

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 27
3017137

BETWEEN SAM ROBINSON
 Applicant

AND KOANUI FARM TRUST
 Respondent

Member of Authority: James Crichton

Representatives: Alex Kersjes, Advocate for Applicant
 Hamish Burdon, Advocate for Respondent

Investigation Meeting: On the Papers

Submissions Received: 7 March 2018 from applicant
 23 February 2018 from respondent

Determination: 17 April 2018

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In the substantive determination issued as NZERA Wellington 4 on 19 January 2018, I decided that Mr Robinson had been unjustifiable dismissed from his employment but that there was significant contribution from him which reduced the remedies which he would have otherwise been entitled to.

[2] I reserved costs.

The claim for costs

[3] Each party seeks an award of costs. The applicant seeks a costs award on the footing that he was the successful party. His claim is a modest one; he seeks \$500, reduced from \$1,000 to take account of a Calderbank offer made to him by Koanui Farm Trust.

[1] Koanui Farm Trust also seek costs based on the Calderbank offer it made to Mr Robinson in November 2017 for a total of \$6,000 which was more than Mr Robinson received from my determination. That Calderbank offer is accordingly an operative Calderbank offer and it must be taken into account in any determination that I now issue.

[2] Although the decision is not referred to in the respondent's costs submissions, Koanui Farm Trust do attach a determination of my colleague Member Tetitaha in which she reversed the usual rule that costs follow the event because of an operative Calderbank letter made by the unsuccessful party and where the successful applicant was directed to pay costs and the applicant has his remedies reduced by 100% because of contribution.

[3] In effect, Koanui Farm Trust is seeking to have me apply similar principles in the present case.

Discussion

[4] The normal rule of course is that costs follow the event and on that footing, if all other things were equal, Mr Robinson would be successful in a costs award.

[5] However, Koanui Farm Trust urge on me the fact that first Mr Robinson was found to have significantly contributed to the circumstances giving rise to his grievance and thus had his remedies reduced accordingly, and secondly Mr Robinson had ignored an operative Calderbank offer which, had he accepted it would have placed him in a materially better position than proceeding to hearing and receiving the effects of the determination that I then issued.

[6] The whole point of an operative Calderbank offer is to enable parties to come to terms on the basis both can live with so that the time of Courts and Tribunals is not taken with matters that could be resolved by the parties.

[10] Further, where a party fails to accept an operative Calderbank offer, this Authority will take that into account in fixing costs.

[7] In the particular circumstances of this case, I am not minded to depart from the usual principle that costs follow the event. The fact is that Mr Robinson was successful. I did find that he had been unjustifiably dismissed. I agree that with Koanui Farm Trust that I found a significant degree of contribution but that in itself does not negative my conclusion that there was an unjustified dismissal.

[8] However, I also accept that Koanui Farm Trust made Mr Robinson a Calderbank offer which, after my determination gave him significantly less benefit than would have been the case if he had accepted the Calderbank letter, became an operative Calderbank offer. On that footing then, Mr Robinson would have been significantly better off to have compromised his claim with the Koanui Farm Trust and accepted their Calderbank offer. The fact that he did not do that must be reflected in the costs award that I now make in his favour.

[9] I note that Mr Robinson has very sensibly conceded, in his submission on costs, that he did fail to pick up an operative Calderbank offer and that the effect of that would have to be taken into account in a costs award and his claim is therefore for the modest sum of \$500.

[10] That figure is expressly identified as having already taken account of Mr Robinson's failure to accept the Calderbank offer and accordingly, implicit in that claim is the proposal that I do not need to rebate the amount claimed again.

[11] Koanui Farm Trust no doubt would have preferred to settle matters on the basis of their Calderbank offer which would have obviated the need for them to appear in the Authority and incur the cost of that.

[12] However, the outcome that they achieved by appearing in the Authority may well have not been too dissimilar from the total cost of the Calderbank offer because I found a significant degree of contribution from Mr Robinson and therefore rebated the remedies that he would have otherwise have received and Mr Burdon's costs for his services would appear to be appropriately modest, given his claim for costs on behalf of Koanui Farm Trust.

Determination

[17] I am satisfied that the proper course of action is to award costs in favour of Mr Robinson, the successful party, at the figure that he seeks of \$500 and that that sum takes into account Mr Robinson's failure to take the Calderbank offer previously offered to him by Koanui Farm Trust.

[13] Accordingly, Koanui Farm Trust is to pay to Mr Robinson free of all deductions the sum of \$500 as a contribution to his costs such payment to be made within 28 days of the date of this determination.

James Crichton
Chief of the Employment Relations Authority