

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 59  
5375306

BETWEEN

SUSAN TULLOCH  
Applicant

AND

RESOURCE DEVELOPMENT  
CONSULTANTS LIMITED  
Respondent

Member of Authority: Christine Hickey

Representatives: Peter Moore, advocate for the applicant  
Raewyn Gibson, advocate for the respondent

Costs submissions received: From the applicant on 21 and 27 January 2014  
From the respondent on 9 December 2013 and  
23 January 2014

Determination: 11 April 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] On 12 November 2013 I determined that Dr Tulloch had a personal grievance that she was unjustifiably dismissed by way of a genuine redundancy that had been undertaken in a procedurally unjustified manner. I awarded her what she would have earned if she had remained employed until 29 February 2012 plus \$6,000 in compensation.

[2] Although some of Dr Tulloch's other claims were successful no additional compensation was awarded and none of the penalties sought were awarded.

[3] In that determination I reserved costs in the hope the parties could reach agreement but they have not been able to do so. I set a timetable for submissions on costs.

## The law on costs

[4] The Authority's jurisdiction to make costs orders is found in clause 15 of Schedule 2 of the Act. Costs are at the discretion of the Authority.

[5] Each case is to be treated in light of its own circumstances. The primary purpose of costs is to compensate the successful party.

[6] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and were outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>1</sup> a judgment of the Full Court of the Employment Court. Costs must be reasonable and costs awards are generally modest. Also set out in *Da Cruz* is the principle that 'without prejudice save as to costs' (or *Calderbank*) offers can be taken into account in setting the amount of costs.

## Calderbank offers to settle

[7] The Court of Appeal in *Health Waikato Limited v Van Der Sluis*<sup>2</sup> observed that *the Calderbank letter field is fully discretionary*. The nature of this wide discretion is that if the Authority awarded an applicant a lesser amount than the amount offered in the *Calderbank* offer, despite being the successful party the applicant may not receive its costs. In that way the party making the *Calderbank* offer acquires some protection in terms of its costs after a substantive decision or determination is made. Equally, the Authority may take into consideration a *Calderbank* offer when more has been awarded than was offered. But how the Authority decides to award and/or apportion costs is entirely in its discretion.

[8] The purpose of taking *Calderbank* offers into account, according to Chief Judge Goddard is:

*... to induce the Court by this means to exercise its discretion against granting the plaintiff any costs if it has recovered less by proceeding with the case than it could have by accepting the offer ...It is intended to put pressure on plaintiffs and discourage them from proceeding with litigation that may turn out to be unproductive simply for the sake of a cathartic day in court*<sup>3</sup>

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<sup>1</sup> [2005] ERNZ 808

<sup>2</sup> *Health Waikato Limited v Van Der Sluis* [1997] 10 PRNZ 514

<sup>3</sup> *Oglivy & Mather v Darroch* [1993] 2 ERNZ 943

[9] Simply put it is in the public interest that there is fair and expeditious resolution of disputes without unnecessary public expense. It would not be in the public interest if parties were allowed to ignore reasonable offers to settle without any impact on the costs they can recover.

[10] The Court of Appeal has suggested that a *more steely* approach to costs would be in the public interest where plaintiffs do not *beat Calderbank offers*<sup>4</sup>.

[11] Both parties seek costs. Dr Tulloch seeks a contribution of \$3,500 to her legal costs on the basis of the Authority's usual daily tariff for one day of hearing time and the fact that she was the successful party.

[12] The respondent seeks a contribution of \$5,000 towards its costs on the basis that it made *Calderbank offers* to Dr Tulloch which were *significantly in excess of* what she achieved from the Authority.

[13] The matter was heard over one day and the parties both made oral submissions at the investigation meeting as well as making further written submissions after that.

#### *Respondent's submissions*

[14] Ms Gibson submits that in all the circumstances the respondent should receive a contribution to costs from the applicant. The circumstances include *Calderbank offers* but also that the respondent was put to extra cost by the applicant filing a second and a third amended statement of problem and because of the wide ranging claims made in addition to the unjustified dismissal claim. She submits that the claims made:

*...unnecessarily prolonged the preparation time required for the hearing, increased the duration of the hearing and consequently incurred the respondent additional costs without any benefit arising to the applicant as a result of these claims.*

[15] I agree that the first statement of problem filed was rather unfocussed and unclear about what the principal claim or claims were. The second amended statement of problem was an improvement. And rather than increasing costs the applicant deserves to be commended for the late narrowing and clarification of issues contained in the Memorandum of Pleadings filed on 17 June 2013. I would not have

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<sup>4</sup> *Health Waikato Limited v Elmsley* [2004] 1 ERNZ 172

considered this case to have been one in which the daily tariff should have been increased.

[16] The submission that most assists the respondent's position is the effect of the *Calderbank* offers, specifically those of 10 and 12 June, in relation to where costs should lie and why.

[17] The respondent made four *Calderbank* offers to Dr Tulloch. The first three were on 13 November 2012, 6 June 2013 and 10 June 2013. The third offer was for a payment of \$10,000 of compensation under s.123(1)(c)(i) of the Employment Relations Act, and a payment towards her legal costs of \$2,000 plus GST. The offer was made on a denial of liability basis and on the basis that a settlement would be full and final and private and confidential between the parties.

[18] The offer remained available for Dr Tulloch to accept up until 5pm on Wednesday 12 June 2013.

[19] The *Calderbank* offer of 10 June 2013 was re-offered to Dr Tulloch in identical terms on 12 June and remained available for her acceptance before 5pm, Thursday, 13 June 2013.

[20] There are certain criteria which a *Calderbank* offer must meet to be considered valid. An offer must:

- be detailed enough to be certain, including in relation to what amount, if any, is offered by way of costs; and
- give the other party a reasonable period of time to consider the offer.

[21] The 10 June and 12 June offers met those criteria and were valid *Calderbank* offers.

#### *Applicant's submissions*

[22] Mr Moore submitted that while the respondent's offer was to pay \$10,000 compensation, plus \$2,000 towards Dr Tulloch's costs, at that point her costs had not been determined and therefore only the substantive portion of the offer, that is the \$10,000, can be compared to the result. That is true to an extent and I put aside the

amount of costs actually incurred when considering whether or not Dr Tulloch was more or less successful in the Authority than the respondent's *Calderbank* offer/s.

[23] However the amount of costs accrued by Mr Moore at the time of consideration of the offer/s is relevant to whether or not Dr Tulloch acted reasonably in rejecting the offer/s. Mr Moore would have been well aware of the amount of costs that he had accrued on Dr Tulloch's case at the date of each of the *Calderbank* offers. Upon the Authority's request Mr Moore has provided invoices showing that as at 10 June 2012 his fees amounted to \$4,097.28<sup>5</sup>. That was before the witness statements were finalised and filed and before a significant amount of work in preparation for the investigation meeting and before the full day's hearing. Both parties incurred significantly increased costs after the last two *Calderbank* offers were turned down. Mr Moore also knew at the time the *Calderbank* offers were made that his client would likely receive a maximum of \$3,500 towards her costs should she be successful in the Authority.

[24] My determination was simply that Dr Tulloch should receive \$6,000 compensation and should be paid what she would have earned had she remained employed until 29 February 2012. I did not quantify that amount. In their costs submissions the parties disagreed on how much Ms Tulloch would have earned up to and including 29 February 2012 because she received paid notice up to 17 February 2012. I can only presume that issue is now resolved between the parties as there has been no application to reopen the investigation.

[25] However, by my calculations, and disregarding payment that had been received up to 17 February, the amount that would have been earned at the maximum from 4 February through to Wednesday 29 February 2012<sup>6</sup> would be \$4,153.85. I note that holiday pay and Kiwisaver contributions were not pleaded as remedies sought and so I have not included those in the \$4,153.85. Therefore, the maximum amount awarded to Dr Tulloch by the Authority was \$10,153.85; only very marginally over the offered *Calderbank* amount.

[26] Mr Moore acknowledges that the only difference between the respondent's *Calderbank* offers and what Dr Tulloch was seeking by way of settlement was *non-*

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<sup>5</sup> GST exclusive

<sup>6</sup> A period of 18 working days (including Waitangi Day)

*economic*. Dr Tulloch's final counter-offer dated 11 June 2013 was that a public statement be made reading:

*In consideration of a flawed redundancy process, RDCL and Dr Susan Tulloch have reached a confidential agreement to resolve all matters of dispute between them.*

[27] Mr Moore submits the *Calderbank* offers made by the respondent did not offer Dr Tulloch any public vindication because the respondent insisted on confidentiality. Mr Moore goes further and submits that *as a matter of public policy* a respondent should not be able to in effect silence an applicant by offering a *potentially realistic Calderbank settlement but only under strict terms of secrecy*. That is plainly not a realistic contention. A *Calderbank* offer may well, and most frequently does, offer some payment without conceding liability and while requiring confidentiality. There is nothing inherently against the public interest in that approach.

[28] It is more correct to say that a *potentially realistic Calderbank offer* lacking only an element of public vindication should not be seen as only 'potentially realistic' and rejected when the respondent, objectively assessed, acted reasonably. As the Court of Appeal said in *Bluestar Print Group (NZ) Limited v Mitchell*<sup>7</sup>:

*...equally, an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the plaintiff.*<sup>8</sup>

[29] Dr Tulloch's apparent desire for reputational or public vindication is a consideration relevant to the exercise of the Authority's discretion in considering costs. The problem for Dr Tulloch is that there was no potential damage to her professional reputation from being made redundant because a redundancy is a no-fault termination of an employee's role. The respondent did not suggest that Dr Tulloch fell short in any way as an employee; it just did not have the specialist work for her it had hoped to gain and decided not to focus on that area of work any longer.

[30] In addition, non-economic loss is able to be compensated under s.123(1)(c)(i) of the Employment Relations Act 2000 which provides for compensation for *humiliation, loss of dignity and injury to the feelings of the employee* and, in addition, is recognised as not being 'income' which makes it non-taxable. Dr Tulloch was

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<sup>7</sup> [2010] ERNZ 446 (CA)

<sup>8</sup> Ibid at paragraph 19.

being offered \$10,000 compensation for any non-economic loss which is \$4,000 more than she was awarded for non-economic loss by the Authority.

### **Determination**

[31] I consider that the *Calderbank* offers made on 10 and 12 June have not been 'beaten' by Dr Tulloch in what she gained by way of my determination of her claims. Both parties incurred significant extra costs as a result of having to go through the investigation meeting process. Dr Tulloch has received at the most only a negligible amount more in the light of the greater legal costs incurred. The circumstances are such as to reverse any presumption that costs follow the event. Put simply both parties would have been financially better off had Dr Tulloch accepted a *Calderbank* offer of \$10,000 plus \$2,000 towards her costs in June 2012.

[32] I consider it reasonable that the parties bear their own costs.

Christine Hickey  
Member of the Employment Relations Authority