



New Zealand Employment Relations Authority Decisions

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Wilson v Geovert Limited (Auckland) [2016] NZERA 247; [2016] NZERA Auckland 214 (28 June 2016)

Last Updated: 18 November 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 214
5461073

BETWEEN JUSTIN WILSON Applicant

A N D GEOVERT LIMITED Respondent

Member of Authority: James Crichton

Representatives: Michael Smyth, Counsel for Applicant

Anthony Parish, Advocate for Respondent

Submissions Received: 2 June 2016 from Applicant

17 June 2016 from Respondent

Date of Determination: 28 June 2016

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] My determination of 26 February 2016 issued as [2016] NZERA Auckland 56, decided that it was still available to Mr Wilson to make an application for costs in respect of the substantive matter (which had been the subject of several previous determinations of the Authority) and I set a timetable for submissions to be filed and served to enable costs to be fixed.

[2] Those submissions have now come to hand and this determination fixes costs in respect of the matter.

The application for costs

[3] The applicant was the successful party in the substantive proceeding and as a consequence of my determination of 26 February 2016, was able to pursue costs

against the respondent and now seeks costs in respect of the totality of the proceedings.

[4] Costs are sought not just in respect of the original substantive determination but also the various attendances required to enable Mr Wilson to have a costs award fixed in his favour. Moreover, an uplift is sought in the notional daily tariff, both because of the respondent's conduct in the proceeding (particularly the respondent's determination to advance a counterclaim and then subsequently withdraw it), and the respondent's refusal to consider an applicable *Calderbank* offer made in good time before the Authority's investigation commenced.

[5] Mr Wilson incurred total costs in the order of \$14,200 of which fully \$10,500 was incurred in respect of the substantive determination.

The response

[6] In its submissions in reply, Geovert Limited (Geovert) says first that it is not true to say that Mr Wilson was entirely successful because he was not successful in satisfying the Authority that his redundancy was not a genuine one. Furthermore, Geovert says that it played no part in incurring costs for Mr Wilson when the latter pursued the Authority to get corrections made to the errors in the original determination and Geovert says that it cannot be held responsible in costs for the errors made by the Authority in the original determination.

[7] It is contended for Geovert that its behaviour was appropriate at all times and that it did not materially contribute to the cost of the litigation and that it was appropriate for it to reject the *Calderbank* offer in the particular circumstances.

Determination

[8] The principles relating to the award of costs in the Authority are well settled and need not be recited again here. It is enough to observe that costs usually follow the event, that the Authority typically approaches costs setting by way of a daily tariff and that that daily tariff is able to be increased or diminished by reference to the particular circumstances of the case. Factors that will allow for an uplift include evidence of the behaviour of the unsuccessful party contributing to the costs of the successful one and the existence of an operative *Calderbank* offer may have a similar effect.

[9] The fundamental question in respect of the determination of costs in the present case is who should bear the cost of the Authority's errors in the original determination. It is a given that Mr Wilson's counsel incurred costs in engaging with the Authority and having those errors addressed. So it follows that Mr Wilson bore the costs of those attendances and he now seeks to have Geovert contribute to those costs.

[10] But Geovert says, understandably, that it is not its fault that the Authority made errors in its original determination and applying the usual principles, I agree with them. Geovert can only be held responsible for matters within its control where its behaviour or the way in which it chose to argue its case caused Mr Wilson to incur additional cost which would not otherwise have been incurred.

[11] On that basis alone then, I am not persuaded that the costs incurred by Mr Wilson in correcting the record on the face of the original determination is a cost that he can appropriately seek a contribution to, from Geovert.

[12] However, the vast bulk of Mr Wilson's costs were incurred in the original determination and it is entirely appropriate that he look to Geovert for a contribution to those costs which, as I have already noted, amounted to about \$10,500.

[13] On Mr Wilson's calculation, which I agree with, the starting point must be

\$3,500 being the notional daily tariff for the original hearing time.

[14] I am not persuaded by Mr Wilson's claim that there is anything improper in Geovert's withdrawn counterclaim; it was, as Geovert says, a claim it was entitled to make given the circumstances and on the face of it, a claim that it could have persevered with and so I am not persuaded that Mr Wilson is entitled to any uplift in the notional daily tariff because of that factor.

[15] The position is different, however, in respect of the operative *Calderbank* offer where I am satisfied that, looked at in a straightforward fashion, the offeree would have been better off to have settled with Mr Wilson on the basis of the *Calderbank* offer than it is now as a consequence of the determination of the Authority, and it follows that that must be taken into account by way of uplift. I allow a figure of

\$3,000 to take account of the failure to accept the proffered *Calderbank* offer so the total contribution under this head is the sum of \$3,500 by way of daily rate plus an

additional sum of \$3,000 to take account of the *Calderbank* offer being a total of

\$6,500.

[16] Moreover, I think some modest further uplift is necessary to the daily tariff to reflect the fact that a fair and reasonable employer would have agreed to the application to reopen, at least to the extent of allowing costs to be fixed, rather than resist the application, as happened here. To reflect that conclusion, I allow an additional sum of \$2,500 to be added to the daily tariff.

[17] On top of that, I allow \$1,000 by way of disbursements as a contribution to the totality of the disbursements so the sum Geovert must pay to Mr Wilson as a contribution to his legal costs in this matter is \$10,000.

James Crichton

Chief of the Employment Relations Authority

