

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 67
5556118

BETWEEN DAVID WALKER-ROGERS
Applicant

A N D QUICK SKIPS LIMITED
Respondent

Member of Authority: David Appleton

Representatives: John Shingleton, Counsel for Applicant
Peter Macdonald, Advocate for Respondent

Submissions Received: 2 May 2016 for Applicant
17 May 2016 for Respondent

Date of Determination: 20 May 2016

**COSTS DETERMINATION OF
THE AUTHORITY**

The respondent is to pay a contribution towards the applicant's costs in the sum of \$7,000.

[1] By way of a determination dated 22 March 2015¹ the Authority found that Mr Walker-Rogers had been unjustifiably constructively dismissed from his employment by the respondent. However, he failed in his application for a backdated pay rise and bonus payments.

[2] Costs were reserved pending clarification of the status of the applications against the second and third respondents. Following the issuing of the above determination, during a case management telephone conference Mr Shingleton communicated to the Authority and Mr Macdonald that Mr Walker-Rogers withdrew his claims against the second and third respondents. Accordingly, the temporary

¹ [2016] NZERA Christchurch 33

order prohibiting the publication of the names of the second and third respondents is hereby made permanent. I can now also determine the matter of costs.

[3] Mr Shingleton seeks a contribution towards Mr Walker-Rogers' costs in the sum of \$15,000, asking for an uplift from the current daily tariff of \$3,500 to \$5,000 and for the two and a half days of investigation meeting to be treated as three days, to take into account how long it would have taken if submissions had been made orally.

[4] Mr Shingleton justifies the uplift of the daily tariff on the following grounds:

- a. A Calderbank offer was made on behalf of Mr Walker-Rogers in the sum of \$45,000, which was rejected by the respondent. Mr Walker-Rogers was awarded \$41,625 in total by the Authority, which Mr Shingleton says is sufficiently close to \$45,000 to trigger the Calderbank principles.
- b. Mr Shingleton had to spend *an inordinate amount of time dealing with the Respondent's Advocate's submission*. Mr Shingleton asserts that Mr Macdonald's submission contained hearsay, personal opinion, irrelevant, new and inflammatory material, all of which needed to be identified and responded to.

[5] Mr Shingleton also argues that, whilst Mr Walker-Rogers was not successful with all of his claims, he was successful with the main claim.

[6] Mr Macdonald, on behalf of the respondent, observes that Mr Walker-Rogers was successful in part only, and that he was awarded only 25% of what he had sought. In addition, his claims for a back dated pay rise and for bonus payments were rejected, as was his claim for the imposition of penalties. Also, no award was made in respect of the suspension which, whilst carried out in a procedurally unjust manner, was substantively justified.

[7] Mr Macdonald also states that a significant amount of time was spent defending the claim for a backdated salary, which he essentially asserts had no reasonable prospect of success.

[8] Mr Macdonald also refers to the two withdrawn claims, which *caused an ongoing and deep seated “hang over” to the second and third Respondents in the preparation for and during the hearing itself.*

[9] Mr Macdonald also states that the investigation meeting was for two and a half days, not three.

[10] In conclusion, Mr Macdonald submits that costs should lie where they fall.

Discussion

[11] The Authority’s power to award costs is set out in paragraph 15 of Schedule 2 of the Employment Relations Act 2000 (the Act), which provides as follows:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[12] When determining how legal costs and expenses should be dealt with, the Authority must take into account the principles set out in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. These principles include the following:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct

which increased costs unnecessarily can be taken into account in inflating or reducing an award.

- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. 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.

[13] *Ogilvie & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943 sets out the two principal criteria that must be satisfied when a *Calderbank* offer is made so as to not prejudice unfairly the recipient of the offer by exerting undue pressure. These safeguards are as follows:

- (a) A modicum of time for calm reflection and the taking of advice before a decision has to be made to accept the offer or reject it; and
- (b) The offer must be transparent if the offeror is later to be given the protection the *Calderbank* offer furnishes.

[14] The starting point is to establish whether Mr Walker-Rogers should be awarded a contribution towards his costs at all, given that he succeeded substantially in only one of his claims. In my view, he is entitled to a contribution as he succeeded in the principal aspect of his claim; namely, that he had been constructively dismissed. That question took up the bulk of the Authority's investigation meeting and most of the submissions of the representatives. The events leading to the constructive dismissal were also the key factors which led to Mr Walker-Rogers' hurt and humiliation.

[15] Having established that, I now turn to what the contribution should be. In particular, whether the Authority's daily tariff should be uplifted, and whether the investigation meeting should be treated as lasting two and a half days or three days.

[16] I shall address each of the key points in turn.

The Calderbank offer

[17] It was rather surprising that neither representative annexed the without prejudice save as to cost correspondence to their submissions. Whilst I had indicated in the case management conference call that I would accept costs submissions in a bullet point form, and that I did not need to be reminded of the key legal principles, I did not indicate that essential evidence supporting the submissions should be withheld.

[18] The failure to show me the Calderbank correspondence gives me a difficulty in that I am unable to assess whether the correspondence making the offer to settle for \$45,000 fulfilled the *Darroch* principles. The only reason to think it did is that Mr Macdonald does not protest that it did not.

[19] However, I am also unable to assess whether the respondent was unreasonable in rejecting the offer. For example, if the \$45,000 that was the subject of the offer consisted of an element reflecting a back dated pay rise and/or bonus payments, the rejection of it would not have been unreasonable, as I found those elements of Mr Walker-Rogers' claim unfounded.

[20] In the absence of this correspondence I am simply unable to judge whether the Calderbank was validly rejected or not and so I do not take it into account.

Mr Macdonald's submissions

[21] These did contain elements which were not conventional, and in one case, appropriate. However, I venture to suggest that they would not have taken Mr Shingleton long to address, as they were obvious. In addition, Mr Shingleton has not indicated how much extra costs were incurred in doing so. I therefore decline to accept that this factor justifies increasing the daily tariff.

Unsustained bonus and backdated pay rise claims

[22] I agree with Mr Macdonald that the claim for a back dated pay rise was unlikely ever to succeed, on normal contractual principles. Whilst this element of the overall claim did not take up a significant amount of time, it did cause the respondent to have to address the claim in its statement in reply, its evidence at the investigation meeting and in submissions. Similarly, whilst less unlikely to succeed from the outset, the bonus payment claim did ultimately fail.

[23] I believe it is appropriate to take this into account. However, Mr Macdonald has not disclosed what element of his client's costs were taken up in addressing these issues.

The claims against the second and third respondents

[24] These claims were withdrawn after the determination of the claims against the first respondent. Whilst Mr Macdonald states that the claims caused stress to the second and third respondents, the award of costs is not meant to punish a party, but is to reimburse the winning party for costs incurred. I do not believe that the second and third respondents would have spent a considerable amount of time investigating the claims against them, although I accept that there would have been some costs associated with addressing them in the statement in reply. As Mr Macdonald did not produce any copy invoices, I cannot tell how much the first respondent was charged, if anything, for defending the claims against the second and third respondents.

Conclusion

[25] When I weigh up the totality of the factors referred to above, I am satisfied that a contribution should be made towards Mr Walker-Rogers' costs, but I am not satisfied that it would be just to increase the daily tariff above \$3,500. This is primarily because of the fact that Mr Walker-Rogers did not succeed in some of his claims.

[26] I also do not consider it just to treat the investigation meeting as lasting three days. If one discounts the time taken for addressing the unsuccessful claims, I believe that two days would have been sufficient to have heard all the evidence and submissions in relation to the successful constructive dismissal claim. I therefore find that a contribution to Mr Walker-Rogers' costs by the first respondent in the sum of \$7,000 is just.

[27] Mr Shingleton has not disclosed what his client's costs were, but I assume that they would have been at least \$7,000.

Order

[28] I order the first respondent to pay a contribution towards Mr Walker-Rogers' costs in the sum of \$7,000.

David Appleton
Member of the Employment Relations Authority