IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2023] NZERA 290
3129694

	BETWEEN	KENNETH SNOWLING Applicant
	AND	SCOTT TECHNOLOGY LIMITED Respondent

Member of Authority:	Andrew Dallas
Representatives:	Anna Oberndorfer, advocate for Applicant James Cowan and John Farrow, counsel for Respondent
Determination:	2 June 2023

COSTS DETERMINATION OF THE AUTHORITY

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[1] By determination issued on 11 January 2023[1], the Authority made findings and gave orders about Kenneth Snowling's employment relationship problem with Scott Technology Limited (Scott). The Authority reserved the issue of costs and Scott was given 14 days from the date of the determination to lodge a memorandum on costs in the event such was necessary.[2] No memorandum was received within this timeframe.

Application for leave to apply out of time lodged

[2] On 8 February 2023, Scott's representative lodged an application in the Authority seeking leave to apply for costs out of time. The application was advanced on various grounds. However, Scott's best arguments were: (i) the company's primary representative was on parental leave between November 2022 and 7 February 2023 and the application to apply for costs out of time was prepared and lodged with the Authority the very next day (8 February 2023) and (ii) the Authority has, in any event, wide discretion to consider costs out of time.

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[1] *Snowling v Scott Technology Limited* [2023] NZERA 8
[2] Above n 2 at para [34]

[3] While accepted that the Authority has wide discretion to entertain the application and any subsequent costs assessment, Scott's application was opposed by Mr Snowling. The reasons advanced were: (i) the length of delay, (ii) the explanation for the delay, (iii) prejudice to Mr Snowling, (iv) the "surrounding circumstances" and (v) the "merits" of any application including in the face of the Authority's finding about Scott withholding statutory and contractual entitlements.

[4] In reply, Scott's representative said that a delay caused by itself should not be visited upon its client. Scott further said no steps were taken by either party to agree upon costs within the 14 day timeframe set by the Authority and that as Mr Snowling had now challenged the substantive determination, costs should be determined by the Authority and not the court.

Leave to apply out of time granted

[5] As to the requirement for Scott to lodge a costs memorandum within 14 days of the date of the Authority's substantive determination, s 221 of the Employment Relations Act 2000 (the Act) allows the Authority to extend time within which anything is or may be done according to its substantial merits and equities. I have decided in all the circumstances of these proceeding, including that proceedings are now between the parties in another forum, which has significantly changed the focus for the parties, it is appropriate to grant Scott an extension to bring it claim for costs in the Authority.

[6] Even if I am wrong in my view that s 221 of the Act applies in the circumstances of this matter, I would find, in the alternative, that s 219(1) applies. Consequently, Scott's claim for costs could proceed on either basis.

Scott's claim for costs

[7] As the investigation meeting lasted one day, Scott would be entitled to seek tariff costs of $4,500.[3] However, Scott applies for $22,295.50 in costs (an uplift of $17,792.50).

[3] See: www.era.govt.nz/determinations/awarding-costs-remedies/

[8] Scott says it is entitled to "indemnity costs" for the period 11 January 2022 until the lodging of legal submission in March 2022 on the basis of a "calderbank offer" – a litigation tactic deployed by one party to either settle the proceedings or, if the matter proceeds to hearing, seek to increase any costs award made against the losing (or only partially successful based on the offer made) other party. A second offer was also made.

Calderbank offer

[9] Scott's first offer was made on 11 January 2022. The offer was open for 10 days. The essence of the offer was that Mr Snowling pay Scott $50,000 and costs would otherwise lie where they fell. While Mr Snowling ultimately rejected the offer, I find it was not an offer capable of acceptance for three reasons.

[10] First, the offer did not address the withholding of Mr Snowling's redundancy and annual leave entitlements; rather it simply proposed Mr Snowling pay Scott $50,000 and, in effect, walk away. In my substantive determination, I made the following finding about Scotts's contractual and statutory obligations to make these payments to Mr Snowling.

> [27] However, the issue of the ongoing retention by Scott of Mr Snowling's redundancy compensation and his accrued annual leave must be resolved. As stated above, I do not accept Scott has a reasonable justification for withholding these payments and I do so because the apparent reasonable justification is countered by enforceable contractual and statutory obligations to pay Mr Snowling both. These components of the employment relationship problem are easily severable from the unjust enrichment dispute and the non-payment of Mr Snowling's annual leave is ***particularly egregious***.[4]

[11] Indeed, if a penalty for failure to pay his annual leave was sought by Mr Snowling, I would have had very little hesitation in imposing one.

[12] Second, Mr Snowling cannot contract out of the Employment Relations Act 2000[5] *and* even if he had accepted Scott's offer to settle, Mr Snowling would have still been entitled to pursue his claims for redundancy pay and annual leave in the Authority.[6] In respect of the latter claim, this is further reinforced by the Holidays Act 2003 which relevantly provides that Mr Snowling right to annual leave continues until he has taken all his entitlement or has been paid out.[7]

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[4] Above n 1. Footnote removed; emphasis added.
[5] Employment Relations Act 2000, s 238.
[6] Employment Relations Act 2000, 131(2).
[7] Holidays Act 2003, s 16(4).

[13] Third, the offer threatened to engage in further legal proceedings if Scott was not successful in the Authority. Specifically, the offer stated, and concerningly so: "[s]hould the Authority fail **(sic)** to order Mr Snowling to return the overpayments [Scott] intends to immediately file a challenge in the Employment Court".

Second "offer"

[14] On 31 January 2022, Scott made a further offer to Mr Snowling to settle via email. This offer was advanced on "drop hands" basis. In other words, both parties would just walk away from the proceedings bearing their own costs. Mr Snowling points out this offer was only open for 5 hours and 29 minutes and expired at 9.00pm on 31 January 2022, being the eve of the investigation meeting.

[15] As with the first offer, I do not accept this offer was one capable of acceptance. First, there was a technical problem with the offer. The offer was expressed "without prejudice" rather than "without prejudice save as to costs". Mr Snowling did not object to this "without prejudice" offer being placed by Scott before the Authority, and indeed he responded to it in his costs submissions. Consequently, the privilege attaching to the offer can reasonably said to be waived by Scott. While the body of the email did refer to the offer being made on a "Calderbank basis", the failure in technical form, identified above, was repeated four times in two emails – the second of which sought to "add context" to the offer – from Scott to Mr Snowling. I find the critical failure of form in this offer is terminal to reliance thereupon.

[16] Second, and notwithstanding the above, the second offer suffered from the same fundamental problems set out in paragraph [12] above.

Outcome

[17] While I have found that it is not open to Scott to rely on its offers, *Calderbank* or otherwise, it is still entitled to a consideration of a contribution to its costs.

[18] It is a notorious fact that the Authority applies a "tariff" approach to fixing costs.[8] As stated above, the tariff for a one day investigation meeting, as this was, is $4,500. Mr Snowling submitted costs should lie where they fall. However, given the adverse findings made against him in the substantive determination, this was never going to be viable.

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[8] See: www.era.govt.nz/determinations/awarding-costs-remedies/

[19] So then, in all the circumstances of the case I find Scott is entitled to $4,500 as a contribution to its costs. This must be paid by Mr Snowling to Scott Technology Limited within 14 days of the date of this determination.

Andrew Dallas
Chief of the Employment Relations Authority