New Zealand Employment Relations Authority Decisions

Dawber v Church Lane NZ Limited (Christchurch) [2018] NZERA 1013; [2018] NZERA Christchurch 13 (2 February 2018)

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Last Updated: 13 February 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 13
3014352

BETWEEN ABBEY JESSICA DAWBER Applicant

A N D CHURCH LANE NZ LIMITED Respondent

Member of Authority: David Appleton

Representatives: Angeline Boniface, Counsel for Applicant

Rowan Kearns, Advocate for Respondent

Submissions Received: 23 January 2018 from Applicant

None received from Respondent

Date of Determination: 2 February 2018

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

[1] By way of a determination1 dated 7 December 2017 the Authority found that Ms Dawber had been unjustifiably constructively dismissed and suffered unjustified disadvantage in her employment. She was awarded remedies totalling $19,881.74.

[2] The parties were encouraged to seek to agree how costs were to be dealt with, but they have been unable to, although Ms Boniface states that the respondent has failed to engage

with her in trying to agree costs.

1 [2017] NZERA Christchurch 211

[3] On 24 January 2018 Ms Boniface sought an abridgement of time within which the respondent was to respond to her submissions on costs, on the basis of alleged activity by the respondent which Ms Dawber believed indicated it was shutting down its business in Riccarton. At that point, the respondent had not paid Ms Dawber the remedies it had been ordered to pay, although it has now done so I understand, by way of a payment to bailiffs instructed on Ms Dawber's behalf.

[4] The respondent was invited to comment on the request for an abridgement, but it did not do so. On that basis, I did grant a modest abridgement of time for the service and lodging of the respondent's submissions in reply on costs. The time for doing so expired on 1

February 2018, but the respondent did not provide any submissions on costs.

[5] Ms Boniface submits that costs should be awarded to Ms Dawber on a full indemnity basis. The basis of this assertion is that the respondent caused delays and 'significant costs' to Ms Dawber. She also relies on a letter marked 'without prejudice, save as to costs' (herein called a Calderbank offer for convenience). Ms Boniface included with her submissions a copy of the Calderbank letter, dated 29 May 2017. This letter was addressed to Pitt and Moore solicitors, which firm was acting for the respondent at that time.

[6] The letter was sent prior to the statement of problem being lodged with the Authority. The amount sought by Ms Dawber in full and final settlement of her claim was $5,000 compensation under s 123(1)(c)(i) the Employment Relations Act 2000 (the Act), 12 weeks' wages (which would equate to around $10,164 gross), and $500 towards Ms Dawber's costs. This amounts to $15,664. She also sought a positive reference. Ms Boniface says that the letter and offer were never responded to.

[7] Other issues raised by Ms Boniface to support her submissions for full indemnity costs are as follows:

a. Requests and correspondence to the respondent from Ms Dawber or her lawyers were not responded to;

b. The respondent had said on numerous occasions that it would not make any payment to Ms Dawber;

c. The respondent lodged its statement in reply late;

d. It unilaterally sought to change the venue of the mediation to Nelson and no mediation occurred ultimately;

e. It lodged no briefs of evidence;

f. It relied on documents at the investigation meeting which had not been disclosed in advance;

g. It did not respond to Ms Boniface's attempts to agree costs.

[8] Some of these failures by the respondent occurred when Ms Dawber had no representation.

Discussion

[9] The Authority's power to award costs is set out in para.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.

[10] Ms Boniface referred to the very well-known principles which the Authority must take into account when determining how legal costs and expenses should be dealt with, and which are set out in *PBO Ltd v. Da Cruz* [2005] NZEmpC 144; [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.

[11] *Ogilvie & Mather (NZ) Ltd v. Darroch2* 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.

[12] The Calderbank letter sent on behalf of Ms Dawber did not give any timeframe within which to reply, and so satisfies the first requirement, as no undue pressure was put on the respondent to reply. In addition, it was transparent in that it made clear what the offer was and treated costs separately. It also explained, to a degree, what the consequences of rejection of the offer would be, although it was sent to a law firm which would have understood those consequences in any event.

[13] Does the rejection of the Calderbank offer justify the award of costs on a full indemnity basis? The Employment Court in *Davide Fagotti v Acme & Co Limited3* confirmed that it is appropriate for the Authority to adopt a 'steely approach' when a valid Calderbank offer has been made and unreasonably rejected. However, even where there has been an unreasonable refusal of a Calderbank offer, indemnity costs are still rarely awarded and generally reserved for cases where a party's conduct has been especially egregious.4

[14] Was the respondent's conduct especially egregious? It was close to that point, for the reasons set out above in paragraph [7] above. What saves the respondent from having full indemnity costs awarded against it is that it was unrepresented at the time most of these issues

occurred, and that its late giving of evidence did not materially prolong the length of the

2 [1993] NZEmpC 172; [1993] 2 ERNZ 943

3 [2015] NZEmpC 135

4 *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [94]

investigation. This was largely due to Ms Dawber being an alert and intelligent witness who was able to address unexpected testimony without undue difficulty.

[15] The award of costs is not to be used as a punishment, and so I decline to award full indemnity costs against the respondent. However, the steely approach means that a significant uplift on the Authority's daily tariff of $4,500 for the first day of the investigation meeting is justified. Had the respondent accepted the offer to settle when it was made, the costs incurred by Ms Dawber would have been much less. No reason has ever been given for why it was not accepted, and so I cannot conclude that it was reasonable to do so.

[16] The costs incurred by Ms Dawber from 20 September 2017 onwards amounts to

$10,451, including GST. This gives me a helpful yardstick against which to judge the uplift. It is appropriate for the respondent to make a contribution towards Ms Dawber's costs in the sum of $10,500.

Order

[17] I order the respondent to pay to Ms Dawber within 7 days of the date of this determination the sum of $10,500 as a contribution towards her costs.

David Appleton

Member of the Employment Relations Authority
