

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 34
5406651

BETWEEN TOM O'CONNOR
Applicant

A N D AUCKLAND UNIVERSITY
STUDENTS ASSOCIATION
INCORPORATED
Respondent

Member of Authority: K J Anderson
Representatives: G Pollak, Counsel for Applicant
B Scotland, Counsel for Respondent
Submissions Received: 25 November 2013 from Applicant
13 November 2013 from Respondent
Date of Determination: 31 January 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] Via a determination issued on 21 October 2013¹, the Authority found that the dismissal of Mr O'Connor was justified. As requested, the parties have attempted to resolve the matter of costs but have not been able to do so. The Authority has now received the respective costs submissions from both parties in anticipation of the Authority now determining the matter.

[2] The submissions for the Auckland University Students' Association (AUSA) inform that costs of \$36,433.65 (exclusive of GST and disbursements) were incurred in defending the claims advanced by Mr O'Connor. AUSA acknowledges the notional tariff based approach of the Authority but then refers to a *Calderbank*² offer made to Mr O'Connor on 18 March 2013, a significant time before the investigation meeting

¹ [2013] NZERA Auckland 484

² *Calderbank v. Calderbank* [1975] 2 All ER 333

held on 19 June 2013; hence preparation for the investigation meeting would not have been at an advanced stage.

The *Calderbank* offers

[3] By a letter dated 18 March 2013, AUSA made a “without prejudice save as to costs” offer to Mr O'Connor. The terms of this offer included:

- (a) A payment equivalent to three months' salary (less tax);
- (b) \$15,000 compensation pursuant to s.123(1)(c)(1) of the Employment Relations Act 2000 (the Act); and
- (c) A contribution towards Mr O'Connor's costs in the sum of \$5,000 (plus GST).

[4] In addressing Mr O'Connor's claim for the remedy of reinstatement, AUSA posited that even if he was successful in establishing that he was unjustifiably dismissed, it was considered to be unlikely that reinstatement would be forthcoming as a remedy from the Authority. The *Calderbank* offer was open for acceptance until 28 March 2013.

[5] While AUSA has made reference to a *Calderbank* offer made to Mr O'Connor, the submissions for him also refer to an offer made by Mr O'Connor via an email dated 8 March 2013. This offer appears to be a response to an earlier offer of settlement made by AUSA on 7 March 2013. In monetary terms, Mr O'Connor proposed that AUSA should make two “compensatory” payments of \$30,000 pursuant to s.123(1)(c)(i) of the Act³ and also pay a further sum of \$15,000 (plus GST) towards his legal costs.

[6] It is established that the *Calderbank* offer made by AUSA on 18 March 2013 is a response to Mr O'Connor's proposal.

[7] While the submissions for AUSA refer to the principles established by *PBO Ltd v. Da Cruz*⁴ and the current notional tariff applied by the Authority of \$3,500 per day of hearing, it is urged that the Authority should apply a “steely approach” in

³ The Authority understands that one of the payments would have been compensation for an unjustifiable disadvantage grievance and the other payment was in compensation for the unjustifiable dismissal grievance.

⁴ [2005] 1 ERNZ 808

recognition of the *Calderbank* offer made to Mr O'Connor. It is submitted that the Authority should increase the amount of costs that would normally be awarded to what would be, effectively, full indemnity of the costs (in fees) incurred by AUSA: \$36,433.65 (plus GST).

[8] On the other hand, it is submitted for Mr O'Connor that while AUSA was largely successful in defending Mr O'Connor's claims, the Authority should not depart from the application of its normal tariff approach; and given that the investigation meeting occupied 1½ days, the costs awarded should not exceed \$5,250 (\$3,500 plus \$1,750).

Analysis and conclusions

[9] Given the success of AUSA in regard to the outcome of the substantive matter, costs must follow the event and in the absence of any *Calderbank* offer, there would be no good reason to award AUSA more than \$5,250.

[10] The reference to “without prejudice save as to costs offers” in *Da Cruz* is recognition by the Employment Court that a *Calderbank* offer is a matter that can reasonably be taken into account by the Authority in exercising its discretion in determining costs. The general principles pertaining to *Calderbank* offers have been considered (and are now well established) by the Court of Appeal. In *Health Waikato v. Elmsly*⁵, the Court espoused the view that:

... we think that a more sensible approach by the 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.

[11] Further, in *Blue Star Print Group (NZ) Ltd v. Mitchell*⁶, the Court of Appeal re-emphasised that a “steely” approach was required whereby it was stated that:

It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered.

⁵ [2004] 1 ERNZ 172

⁶ [2010] ERNZ 446 (CA)

Determination

[12] On the weight of the evidence before the Authority regarding the substantive matter, the assessment made by AUSA that even if Mr O'Connor was found to have been unjustifiably dismissed, he would not be reinstated, was, in my view, a reasonable one. It follows that the *Calderbank* offer made by AUSA on 18 March 2013 must be seen as being quite reasonable, particularly given that the Authority found there were substantial deficiencies in the management of the financial affairs of AUSA on the part of Mr O'Connor. Hence his dismissal was found to be justified.

[13] Therefore, in a costs setting, the outcome for Mr O'Connor is that it would have been prudent for him to have accepted the *Calderbank* offer made by AUSA. Of course it has to be accepted that the rejection of the offer was a decision that Mr O'Connor was entitled to take. But in doing so, he was on notice from AUSA that it would rely on the existence of the *Calderbank* offer in regard to claiming costs, in the event that it was successful in the defence of Mr O'Connor's claims.

[14] The Authority had the advantage of hearing the evidence of a number of witnesses for both parties and the benefit of being able to spend some time analysing the content of a considerable number of relevant documents before determining that Mr O'Connor was justifiably dismissed. Nonetheless, it is my considered opinion that Mr O'Connor should have anticipated that by rejecting the reasonable *Calderbank* offer, and continuing with the litigation of his alleged grievance, he was exposing himself to significant risk in regard to the consequences, in a costs setting, if his claims were not upheld.

[15] It is accepted by the Authority that AUSA is entitled to an increase in the normal award of costs that would be awarded; because of the valid, and in the view of the Authority, reasonable, *Calderbank* offer that was made to Mr O'Connor.

[16] The issue for the Authority then becomes the extent of the increase that should be awarded. Mr O'Connor has not made any submissions or provided any evidence regarding his current financial position. Nonetheless, the Authority has previously heard evidence that Mr O'Connor had to sell his house as a consequence of his dismissal and there was further evidence from him, pertaining to remedies in the substantive matter, of other financial consequences. It is not the role of the Authority to impose further hardship upon an unsuccessful grievant. On the other hand, one

would have expected to have received tangible evidence of Mr O'Connor's current situation in a costs setting, rather than him simply submitting that the Authority should ignore the *Calderbank* offer made by AUSA and then proceed to apply the usual daily tariff approach.

[17] While I do not accept that AUSA is entitled to full reimbursement of the fees incurred, it is accepted that legal precedent requires that the Authority should uphold the basic principles applying to the circumstances when a reasonable *Calderbank* offer is rejected by an unsuccessful litigant.

[18] Taking into account all of the circumstances, I conclude that Mr O'Connor should make a reasonable contribution to the costs incurred by AUSA and that this sum should be more than would normally be awarded if applying the usual daily tariff approach of the Authority.

[19] Pursuant to clause 15 of Schedule 2 of the Act, Mr O'Connor is ordered to pay to Auckland University Students' Association the sum of \$10,000 as a contribution to the costs incurred.

K J Anderson
Member of the Employment Relations Authority