

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 402
5461059**

BETWEEN PHILIP DEIBERT
Applicant
AND WURTH (NZ) LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Robert Morgan, Advocate for Applicant
Bethany Frowein, Counsel for Respondent
Costs Submissions 17 September 2014 from Applicant
18 September & 2 October 2014 from Respondent
Determination: 3 October 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 20 August 2014 ([2014] NZERA Auckland 342), the Authority found that the Applicant, Mr Philip Deibert, had been justifiably dismissed from his employment by the Respondent, Wurth (NZ) Limited (Wurth).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and Ms Frowein, on behalf of Wurth, has filed a submission in respect of costs.

[3] The matter involved 1 day of meeting time. Ms Frowein, citing actual costs of \$27,137.36 (incl GST and disbursements) is seeking a contribution to costs at a sum set above the normal daily tariff rate in the Authority of \$3,500.00 per day.

[4] Ms Frowein submits that Wurth made *Calderbank*¹ offers, that is without prejudice save as to costs offers, to Mr Deibert:

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA)

- By letter dated 13 June 2014 Wurth offered the sum of \$3,000.00 to Mr Deibert in full and final settlement, and put him on notice that it would seek indemnity costs from the date of its letter onwards if the offer was refused. (Offer 1).
- By email via Mr Morgan dated 25 June 2014; Mr Deibert refused Offer 1 and advised that he would continue with his claim in the Authority.
- By letter dated 22 July 2014 Wurth made a further offer to Mr Deibert in full and final settlement, and further offered to record Mr Deibert's termination as a resignation in order to alleviate his concern with future job prospects (Offer 2).
- By email via Mr Morgan dated 23 July 2014; Mr Deibert refused Offer 2.
- Following receipt of the email dated 23 July 2014, Wurth engaged in a telephone discussion with Mr Morgan to ascertain if it was possible to reach agreement on a sum which Mr Deibert would accept in order to withdraw his claim, which at that stage was quantified as only \$3,000.00 above Offer 2.
- In response Mr Morgan confirmed in an email dated 25 July 2014 that: "*Our client still wishes to have the matter heard in the ERA*".

[5] Ms Frowein further submits that an award of costs to Wurth in excess of the notional daily tariff rate is merited on the basis that:

- a. The Offers were made at an early stage in the proceedings and were rejected without any counter-offer having been made by Mr Deibert.
- b. Mr Deibert had not quantified the lost wages part of his claim in the Statement of Problem, and failed to do so when requested by Wurth subsequently in an attempt to identify his expectations in a further attempt to resolve the matter prior to the Authority Investigation Meeting date.

[6] Ms Frowein refers in her submissions to *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² and submits that the principles on which an award of costs are made are well settled. These well established principles are that costs generally follow the event, without

² [2005] 1 ERNZ 808

prejudice offers can be taken into account, and costs are modest. I have relied upon the principles as set out in *Da Cruz* in determining this matter.

Determination

[7] The Authority Investigation Meeting was held on 6 August 2014. Offer 1 was made more than eight weeks in advance of the Investigation Meeting and Offer 2 was made two weeks in advance of the hearing date. I consider that there was therefore ample time for Mr Deibert to consider Offer 1 and Offer 2 (the Offers) prior to the Investigation Meeting.

[8] It is necessary to consider what effect the Offers should have upon the award of costs in this matter. The Court of Appeal in *Health Waikato Limited v Van Der Sluis*³ observed that: “*the Calderbank letter field is fully discretionary*”. The nature of this wide discretion is such that if the Authority awarded a lesser amount than the amount offered in the Calderbank letter, there would be no absolute protection to the party which had made the offer in terms of costs. Equally, the Authority may take into consideration a Calderbank letter when more has been awarded than was offered.

[9] The Court of Appeal in *Aoraki Corporation Ltd v McGavin*⁴ in commenting on the exercise of this discretion, noted that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore these Calderbank offers without costs being impacted:

The discretion as to costs is a judicial one to be exercised according to what is reasonable and just to both parties and the public interest in the fair and expeditious resolution of disputes requires that full weight be given to the extent to which costs were properly incurred subsequent to the non-acceptance of an offer of settlement at a figure above the amount eventually awarded in the litigation.

[10] The need for a “*more steely*” approach to costs where reasonable settlement proposals have been rejected was noted by the Court of Appeal in *Health Waikato Limited v Elmsley*.⁵

[11] Mr Deibert was wholly unsuccessful in his claim before the Authority, and consequently received no award in respect of his claim.

³ [1997] 10 PRNZ 514

⁴ [1998] 1 ERNZ 601

⁵ [2004] 1 ERNZ 172 (CA) at [53]

[12] The principles governing an award of costs as set out by the Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* include:⁶

Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.

It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

[13] Wurth was the successful party in this matter. It is a principle that costs normally follow the event⁷, and I do not find that this is a case in which that principle should be displaced.

[14] Turning to consideration of the Offers in relation to Wurth's claims for a costs award in excess of the notional daily rate, I find that the Offers were a genuine attempt to resolve the matter without further expenditure on litigation made at a relatively early stage in the proceedings.

[15] I note that Wurth incurred significant additional costs following each of the Offers. I have concluded that taking all these circumstances into account, the Offers should be given full weight.

[16] I determine that this is case in which it is appropriate to adopt a "more steely" approach to costs. Having considered all of the circumstances, I can see no justification for not making the costs award to Wurth as the successful party in the proceedings.

[17] Whilst it is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings, and I acknowledge that Mr Deibert has filed details of his personal financial situation with the Authority which establish that he will have difficulty in meeting a costs award, I also take into consideration the fact that Mr Deibert was provided with an opportunity to settle the matter on a full and final basis on at least two occasions.

[18] In these circumstances, recognising Mr Deibert's financial situation, I do not order an uplift in the daily tariff rate normally applied in the Authority, However I do consider it appropriate that Mr Deibert is ordered to pay Wurth costs at the normal daily tariff rate in the Authority.

⁶ 2005] 1 ERNZ 808 at para [44]

⁷ *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[2005] 1 ERNZ 808

[19] Mr Deibert is ordered to pay Wurth the sum of \$3,500.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority