

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 448  
5450093

BETWEEN COLIN MARK PHILLIPS  
Applicant  
  
AND JUKEN NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: Robin Arthur  
  
Representatives: Sally Leftley, Advocate for the Applicant  
Penny Swarbrick, Counsel for the Respondent  
  
Submissions: 24 October 2014 from the Respondent and 28 October  
2014 from the Applicant  
  
Determination: 3 November 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A. Colin Phillips must pay Juken New Zealand Limited \$5500 as a contribution to its costs.**

[1] Juken New Zealand Limited (Juken) sought an award for a sum equal to actual legal costs it had incurred after the expiry of an offer it made to settle Colin Phillips' personal grievance application before an Authority investigation meeting was held. Mr Phillips had not accepted the offer made on a 'without prejudice except as to costs' basis (referred to as a *Calderbank* offer).

[2] The Authority investigation went ahead and resulted in a determination that Juken acted unjustifiably in how it went about dismissing Mr Phillips on the grounds of redundancy – by failing to consult and treat him properly – but that Juken had disestablished his position for genuine business reasons.<sup>1</sup> Mr Phillips would usually

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<sup>1</sup> [2014] NZERA Auckland 419.

be entitled to an award of costs because he was successful in establishing Juken acted unjustifiably and Juken was ordered to pay a remedy to him. However, in this case, Juken was able to seek an order for Mr Phillips to contribute to its reasonably incurred costs because its offer to settle the matter with Mr Phillips had been for an amount higher than what he was subsequently awarded.

[3] The Authority determination issued on 10 October 2014 ordered Juken to pay Mr Phillips \$8000 compensation under s123(1)(c)(i) of the Employment Relations Act 2000 but Juken's earlier settlement offer (made with an expiry date of 15 August 2014) had proposed paying him \$10,000 compensation along with payment of one month's further salary (\$6,859 gross) and a contribution of \$2000 to his costs. If he had accepted it, he would have been about \$7000 better off compared to the Authority award (after allowing for paying his representative's fee and tax on the additional wages) while Juken would have saved more than \$11,000 in legal fees. Both parties would have been spared the time and effort of attending a day-long investigation meeting in Whangarei.

[4] Mr Phillips' costs memorandum described the offer as received at "*a very late stage of the proceedings*", coming after his witness statement was lodged in the Authority. It said Mr Phillips had decided not to accept the offer on the assumption that the further wages offered meant Juken thought such an award was "*highly possible*" and because he had already incurred most of his costs (totalling \$2210). It submitted his decision was "*not unreasonable*" and costs should lie where they fall.

[5] I have not accepted Mr Phillips' submission about the lateness of the offer. It was made on the same day he lodged his witness statement and expired before Juken was due – under the Authority's investigation timetable – to lodge its witness statements. The expiry date set in the offer, of 15 August, was more than two full weeks before the date set for the investigation meeting. As a matter of employment law practice, the employer's offer was made at an appropriate time – having seen the strength of Mr Phillips' argument (to the extent it was revealed in his witness statement) and before the employer committed further resources to preparing and lodging its witness statements in response. Instead those resources – in some part at least – could have been better spent on the settlement sum offered, to the benefit of both parties. Mr Phillips' choice to proceed and not settle meant he bore a greater risk in respect of the eventual costs award if his assessment of the likely outcome proved

to be wrong and the Authority determination provided him with less than the settlement terms offered by Juken. The reasonableness of his choice had to be measured against the actual outcome – which in this case proved to be less advantageous to him than the *Calderbank* offer.

[6] On that basis Juken correctly submitted that it was usual for the party who had unreasonably rejected a *Calderbank* offer to have costs awarded against it and for there to be some increase above the Authority's usual daily tariff, unless there were good reasons why such an increase should not occur.

[7] The 'good reasons' to be considered included the general principles guiding the exercise of the Authority's discretion to set costs and how those principles should be applied in light of the particular factors or circumstances in the case. The danger of undue rigidity in the application of a tariff-based approach could be avoided by adjusting the tariff up or down according to those principles and factors, without compromising the Authority's modest approach to costs. As the Employment Court stated in *PBO Ltd v Da Cruz*:<sup>2</sup>

*Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.*

[8] Against that background the costs award made in this determination was reached after considering three questions relevant to the particular circumstances of this case:

- (i) Were the costs incurred by Juken reasonable and necessary?
- (ii) Did equity and good conscience require any adjustment of the level of contribution to those costs by Mr Phillips to allow for his financial situation and the justice of the overall result?
- (iii) Was the amount awarded a modest contribution to reasonably incurred costs?

### **Reasonably incurred costs**

[9] Juken's costs memoranda stated its costs from the expiry of the *Calderbank* offer totalled \$11,478.50, not including GST. The costs were said to comprise fees of \$6016 for 12.6 hours preparation, \$3562.50 for attendance at a full day investigation

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<sup>2</sup> [2005] ERNZ 808 at [46].

meeting and \$1900 for counsel's return travel from Auckland to Whangarei. An additional disbursement of \$249.48 was sought as mileage for counsel's travel to Whangarei for the investigation meeting.

[10] If the Authority were not minded to award those actual costs, Juken submitted the daily tariff of \$3500 should be uplifted to provide "*a significant contribution*" of at least \$7500 as recognition that its costs incurred after the expiry of the *Calderbank* offer had proved to be "*completely pointless*".

[11] In assessing the reasonableness of costs incurred I excluded the costs of counsel's travel. Juken had an absolute right to retain expert counsel at a senior level from Auckland, as it chose to do. It may also have had limited alternative options for specialist representation in the Kaitaia district where the cause of action arose (as Mr Phillips had worked in its mill there). However I have preferred Mr Phillips' submission, through his advocate, that Juken could have retained a suitably experienced employment law practitioner from within Northland so that it must bear the additional cost of its choice not to do so.

[12] Similarly Mr Phillips should not have to bear the full cost of Juken's decision to retain expert counsel from Auckland at the level of fees associated with that choice. Applying a lesser (but still commercial) rate of \$350 an hour to Juken's suggested contribution of \$7500 equated notionally, and approximately, to eight hours attendance on the day of the investigation meeting and 13 hours for preparation. In the circumstances of this case I took that figure of \$7500 as both what would amount to reasonably incurred costs and as a starting point for a significant uplift of the usual daily tariff of \$3500 in order to take account of the without prejudice offer. Other relevant principles needed to be applied to that level of costs and that starting point.

### **Mr Phillips circumstances and the overall result**

[13] Mr Phillips' cost memoranda stated he had no savings and referred to his evidence at the investigation meeting about the significant reduction to his income following his redundancy and the increase in his costs for travel and rent when he travelled from Kaitaia to Whangarei for temporary work. On 1 September 2014 he had started a new job at a lower level of income than he received while working as a Juken manager.

[14] Juken suggested that an award of \$7500 costs against Mr Phillips could be offset against the order for \$8000 compensation made in his favour by the Authority. The net result for him would be \$500 which would not cover what, according to his costs memoranda, were his own costs of \$2210 for his advocate's for preparation and attendance at the investigation meeting.

[15] I considered those factors militated against an uplift of the tariff to Juken's suggested level of \$7500. Mr Phillips was successful in establishing that he was unjustifiably treated by Juken so it would not be a satisfactory outcome for him to be out of pocket. However an overall requirement for sensible use of parties' resources in litigation meant he had to bear some consequence for what proved to be an unwise choice in rejecting Juken's settlement offer. Weighing those factors in the particular circumstances, I concluded an equitable outcome would be a costs award of \$5500. It meant Mr Phillips would not end up paying out more to Juken and his own advocate than he got as a remedy, but – in recognition of its efforts to resolve the matter earlier and more beneficially to both parties – Juken would offset a significant portion of its reasonably incurred (but not actual) costs. There was an element of that outcome that was unsatisfactory (and, understandably, might feel unjust to many people) given that the situation only arose because Juken had not done what it should have done in respect of Mr Phillips in the first place. However the outcome of the costs award also had to reflect a choice he had made during the litigation about his dismissal.

### **A modest award**

[16] As a final check I considered whether an order for Mr Phillips to pay Juken \$5500 in costs was consistent with the requirement for modest awards. Measured against the general range of awards I concluded the amount was modest but consistent with the overall requirements of equity and good conscience in the exercise of the Authority's statutory discretion to award costs.<sup>3</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>3</sup> *Mattingly v Strata Title Management Limited* [2014] NZEmpC 15 at [27].

