

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 21
5388493

BETWEEN

WAYNE WOODWARD
Applicant

A N D

TOTALLY BOATING 2004
LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Anjela Sharma, Counsel for Applicant
David Ballantyne, Counsel for Respondent

Submissions Received: 13 January 2014 from the Applicant
27 January 2014 from the Respondent

Date of Determination: 12 February 2014

COSTS DETERMINATION OF THE AUTHORITY

A. I order that the respondent pay to Mr Woodward costs totalling \$4,300 together with repayment of disbursements in the sum of \$122.81.

[1] By way of a determination dated 11 November 2013 the Authority found that Mr Woodward had been unjustifiably dismissed and had suffered an unjustified disadvantage in respect of a failure to be given sufficient notice of a requirement to take leave. He was awarded a total of \$10,500 compensation under s. 123(1)(c)(i) of the Employment Relations Act 2000, together with \$1,960 gross pay. Costs were reserved but the parties have been unable to agree between them how they should be dealt with.

[2] Mr Woodward seeks a contribution to his legal costs in the sum of \$6,000 plus disbursements in the sum of \$122.81 and a further \$400 towards the application for costs.

[3] The respondent, in turn, seeks a contribution to its costs in the sum of \$7,560.01, excluding GST, together with \$130.74 disbursements. It relies upon a Calderbank offer that was sent to Ms Sharma on 4 October 2013.

Preliminary points

[4] There are two preliminary points that need to be addressed. First, Ms Sharma reserved *a right of reply to the respondent's submissions*. Although I did not direct for a right of reply, in this case I would have allowed it given that the respondent itself seeks costs. However, Ms Sharma has not indicated any wish to do so having received Mr Ballantyne's submissions on 27 January, save to object to a comment made in the submissions, and so it is assumed that she does not wish to reply substantively.

[5] Secondly, Mr Ballantyne seeks a stay as an alternative to costs being awarded to the respondent, pending the determination of the Authority of Mr Woodward's application to reopen the investigation. However, I do not consider that that is an appropriate approach, given that the Authority's substantive determination has been issued and orders made. Clearly, costs will need to be considered again once the Authority has determined the application to reopen, but they should be considered as a discrete matter in my view.

The applicant's submissions on costs

[6] Ms Sharma reminded me of the usual principles that apply in determining costs, including that costs normally follow the event. She referred to the last Calderbank offer that had been made by the respondent, saying that it had not made any provision for payment of Mr Woodward's legal costs, which were by then sitting at around \$9,000 it appears. She also refers to commentary in *Brookers Online* ERSch2.15.15 which states that the Authority operates on a tariff principle so far as costs are concerned, and that this may affect the application of Calderbank principles taken from cases in the Employment Court.

The respondent's submissions

[7] The respondent refers to the Calderbank offer that it had made to Mr Woodward via Ms Sharma dated 4 October 2013, in which it had offered the sum of \$12,000 in full and final settlement. It seeks its costs from 4 October 2013 on an indemnity basis because Mr Woodward had declined the offer. Mr Ballantyne reminds me of the *steely approach* to be adopted when a valid Calderbank offer has been made, as advocated by the Court of Appeal in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385.

[8] Mr Ballantyne also argues that the \$500 awarded in respect of the disadvantage should be ignored when assessing whether the Calderbank offer has been beaten because no claim under the Holidays Act 2003 had been brought by Mr Woodward in the Authority.

Determination

[9] The starting point in any costs determination in the Authority are the principles set out in the seminal case of *PBO Ltd (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808. These principles include the following:

- (a) There is a discretion in the Authority as to whether costs would be awarded and 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 is 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.

[10] In the current matter, Mr Woodward was clearly successful in his substantive claim, and all other factors being equal, costs would follow the event. I must examine whether the letter sent to Ms Sharma on 4 October 2013 overrides that principle.

[11] The text of the letter was as follows:

Dear Ms Sharma

“WITHOUT PREJUDICE EXCEPT AS TO COSTS”

RE: WAYNE WOODWARD v. TOTALLY BOATING 2004 LTD

As you are aware we have today filed our clients brief of evidence along with the further information sought by the Employment Relations Authority.

We remain of the view that our client has good prospects of defending Mr Woodward’s claim. In this regard, we must make it clear that Mr Woodward’s dismissal by way of redundancy was genuine and substantially justified. Clearly your client does not agree with the way in which his redundancy was handled procedurally and in particular the impact of the company’s finding that he had more than “comebacks” than others in the employ of our client. However we trust that after reviewing the information provided today you will be able to assure your client that this was not the case.

Equally, however, our client is mindful of the rising costs of litigation and also the downtime for staff in preparing for and attending an investigation meeting.

By way of addressing those matters we are instructed by our client to offer your client the sum of \$12,000.00 in full and final settlement of your client’s claims relating to all matters arising out of Mr Woodward’s employment by our client company and the termination of that employment by way of redundancy.

The forgoing [sic] settlement offer would be strictly confidential to the parties and their advisers and will remain open for three working days from the date of this letter.

Our client's offer is a very reasonable one in light of the fact that that [sic] should the matter proceed further the evidence indicates the very best your client could hope to achieve would be a ruling that there has been a minor procedural breach that has not resulted in Mr Woodward being treated unfairly in any way. Of course your client also faces the prospect that if the Authority accepts that the redundancy was genuine and fair then he will receive nothing and a costs award will be made in favour of our client.

Accordingly if our client's offer is rejected, we reserve our client's right to rely on this letter in the context of any submissions on costs should your client continue with his claim in the Authority.

*Yours faithfully
C & F Legal Limited*

[12] As Calderbank offers put pressure on an applicant, they must comply with certain basic safeguards so as not to unfairly prejudice the recipient of the offer. These safeguards have been identified in *Ogilvy & Mather (NZ) Limited v Darroch* [1993] 2 ERNZ 943 as including:

- (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;
- (b) The offer must be transparent if the offeror is later to be given the protection that a Calderbank offer furnishes.

[13] The making of a successful Calderbank offer is not wholly determinative of how costs will be dealt with by the parties but is an important factor which the Authority should bear in mind.

[14] The respondent's letter gave Mr Woodward three days within which to accept the offer. This is just about enough time, in my view, for Mr Woodward to have given it serious consideration. Given the proximity to the investigation meeting on 23 October, this tight time limit can be justified.

[15] Turning to whether the offer was transparent, I note that the respondent made no mention in the letter of how pre-offer costs would be dealt with, although an offer regarding Mr Woodward's costs was made in a previous Calderbank letter from the respondent dated 16 May 2013. In *Jackson v Moyes Motor Group Ltd* [2005] ERNZ 504 (EmpC) the Court held at [31] as follows:

The factors that are relevant to the plaintiff's claim for costs are these:

(1) The plaintiff was wholly successful in his claim of constructive dismissal which, but for a qualifying Calderbank offer, would entitle him to a contribution to his reasonably incurred costs.

(2) A defendant who makes a Calderbank offer which is silent as to pre-offer costs bears the burden of persuading the Court that the offer is adequate to disentitle a successful plaintiff from recovering costs.

(3) The closer an offer is made to trial the more pre-trial costs are likely to have been incurred.

[16] In my view, the respondent's Calderbank letter fails to satisfy the transparency test, as being silent on the issue of Mr Woodward's costs, which the respondent must have known would have been substantial by 4 October 2013, and so a major element in any settlement considerations.

[17] If I am wrong in that analysis, I am not satisfied in any event that Mr Woodward's rejection of the offer was unreasonable, as the offer failed to take any account of the costs that would have been incurred by Mr Woodward by then.

[18] Having rejected the validity of the Calderbank offer made on 4 October 2013, I am satisfied that costs should follow the event. However, it is not clear to me on what basis Mr Woodward seeks costs of \$6,000. The investigation meeting lasted from 9.30 am until 4.25 pm on 23 October 2013 with submissions being given orally on a later date, which lasted a total of one hour and 20 minutes. I would assess the overall time taken as slightly more than one day.

[19] As Ms Sharma recognises in her submissions, the Authority often orders costs to be paid by reference to a daily tariff basis, the current standard daily rate being \$3,500. I see no reason to depart from that approach in this case. The matter was both legally and factually straightforward. I believe that it would be appropriate to fix the respondent's contribution to Mr Woodward's costs in respect of the substantive investigation meeting at \$4,000.

[20] I agree that it is appropriate for the respondent to pay Mr Woodward's disbursements in the sum of \$122.81. As for the cost of preparing the costs submissions, I see that Ms Sharma's charge out rate is \$250 an hour plus GST. Ms Sharma's submissions consisted of three pages and I believe that \$400 is on the high side. I award \$300 in respect of her costs submissions.

Orders

[21] I order that the respondent pay to Mr Woodward costs totalling \$4,300 together with repayment of disbursements in the sum of \$122.81.

David Appleton
Member of the Employment Relations Authority