

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 131
5551402

BETWEEN RAJEEV SUNDER
 Applicant

AND VASONA NETWORKS INC
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Megan Richards and Alice Chote, Counsel for Applicant
 Giles Brant, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 29 July 2016 from the Applicant
 8 July and 15 August 2016 from the Respondent

Determination: 27 October 2016

DETERMINATION OF THE AUTHORITY

[1] In my determination of 16 June 2016 I found Mr Sunder's dismissal to have been unjustifiable on procedural grounds but substantively justified.¹ I found Vasona Networks Inc (Vasona) had breached its obligation of good faith to Mr Sunder in not providing him with all relevant information during the consultation that preceded the decision to make his position redundant.

[2] I awarded compensation of \$10,000 under s.123(1)(c)(i) to Mr Sunder. He had not sought the imposition of a penalty on Vasona for the breach of good faith and none was imposed. I reserved the issue of costs.

[3] Mr Sunder has made no claim for costs, but Vasona now seeks a costs award against him on the basis that he had refused a *Calderbank* offer made on 16 February 2016 and had unreasonably proceeded with his claims in the Authority. Mr Sunder

¹ 2016 NZERA Wellington 69

recovered significantly less in the Authority than had been offered to him in the *Calderbank* offer. Vasona seeks \$62,918.60 as a contribution to its costs.

[4] Mr Brant, counsel for Vasona, submits that amount represents 75% of the legal costs invoiced to Vasona between 27 February 2015 and 29 February 2016; and 100% of its costs thereafter. It also includes the full cost of an expert witness called by Vasona to give evidence to the Authority's investigation and the full costs of travel and accommodation for Biren Sood, Vasona's founder, director and Chief Executive who resides in the United States where the company is based.

[5] Ms Richards and Ms Chote, counsel for Mr Sunder, submit costs should lie where they fall given neither party was fully successful. Alternatively, if costs were to be awarded, they submit these should be on the basis of the Authority's notional daily tariff at the time (\$3,500 per day) with no or little adjustment in respect of the *Calderbank* offer of 16 February 2016.

[6] Counsel submit Vasona has not put forward any proper justification for seeking 75% of all costs incurred before the *Calderbank* offer had been made. Nor has it explained why this case justified an award of full costs after the offer was made. They cite *Bradbury v Westpac Banking Corporation*² where the Court of Appeal held that indemnity costs were exceptional and required exceptionally bad behaviour.

[7] Mr Sunder also queries the disbursements sought by Vasona, submitting the Authority's broad discretion should be exercised in accordance with principle, which includes determining whether the claimed disbursements were reasonably incurred and appropriate. In particular, Mr Sunder identifies the expert evidence supplied by Professor Locke as being unnecessary and inappropriate. Mr Sunder also queries the reasonableness of being asked to reimburse his former employer for the full travel expenses incurred by Mr Sood.

[8] With regard to the *Calderbank* offer made on 16 February 2016, counsel for Mr Sunder submit it was not unreasonable for him to reject the \$40,000 offered. That offer did not address the issue of reinstatement in which they submit he had a genuine interest. They also note the timing of the offer, which was made three weeks before the investigation meeting. By this stage most of the preparation for the hearing had been completed and Mr Sunder had incurred significant legal fees. Counsel note that

² [2009] NZCA 234 at [28]

costs incurred by Mr Sunder were higher than they would have been if Vasona had complied with their requests for information in a timely manner. They submit Vasona's delays resulted in them having to request the information multiple times.

[9] In reply submissions Mr Brant refers to the "*hopeless elements*" of Mr Sunder's case that required Vasona's response. This, and Mr Sunder's undue focus on reinstatement and other matters on which he was unsuccessful, justified an award of 75% of pre-*Calderbank* offer costs in Mr Brant's submission. In support of Vasona's request for 100% reimbursement of costs it incurred following the *Calderbank* offer, counsel cites the principles from *Da Cruz*³, endorsed in *Fagotti*⁴.

[10] Those principles are well known and it is unnecessary to repeat them all here. Amongst them are:

- There is a discretion as to whether costs would be awarded and what amount;
- The discretion is to be exercised in a principled manner and not arbitrarily;
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct that increased costs unnecessarily can be taken into account in inflating or reducing an award;
- costs generally follow the event;
- costs are frequently judged against a notional daily tariff; and
- *Calderbank* offers can be taken into account.

[11] Having considered the submissions of both parties and the applicable principles referred to above, I find it is appropriate to take Vasona's *Calderbank* offer to Mr Sunder into account. Its offer of \$40,000 was substantial and was open for one week for his acceptance. That was a reasonable time for Mr Sunder to consider it although, as Ms Richards rejected the offer on his behalf the day after it had been made, it is doubtful whether Mr Sunder gave it very much consideration.

[12] That may have been due to the proximity to the investigation meeting which was scheduled to take place three weeks after the offer was made, or two weeks after the offer lapsed. I accept Ms Richards and Ms Chote's submission that, by 16 February 2016, much of the preparatory work for the investigation meeting had been undertaken and Mr Sunder's legal costs were significant. Had the offer been made

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC)

⁴ *Fagotti v Acme & Co Ltd* [2015] EmpC 135

earlier than three weeks before the investigation meeting I would have accorded it greater weight. I am less inclined to take into account Mr Sunder's wish for reinstatement, given the obstacle of his former position being disestablished for reasons I found to be genuine.

[13] It is indisputable that if Mr Sunder had accepted the *Calderbank* offer it would have resulted in a far more favourable monetary outcome for him than he achieved through his partial success in the Authority. He would have achieved four times the amount awarded to him and Vasona would not have incurred the legal fees and disbursements that it did. Therefore, despite Mr Sunder's partial success with his claims, I find it equitable that he contribute to the legal costs of his former employer.

[14] I do not accept Vasona's submission that Mr Sunder should be required to pay 75% of the costs it incurred before making the *Calderbank* offer and 100% of costs after the offer. I note Vasona is seeking reimbursement of all legal costs it incurred, other than those associated with mediation, from 27 February 2015. These include responding to the notification of Mr Sunder's personal grievance and correspondence its solicitors entered into with "*various parties*", before Mr Sunder lodged his application in the Authority.

[15] I find no reason to require Mr Sunder to pay 75% of the costs incurred by his employer in responding to the employment relationship problem he raised in accordance with his statutory rights. An award of that magnitude would breach the principles that costs should be modest and should not be used as a punishment. The deterrent effect it could have on employees exercising their lawful rights to raise employment relationship problems would be offensive to public policy.

[16] It is more reasonable for costs Vasona incurred after it made the *Calderbank* offer to Mr Sunder to be considered. Mr Brant's summary of legal costs show these to be \$24,116.10. I find it would not be equitable to award 100% of these costs against Mr Sunder, as that approach would fail to acknowledge the partial success he achieved in the Authority.

[17] I find a more reasonable approach is to award half of the legal costs incurred by Vasona following its *Calderbank* offer. That gives appropriate recognition to Mr Sunder's partial success and also acknowledges the additional legal expense to which Vasona was put by his rejection of its reasonable offer to resolve the matter.

[18] I make no separate award with regard to witness costs.

Determination

[19] Mr Sunder is ordered to pay Vasona Networks Inc the sum of \$12,058.05 as a contribution to its legal costs.

Trish MacKinnon
Member of the Employment Relations Authority