IN THE COURT OF APPEAL OF NEW ZEALAND

CA504/2009
[2010] NZCA 385

	BETWEEN	BLUESTAR PRINT GROUP (NZ) LTD Appellant
	AND	DAVID MITCHELL Respondent

Hearing: 10 August 2010

Court: O'Regan P, Randerson and Stevens JJ

Counsel: C Heaton for Appellant
P B Churchman as counsel assisting the Court

Judgment: 19 August 2010 at 2.30 p.m.

JUDGMENT OF THE COURT

A The appeal is allowed.

B The costs order in the Employment Court is quashed.

C There is no order for costs in this Court.

REASONS OF THE COURT

(Given by Stevens J)

Introduction

[1] Mr Mitchell was employed as a cutter and guillotine operator by Printlink (a subsidiary of the appellant Bluestar) from 1990. He brought a personal grievance for constructive dismissal following his resignation on 30 December 2003. He claimed reimbursement of lost wages, compensation, including $100,000 for hurt and humiliation, and exemplary damages of $400,000, each sought under s 123 of the Employment Relations Act 2000 (ERA). Among other complaints, he contended that the appellant had given incorrect information to the Accident Compensation Corporation (ACC) which led to his claim for compensation for a work-related accident being declined.

[2] This appeal concerns the correctness of the Employment Court's decision[1] to disregard a Calderbank offer[2] by the appellant when assessing costs because the offer did not address the vindication that Mr Mitchell was seeking. This Court[3] granted leave to appeal under s 214 of the ERA on the following question of law:

> Was there an error of law by the Employment Court in not taking into account the Calderbank offer because it did not address the personal vindication elements of the personal grievance?

Procedural history

Employment Relations Authority

[3] Mediation failed and the matter went to the Employment Relations Authority. The Authority dismissed Mr Mitchell's personal grievance and exemplary damages claims. After the parties were unable to settle costs, the Authority awarded $6,000 to the appellant. Mr Mitchell appealed to the Employment Court.

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1 *Mitchell v Bluestar Print Group Ltd* EmpC Wellington WC2/09, 19 March 2009.
2 *Calderbank v Calderbank* [1976] Fam 93 (CA).
3 *Bluestar Print Group (NZ) Ltd v Mitchell* [2009] NZCA 323.

Employment Court

[4] Mr Mitchell was partially successful in the de novo hearing before the Employment Court.[4] Judge Shaw found that the employer had breached its duty of good faith to Mr Mitchell by failing to respond to his complaints, failing adequately to review his working conditions when he returned to work from sick leave, and providing incorrect information to ACC without offering him a chance to comment on it, which resulted in his ACC claim being initially declined. The Judge concluded that the employer's unreasonable actions caused his foreseeable resignation. She found that he had been unjustifiably constructively dismissed and awarded him $10,000 under s 123(1)(c)(i) of the ERA. The claim for exemplary damages was dismissed on the basis that it had been abandoned.[5] We return to this finding below.

Costs decision

[5] The Judge noted that there was no specific guidance in the Employment Court Regulations 2000 (the Regulations) and applied the costs regime stated at r 14.11(4) of the High Court Rules. This rule provides that the Court may take into account a Calderbank offer which is "close to" the benefit obtained in judgment. The Judge disregarded the Calderbank offer stating that it did not address the personal vindication element which was "at the heart of Mr Mitchell's claim".[6] The offer was unaccompanied by an acknowledgement of wrongdoing or apology. Hence, the Judge concluded that Mr Mitchell, having abandoned some of the large monetary claims, was not motivated by money, but rather by having a court assess the merits of his claim. The Judge awarded Mr Mitchell $1,000 for Authority costs, $3,000 Court costs and $1,510 disbursements.

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4 *Mitchell v Bluestar Print Group (NZ) Ltd* EmpC Wellington WC 21/09 and WRC 19/06, 23 December 2008.

5 At [6].

6 At [26].

Applicable regulations and rules

Employment Court Regulations

[6] Regulations 68 and 69 contain costs rules for that Court. Regulation 68(1) states:

> In exercising the Court's discretion under the Act to make orders as to costs, the Court may have regard to any conduct of the parties tending to increase or contain costs, including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.

[7] Regulation 6 states that where there is no relevant procedure in the Regulations or the ERA, the Court must resolve the issue, as nearly as is practicable, in accordance with the High Court Rules.

High Court Rules

[8] Rules 14.1–14.23 of the High Court Rules set out the costs regime. Rule 14.10 states that a party may make a Calderbank offer at any time. Rule 14.11 governs the effect of Calderbank offers on costs:

> **Effect on costs**
>
> (1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.
>
> (2) Subclauses (3) and (4)–
>
> (a) are subject to subclause (1); and
>
> (b) do not limit rule 14.6 or 14.7; and
>
> (c) apply to an offer made under rule 14.10 by a party to a proceeding (party A) to another party to it (party B).
>
> (3) Party A is entitled to costs on the steps taken in the partner after the offer is made, if party A–
>
> (a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or
>
> (b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.

(4) The offer may be taken into account, if party A makes an offer that-

(a) does not fall within paragraph (a) or (b) of subclause (3); and

(b) is close to the value or benefit of the judgment obtained by party B.

Submissions

[9] Ms Heaton for the appellant submitted that the Employment Court erred in finding that Mr Mitchell had abandoned his claim for exemplary damages with the result that Judge Shaw erred in her decision to disregard the Calderbank offer. Ms Heaton also submitted that she erred in considering the offer under r 14.11(4) of the High Court Rules, rather than the more prescriptive r 14.11(3). As a result the Calderbank offer was not given its proper weight.

[10] Mr Churchman, counsel assisting the Court, submitted that the appellant had not identified an error of law in Judge Shaw's decision. Rather, the issue of whether he had abandoned his exemplary damages claim was one of fact which the Judge was competent to determine. Further, the Judge was exercising a discretion on the question of costs and this should not lightly be interfered with. Finally, he submitted that Calderbank offers in the employment law context should not necessarily be treated in the same way as those in respect of ordinary civil cases, given the trust and confidence inherent in the employment relationship.

Discussion

The Calderbank offer

[11] It is convenient to refer first to the terms of the Calderbank offer. It was made on 30 November 2005, before the claim came before the Employment Relations Authority. The offer relevantly stated:

Without Prejudice Save as to Costs

Dear Mr Mitchell

Printlink – Employment Relations Authority Matter

This letter is what is known as a "Calderbank letter". It is privileged and "without prejudice save as to costs". That means it cannot be shown to the Employment Relations Authority until the Authority has made its decision following the hearing. It is written for the purpose of trying to resolve the dispute between you and Printlink.

Printlink offers to settle fully and finally for $10,000, plus the sum of $3,000 toward your past legal costs. The total sum of $13,000 would be paid to you immediately, under section 123(1)(c)(i) of the Employment Relations Act 2000, which means it would not be subject to any taxation in your hand.

I urge you to take legal advice about this letter and what it means. I recommend that you discuss it with your local community law centre or give the Wellington Community Law Centre a call...

[12] Mr Mitchell chose to ignore the letter and made no reply to it.

A reviewable error of principle

[13] We accept Ms Heaton's submission that the Judge erred in finding that Mr Mitchell formally abandoned his claim for exemplary damages. Ms Heaton referred to the following exchange between the Judge and Mr Mitchell:

> Judge Shaw: I got the message from the other day – in the end the money is nice but this is a matter of principle with you.
>
> Mr Mitchell: Yes I'm – when Your Honour makes a decision I've got to get over this because it's a long time and I accept under the law if you say that I'm not entitled to zero well I will accept it but what I'm trying to do is get a ruling that yes this did happen to Mr Mitchell but under the law because he gets ACC he's not entitled to any extra.
>
> Judge Shaw: So it's a finding on the facts and what actually happened and the effects on you of what happened is what you're after actually isn't it?
>
> Mr Mitchell: Yes, but if I do not get awarded any money at all I'm going to have to go and get my house – I've got major problems, I've got major problems now but I'm hoping that you will see that the humiliation and stress they put me through even standing here today in front of you I should not be standing here but it's been quite an experience I must say.

[14] There is no indication that Mr Mitchell abandoned the claim. In fact the reverse is the case. His first response above relates to compensation that he might have been able to recover from Printlink had he not received ACC payments. The availability of ACC payments does not affect a plaintiff's entitlement to exemplary damages. In the second response, Mr Mitchell quite clearly is concerned with, and motivated by, money. We agree with Ms Heaton's submission that there is no basis for the Judge's conclusion that he abandoned his claim for exemplary damages. Moreover, Mr Mitchell wrote to the Court after the costs decision, denying that he had abandoned the exemplary damages claim. Although this evidence was not before the Judge when she made her ruling on the Calderbank offer, it is evidence that this Court may take into account in determining whether the Judge was operating under a mistake of fact in exercising her discretion not to award costs.

[15] We accept Ms Heaton's submission that the Judge exercised her discretion on a wrong principle. The finding that Mr Mitchell had abandoned the claim for a large sum of money was central to the Judge's reasoning that he was motivated primarily by vindication and not by money. But we are also satisfied that the Judge made a second error of principle in disregarding the Calderbank offer.

[16] It follows that there has been a reviewable error of law. In such circumstances this Court may remit the issue of costs to the Employment Court or determine the matter itself. The parties were content for us to deal with the matter.

Application of the costs regime

[17] The starting point is that reg 68(1) of the Regulations provides that the Court may, in the exercise of the Court's discretion, have regard to any conduct of the parties tending to increase or contain costs. Further, such conduct may include "any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties". The relevance of Calderbank offers could hardly be clearer.

[18] The High Court Rules provide detailed guidance as to the effect of a Calderbank offer. The courts have developed a considerable body of jurisprudence

as to the exercise of the Court's discretion under the rules. In *Glaister v Amalgamated Dairies Ltd* this Court stated that the discretion must be exercised in a particularised and principled way.[7] In the employment context it has also recognised, in *Aoraki Corporation Ltd v McGavin*,[8] that the public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.

[19] We accept that there may be cases where vindication through seeking a statement of principle in the employment context may be relevant to the exercise of the Court's discretion.[9] Thus the relevance of reputational factors means that cost assessments are not confined solely to economic considerations.[10] But 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.

[20] We consider that the potential for vindication to be a relevant factor does not mean that the developed jurisprudence under the High Court Rules costs regime should be ignored. We reject Mr Churchman's submission that the principles applicable to Calderbank offers should be adjusted or ignored in employment cases merely because of the nature of the employment relationship and because employees may in certain cases be motivated in part by the desire for vindication. As this Court has previously said a "steely" approach is required.[11] It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors. The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

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7 *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 at [22].
8 *Aoraki Corporation Ltd v McGavin* [1998] 1 ERENZ 601.
9 The possibility was discussed by this Court in *Burns v Attorney-General* [2002] 1 ERNZ 576 at [31].
10 *Health Waikato v Elmsly* [2004] 1 ERNZ 172 (CA) at [53].
11 Ibid.

[21] We agree with Ms Heaton that *Burns* is distinguishable from the present case because, by the time the Calderbank offer in that case was made, vindication had already been achieved.

[22] Here, Mr Mitchell sought in his statement of claim:

(a) Reimbursement of lost wages;

(b) Compensation for lost benefits;

(c) Compensation for hurt and humiliation amounting to $100,000; and

(d) Exemplary damages of $400,000.

[23] In the Employment Court, his claim of unjustified constructive dismissal was upheld. He was successful in his claim for compensation for the effects of the breaches of duty in the sum of $10,000. He was unsuccessful in claiming lost wages as these had been dealt with by ACC, in seeking lost benefits, and in his exemplary damages claim. Thus in monetary terms he had partial success before the Employment Court, albeit well short of the substantial losses he had sought in his statement of claim.

[24] In determining costs, it is therefore necessary to measure the degree of success he achieved in the Employment Court. While he obtained a modest award of $10,000 compensation, he lost on all the other monetary claims. It is then necessary to take into account the Calderbank offer, which we accept was more than what he achieved in the Employment Court. This is because the $13,000 Printlink offered for compensation and costs before the Employment Relation Authority investigation was more than the $11,000 the Employment Court later awarded under those heads. The normal effect of a Calderbank offer is that the costs position is reversed. In this case, the appellant did not seek costs, but rather contended that the costs order against the appellant should be reversed. We agree. Bearing in mind the offer, the timing of the offer and other factors relevant to the outcome of the claim, we are

satisfied that there should have been no award of costs against the appellant in the Employment Court.

[25] We therefore answer the leave question referred to at [2] above "yes".

[26] The appellant did not seek costs in this Court.

Result

[27] We make the following orders:

(a) The appeal is allowed.

(b) The costs order in the Employment Court is quashed.

(c) There is no order for costs in this Court.

Solicitors:
Morrison Kent, Wellington for Appellant