New Zealand Employment Relations Authority Decisions

Tobin v Rapid Labels Limited (Auckland) [2016] NZERA 353; [2016] NZERA Auckland 270 (10 August 2016)

Last Updated: 30 November 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 270
5436691

BETWEEN DARREN TOBIN Applicant

AND RAPID LABELS LIMITED Respondent

Member of Authority: Eleanor Robinson

Representatives: Blair Edwards, Counsel for Applicant

Dean Organ, Advocate for Respondent

Costs Submissions 8 August 2016 from Applicant

25 July 2016 from Respondent

Determination: 10 August 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 24 June 2016 ([2016] NZERA Auckland 209), I found that the Applicant, Mr Darren Tobin, had not been unjustifiably dismissed from his employment by the Respondent, Rapid Labels Limited (RLL).

[2] I further found that RLL had not failed to pay Mr Tobin agreed commission payments during the period 2007 to 2013.

[3] In that determination costs in the substantive matter and relating to a preliminary decision issued on 7 March 2014 [2014] NZERA Auckland 82 were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and both parties have filed submissions in respect of costs.

[4] The matter involved 5 days of meeting time (4 full days plus 2 half days), in addition to the preliminary matter which was determined 'on the papers'.

[5] Mr Organ, on behalf of RLL, submits that it made two Calderbank1 offers, which are

'without prejudice save as to costs' offers, to Mr Tobin and seeking costs on an indemnity

1 *Calderbank v Calderbank* [1976] Fam 93 (CA)

costs basis of $36,601.75 (inclusive of GST) from the date of the expiry of the first Calderbank Offer in respect of the substantive matter, in addition to a contribution to costs in the sum of $2,105.25 (inclusive of GST) in respect of the preliminary matter.

[6] Mr Blair, on behalf of Mr Tobin, submits that either costs should lie where they fall, or in the alternative, be modest.

Submissions for the Respondent

Applicant's Conduct

[7] The Respondent submits that Mr Tobin's evidence and behaviour in the Authority

were dishonest, and intended to mislead the Authority to obtain financial advantage.

Calderbank Offers

[8] Mr Organ submits that RLL made two Calderbank Offers to Mr Tobin. The first was made on 10 February 2015 and was headed: "*Without Prejudice Save As To Costs".* IT offered Mr Tobin the sum of $50,000.00 in respect of all claims he had against RLL.

[9] The first Calderbank Offer expired and RLL made a second Calderbank Offer to Mr Tobin dated 12 May 2015, again headed: "*Without Prejudice Save As To Costs".* The Second Calderbank Offer offered Mr Tobin the sum of $55,000.00 in respect of all claims he had against RLL.

[10] The second Calderbank Offer also expired without acceptance.

Submissions for the Applicant

[11] In support of his submission that costs should lie where they fall, or in the alternative, should be modest, Mr Blair submits that RLL's claim for full indemnity costs is not reasonable.

[12] Mr Blair submits that indemnity costs are only awarded when a party has acted in a

manner which constitutes 'Flagrant misconduct', however no such conduct exists in this case.

[13] Further that Mr Tobin's conduct in failing to advise the RLL that he had accepted alternative employment during the restructuring process was conduct within the employment rather than during litigation, and has already been taken into consideration by the Authority in

determining Mr Tobin's claim for unjustified dismissal. It would therefore be penalising Mr

Tobin twice for the same conduct.

[14] In respect of the Calderbank Offers, Mr Edwards submits that it is not appropriate for the Authority to have the same '*steely*' approach to Calderbank offers as is appropriate before the Employment Court, citing the observation by Judge Inglis in *Stevens v Hapag-Lloyd (NZ) Ltd2* that: *"it will generally be inconsistent with statutory imperative underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority ...".*

Determination

[15] I have carefully considered the submissions of the parties. It is incumbent upon me that I approach the question of costs in a principled manner and not arbitrarily, and I therefore consider each relevant ground for uplift separately as appropriate.

[16] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz3.*

[17] I note the submissions made by Mr Organ and Mr Edwards regarding the conduct of Mr Tobin in relation to misleading behaviour, however this is a matter addressed and taken into consideration in my determination of the substantive matter, and I make no uplift in costs on this basis.

[18] I am however minded to give weight to the matter of the two Calderbank Offers.

[19] Whilst taking note of the comments made by Judge Inglis as regards the ameliorating of the '*steely*' approach noted in the judgment in *Stevens v Hapag-Lloyd (NZ) Ltd4,* I also take note of the full Employment Court judgment in *Fagotti v Acme & Co Ltd5* in which it was stated:

[109] We do not agree with the defendant's submission that the remarks of the Court of Appeal about a "steely" approach to Calderbank offers expressed in Bluestar Print Group applies only to Employment Court proceedings and not to matters before the Authority. That submission cannot, logically, be correct. The vast majority of matters in which Calderbank offers are considered by the Employment Court are in proceedings brought to the Court by a

challenge to the Authority's determination. Calderbank offers are most

2 [2015] NZEmpC 28 at para [95]

3 [2005] NZEmpC 144; [2005] 1 ERNZ 808

4 [2015] NZEmpC 137

5 [2015]m NZEmpC 135

usually made before the Authority's investigation meeting. So it follows that the Court of Appeal's remarks about the fortitude with which they are approached, should apply also to Calderbank offers before an Authority investigation meeting. They are, therefore, applicable also to the Authority's first instance jurisdiction as well as to the Court's appellate role in the same cases.

[20] I consider that Calderbank Offers may still be taken into consideration in the matter of costs in the Authority on the basis that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted6.

[21] The Calderbank Offers were both made well in advance of the Investigation Meeting and there was therefore sufficient time for Mr Tobin to consider them fully prior to taking any part in that proceeding. They offered significantly more than what was awarded to him in determination [2016] NZERA Auckland 209.

[22] Costs normally follow the event and on the basis of the normal daily tariff rate of

$3,500.00 applied in the Authority, this equates to $17,500.00.

[23] I determine that that starting point should be uplifted to take into account the rejection of the First and Second Calderbank Offers.

[24] Mr Tobin is ordered to pay RLL $25,000.00 costs in respect of the substantive matter, and $400.00 in respect of the preliminary matter which I determined on the papers.

[25] Mr Organ has also claimed reimbursement of $348.00 in respect of disbursements as supported by invoices. Disbursements are normally recoverable and I am satisfied that

$348.00 is an appropriate amount for the Applicant to contribute.

[26] Mr Tobin is ordered by pay RLL $25,400.00 towards its legal costs and $348.00 as disbursements.

Eleanor Robinson

Member of the Employment Relations Authority

6 *Aoraki Corporation Ltd v McGavin*6 [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) at [53]
