

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Neil Richard Taylor (Applicant)

AND eCom New Zealand Limited (Respondent)

REPRESENTATIVES Richard Harrison, counsel for the applicant
Chris Patterson, counsel for the Respondent

MEMBER OF AUTHORITY Ken Raureti

DATE OF DETERMINATION 28 November 2006

COSTS DETERMINATION OF THE AUTHORITY

[1] The life of the employment relationship problem between Mr Taylor and eCom New Zealand Limited commenced in the Authority in October 2005 as an urgent application for interim reinstatement. The full investigation into Mr Taylor's alleged problems had a three pronged approach, resulting in three separate determinations.

[2] The first determination was in respect of the interim reinstatement application. The Authority determined that Mr Taylor had an arguable case and the balance of convenience and overall justice of the case favoured him. The Authority ordered reinstatement on a garden leave basis.

[3] The second determination was in respect of the substantive matter surrounding Mr Taylor's dismissal. Mr Taylor had been suspended twice during the disciplinary process. The Authority determined that the two suspensions in the matter were unjustified; however the decision to dismiss Mr Taylor was one which a reasonable employer could have taken in the circumstances. In respect of the suspensions, Mr Taylor gave no evidence regarding the effect of the suspensions on him, therefore, in light of that no award for humiliation or distress was made.

[4] The third determination was in respect of a claim Mr Taylor made saying he was owed \$88,904.00 in unpaid commissions. He tabled twelve customer accounts to which he claimed commission was due. The Authority investigated each of the claims separately and found that he was not entitled to any commission at all.

[5] In each of the determinations, costs were reserved, which in effect left an accumulation of costs incurred over a twelve month period for the three separate investigation meetings. The respondent now seeks an award of costs in its favour.

[6] The respondent's actual costs were \$16,733.50 plus disbursements of \$91.00. The respondent has provided copies of all invoices of how the costs have been incurred.

[7] The respondent is seeking full costs incurred up until the second investigation meeting, (the rationale it says being Mr Taylor was seeking reinstatement and had signed an undertaking in respect of damages when he applied for interim reinstatement) and 75% of the balance of its costs after the second investigation meeting, the total being \$12,447.10 .

[8] Alternatively, the respondent is seeking a contribution of 75% of its reasonable costs being \$9,798.66.

[9] While on the other hand the applicant accepts that the respondent is entitled to an award of costs, it proposes that costs should not exceed that normally awarded by the Authority for a two day meeting with some concession for the applicant's success with the interim reinstatement application. The applicant also points out that on perusal of the legal fees incurred by the respondent, it is apparent that the fees include work which appears to be unrelated to the investigation meetings, and it highlights redundancy negotiations, costs around seeking a compliance order, and issues around sick leave while on suspension.

[10] The summary of the applicant's position is that a costs award in favour of the respondent should be between \$1500.00 and \$2000.00.

Calderbank Offers.

[11] The respondent indicates that it made two *Calderbank* offers, one on the 7th October 2005 and one on 2 November 2005. It submits that the Authority should heavily rely on the applicant's stance in rejecting both reasonable *Calderbank* offers.

[12] Looking at the first offer of 7 October 2005, it appears to be an offer of settlement, offered on a "without prejudice" basis. There is no evidence to suggest that it was anything other than a without prejudice exchange between the parties during their attempts to negotiate a resolution. I do not regard it as a *Calderbank* offer for this costs consideration.

[13] The second offer (2 November 2005) is clearly a *Calderbank* offer. It is headed ***WITHOUT PREJUDICE SAVE AS TO COSTS***. The offer of settlement included various terms from the respondent's offer to revoke Mr Taylor's dismissal with Mr Taylor resigning from his employment immediately, through to eCom offering to pay Mr Taylor a compensatory sum of \$30,000.00 without deduction in full and final settlement of all matters in dispute between the parties. The offer was open to be accepted up until 5.00pm on Friday 4 November 2005. The last paragraph of the letter reserved the respondent's right to provide a copy of the letter to the Authority should an issue arise as to costs between the parties, and as such it said the letter should be treated as a *Calderbank* offer.

[14] It is clearly and plainly a proper *Calderbank* offer, with particular headings and plain language as to its status. As such, I have factored it into my consideration of this matter.

[15] The applicant's representative indicated that Mr Taylor was looking for other counsel at the time of the *Calderbank* offer and says that he had no

understanding of the meaning of a Calderbank offer or the practical effect of turning it down.

[16] I do not accept that Mr Taylor was as uninformed as he is suggesting. It is clear from the invoices he copied to the Authority that he was paying for professional legal services throughout the relevant period of the Calderbank offer, and it is also apparent that whilst he may have been looking for counsel at the time, he also had at least one consultation with another professional employment law advocate during the afternoon of Friday 4 November.

[17] The Authority's discretion to award costs is set out in Clause 15 of the Second Schedule of the Employment Relations Act 2000. The principles guiding the Authorities discretion are set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*

- There is a discretion as to whether costs should be awarded and what amount;
- The discretion is to be exercised in accordance with principle;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience is to be considered on a case by case basis;
- Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;
- That frequently costs are judged against a notional daily rate;
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[18] I have had regard for the parties submissions, including Mr Taylor's success in respect of the interim reinstatement, the respondent's request for full costs as outlined above, and the *Calderbank* offer. While I do not accept the respondent's submissions for full costs, I do accept that the *Calderbank* offer of 2 November 2005 is relevant.

[19] In exercising the Authority's discretion to award costs, Mr Taylor is to pay eCom New Zealand Limited the sum of \$7500.00 as a contribution towards the reasonable costs the respondent has incurred.