, I must also consider whether Ms Ngatai's rejection of this second offer was reasonable.

[19] Ms Ngatai's unjustified dismissal argument before the Authority was largely, although not exclusively, predicated upon a failure by the respondent to take account of financial and organisational information the disclosure of which she had been seeking from the respondent both prior to her redundancy dismissal and after it. My finding in the substantive investigation meeting was that some of this information should have been disclosed, but was not, contrary to the duties of the respondent under the Act.

[20] At the time when the respondent's second Calderbank offer was rejected by Ms Ngatai, she was still waiting for some of the information which she had been seeking for some months. Whilst Ms Dalziel's email rejecting the first Calderbank offer does not state that Ms Ngatai was doing so because she did not have the information she was seeking, it is fair to surmise that, had it been disclosed when requested, Ms Ngatai and Ms Dalziel would have been in a better position to assess and weigh up the merits of Ms Ngatai's personal grievance, the likely remedies she could expect to be ordered by the Authority if she did not settle, and the offers made by the respondent.

[21] The Authority's statutory power to award costs against a party is founded in an assessment of what is reasonable. As *Da Cruz* makes clear, its statutory jurisdiction to award costs must be consistent with the equity and good conscience jurisdiction of the Authority, and equity and good conscience are to be considered on a case by case basis.

[22] When I stand back and consider the fairest way of disposing of costs between the parties in this matter, I consider that it is to order that costs should lie where they fall. This is because the usual convention that costs follow the event is not applicable in this case because a successful Calderbank offer was made by the respondent. However, I step away from ordering costs in favour of the respondent because the offer, which was a reasonable one when looked at in hindsight, was not obviously so

where all the relevant information had not yet been put before Ms Ngatai and Ms Dalziel at the time it was made.

Order

[23] I order that each party should be responsible for its own costs.

David Appleton
Member of the Employment Relations Authority