Employment Court of New Zealand

Fifita aka Bloomfield v Dunedin Casinos Limited [2013] NZEmpC 171 (12 September 2013)

Last Updated: 27 September 2013

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2013] NZEmpC 171

CRC 42/12

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN ETIMOA TALU FIFITA also known as

EDDIE BLOOMFIELD Plaintiff

AND DUNEDIN CASINOS LIMITED Defendant

Hearing: on the papers - submissions received 31 January, 14 February and 15 February 2013

Appearances: Len Anderson, counsel for the plaintiff

Diana Hudson, counsel for the defendant

Judgment: 12 September 2013

JUDGMENT OF JUDGE A A COUCH

[1] The plaintiff challenges a costs determination of the Employment Relations Authority.1 The principal issue is the effect that a *Calderbank* offer made by the defendant should have.

[2] The plaintiff was employed by the defendant as a security officer at the casino it operates in Dunedin. The plaintiff was dismissed and pursued a personal grievance that his dismissal was unjustifiable. In its substantive determination,2 the Authority upheld the plaintiff's claim but found that he had contributed substantially to the situation giving rise to his dismissal. Reflecting that conclusion, the Authority rejected his claim for reinstatement and reduced the monetary awards it made by

half. The total amount of remedies awarded to the plaintiff was $6,957.

1 [2012] NZERA 219.

2 [2012] NZERA 182.

[3] In its subsequent costs determination, the Authority concluded that costs should not follow the event and ordered the plaintiff to pay the defendant $5,250 as a contribution to its costs. The reason for that conclusion was that the defendant had made a *Calderbank* offer of $8,000 three weeks prior to the Authority's investigation meeting. The plaintiff challenges that determination and the matter proceeded in the Court by way of a hearing de novo. By agreement, that hearing was conducted on the papers in the form of written submissions from counsel and an agreed bundle of documents.

The Authority's substantive determination

[4] As the challenge now before the Court is solely to the Authority's costs determination, it must be decided in light of the Authority's unchallenged determination of the plaintiff's substantive claims.

[5] On 11 October 2011, the plaintiff was working as a security officer at the Dunedin casino. He saw a plastic packet fall from the clothing of another employee. The packet contained cannabis. One of the plaintiff 's duties that day was to manage lost and found property. The defendant had a well established system for doing this.

[6] Rather than process the package in accordance with the defendant's procedure, the plaintiff spoke to another member of the security staff about it. They identified the staff member who had dropped the package. The plaintiff then took the package to the toilet where he flushed the contents away and disposed of the packet.

[7] In the course of an investigation by the defendant, the plaintiff gave a variety of explanations for his actions which the Authority found were inconsistent and implausible. The defendant concluded that the plaintiff had conspired with his fellow security officer to dispose of the cannabis in direct contravention of casino policy. The Authority found that it was open to the defendant to reach this conclusion but that the process of its investigation was fatally flawed because the allegation of conspiracy was never put to the plaintiff for comment. The Authority

also found that there was an element of predetermination in the defendant's

conclusions which formed the basis for the plaintiff's dismissal.

[8] On this basis, the Authority found that the defendant had failed to comply with paragraphs (b) to (d) of s 103A of the Employment Relations Act 2000 (the Act), which provides:

103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

...

[9] Having regard to these deficiencies, the Authority determined that the plaintiff's dismissal was unjustifiable.

[10] The principal remedy sought by the plaintiff was reinstatement. The Authority rejected that claim as neither practical nor reasonable. In reaching that conclusion, the Authority found that plaintiff 's actions and attitude undermined his employer's trust in him to such an extent that it could never be restored.

[11] The plaintiff sought reimbursement of lost income for a period of nine months. The Authority found that he had made little effort to mitigate his loss and limited its award to the statutory benchmark of three months' ordinary time pay3.

[12] The plaintiff also sought compensation for distress but the Authority noted that no evidence was offered in support of this claim. Notwithstanding that, the Authority determined that an award of $5,000 was appropriate4.

[13] As required by s 124 of the Act, the Authority considered the extent to which the plaintiff had contributed to the situation giving rise to his dismissal. It found that he had clearly breached the defendant's policies and had aggravated the situation by offering contradictory explanations. The Authority also found that the plaintiff had a total lack of remorse for his actions. Having regard to this conduct, and to the evidence as a whole, the Authority concluded that the monetary remedies awarded to the plaintiff should be reduced by 50 percent. The total value of the remedies finally awarded was $6,957.

Calderbank offer

[14] The Authority's investigation meeting was scheduled to begin on 8 August

2012. On 16 July 2012, Ms Hudson on behalf of the defendant made the following offer of settlement to the plaintiff's solicitor, Mr Paterson:

Without Prejudice Except as to Costs

Dear Alistair

Etimoa Fifita (Eddie Bloomfield) v Dunedin Casinos Management

Limited

We are authorised by the company to offer the sum of $8,000 compensation under section 123(1)(c)(i) of the Employment Relations Act 2000 in full and final settlement of this matter.

This offer is made on the basis that the settlement remains confidential to the parties and without admission of liability. as a pragmatic outcome for both parties to avoid the costs of a hearing.

Yours faithfully

3 .Section 128(2) of the Act.

4 The making of this award was dubious given the lack of evidence but, as the Authority's substantive

determination has not been challenged, it must stand.

[15] The following day, Mr Anderson sent the following reply by email on behalf of the plaintiff:

Thank you for your offer. I advise that my client is not prepared to settle on the basis offered. He wants his job back.

Submissions

[16] The parties were agreed that, if costs are to be awarded to either party, the amount should be $5,250. That is based on an investigation meeting lasting one and a half days at a daily rate of $3,500.

[17] For the plaintiff, Mr Anderson made three submissions:

(a) As the successful party, the plaintiff ought to have been awarded costs.

(b) The plaintiff achieved a better result than that offered in the

Calderbank letter.

(c) Even if the result was not better than that offered in the *Calderbank*

letter, costs should not be awarded against the plaintiff.

[18] The first of these submissions was founded on the general principle that costs will usually follow the event. As the word" usually" implies, however, there are exceptions to that principle and the key issue in this proceeding is whether the *Calderbank* offer made by the defendant ought properly to be regarded as such an exception.

[19] In arithmetic terms, the awards made by the Authority were clearly less than the sum the plaintiff was offered. Implicitly acknowledging this, Mr Anderson's argument in support of this submission was summarised as follows:

The plaintiff's position is that he did receive a better result because of the public vindication in the decision of the Authority that he had been unjustifiably dismissed. This has implications not only for explaining his departure to future employers but also in relation to his ability to obtain approval for work in a casino in the future.

[20] Mr Anderson emphasised the value to the plaintiff of vindication being public and submitted that the condition placed on the *Calderbank* offer that any settlement be confidential would have effectively deprived the plaintiff of any element of vindication.

[21] In support of his third submission, Mr Anderson noted that the discretion to award costs is a broad one and that factors other than offers of settlement needed to be taken into account. He submitted that a plaintiff's failure to improve at trial upon a prior *Calderbank* offer did not necessarily mean that costs should be awarded to the defendant. He cited several cases involving *Calderbank* offers in which the Court had decided that a just outcome was for each party to bear its own costs.

[22] Mr Anderson also submitted that the Court should have regard to the ability of the plaintiff to pay any award of costs which might be made. While that submission is sound as a matter of general principle, it can only apply where there is proper evidence of the plaintiff's financial position, including income, expenditure, assets and liabilities. No such evidence is before the Court in this case.

[23] For the defendant, Ms Hudson referred to the regulations and rules guiding the exercise of the discretion to award costs. Firstly, she noted reg 68(1) of the Employment Court Regulations 2000 (the Regulations):

68 Discretion as to costs

(1) 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

[24] Relying on reg 6 of the Regulations, Ms Hudson also invited me to follow rules 14.10 and 14.11 of the High Court Rules relating to "Written offers without prejudice except as to costs".

[25] I accept that reg 68 is applicable and provides useful guidance. As to the High Court Rules, I do not accept that they are binding on this Court in this case. Those rules are only imported into this jurisdiction where specifically referred to in the Act or through reg 6. Regulation 6 applies only in cases "for which no form of

procedure has been provided by the Act or these regulations". As Ms Hudson correctly noted, the Regulations do deal with costs in reg 68. It also seems to me that rules 14.10 and 14.11 deal with matters of jurisdiction rather than procedure and, as such, cannot be imported under reg 6.

[26] Having said that, the principles embodied in rule 14.11 and the jurisprudence which has been developed around them in the High Court are useful in deciding what is just in cases such as this. In particular, I adopt the principle that a *Calderbank* offer should be taken into account as a factor in favour of the defendant if it makes an offer that would have been more beneficial to the plaintiff than the judgment subsequently obtained. At the same time, I am mindful that the Court is directed by s 189(1) of the Act to exercise its jurisdiction in equity and good conscience.

[27] Ms Hudson's submissions on behalf of the defendant were summarised as follows:

(a) That the decision of the Authority, in exercising its discretion to award costs in the sum of $5,250 against the plaintiff was correct.

(b) That the plaintiff did not achieve a better result than that offered in the

Calderbank letter.

(c) That the Authority considered the plaintiff 's position before making an award of costs against him.

(d) That should the Court find that the plaintiff did achieve a better result than the *Calderbank* offer, costs should lie where they have fallen for both parties.

[28] The difficulty with the first and third of these submissions is that they are made by reference to the Authority's determination. In this proceeding, the plaintiff elected a hearing do novo and the matter is to be decided on that basis. The Court must make its own decision5 on the basis of the material before it and there is no

onus on the plaintiff to establish that the Authority was wrong.

5 Section 183(1) of the Act.

[29] In support of her first submission, Ms Hudson argued that the effect of reg 68 was that the *Calderbank* offer must be taken into account because it was an offer made a reasonable time before hearing to settle all or some of the matters at issue. I agree. What effect it should have on the Court's decision, however, is still a matter of discretion.

[30] In support of her second submission, Ms Hudson questioned whether the Authority's conclusion that the plaintiff was unjustifiably dismissed provided him with any vindication given the findings of fact which led the Authority to also conclude that he had significantly contributed to his dismissal.

[31] As to the condition of confidentiality attached to the *Calderbank* offer, Ms Hudson submitted that there was nothing unusual about this as "the majority of settlements reached whether or not by way of a *Calderbank* offer are usually documented and signed off in a formal Record of Settlement" under s 149 of the Act. With respect, this submission misses the point. This case is not concerned with an offer which has been accepted. Rather, it is concerned with an offer which was not accepted and an assessment of the benefit the plaintiff would have derived from the offer had he accepted it. Whether the plaintiff was able to disclose the terms of any settlement to third parties is a relevant consideration in deciding that issue.

[32] In relation to her third submission, Ms Hudson correctly noted that there was

no evidence before the Court of the plaintiff's ability to pay.

[33] Ms Hudson's fourth submission mirrored what Mr Anderson had said on behalf of the plaintiff. The fall back position of both parties is that no award of costs should be made.

Discussion and Decision

[34] The general principles applicable to the consideration of *Calderbank* offers are settled. Such an offer should be taken into account when fixing costs if it would have been more beneficial to the defendant than the judgment ultimately obtained. In that case, it is one of the factors to be considered in the exercise of the overall

discretion to award costs. In particular, it may justify departing from the general principle that costs should follow the event. Alternatively, it may justify a substantial movement from the accepted starting point of two thirds of the costs actually and reasonably incurred. In any event, it is not decisive. Rather it is a factor to be taken into account to a greater or lesser extent depending on the circumstances of the case.

[35] Where a plaintiff seeks only monetary remedies, the application of these principles will be relatively straightforward. If the plaintiff is successful but fails to achieve more at trial than was offered by the defendant, the plaintiff is unlikely to be awarded costs and may be required to contribute to the defendant's costs.

[36] The assessment becomes more difficult when non-monetary remedies, particularly reinstatement, are sought or where the plaintiff's legitimate interest in the outcome includes non-monetary components, such as reputation or vindication. This has been recognised by the Court of Appeal in a number of cases but what was said in those cases and the approach to be taken was summarised in *Bluestar Print*

Group (NZ) Ltd v Mitchell6:

[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 way7. In the employment context it has also recognised, in *Aoraki Corporation Ltd v McGavin8*, 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. Thus the relevance of reputational

6 [2010] NZCA 385; [2010] ERNZ 446.

7 [2004] NZCA 10; [2004] 2 NZLR 606 (CA) at [22].

8 [1998] NZCA 88; [1998] 1 ERNZ 601 (CA).

factors means that cost assessments are not confined solely to economic considerations9. 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 required10. 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.

[37] In this case, it is common ground that the monetary remedies awarded to the plaintiff were less than the sum offered by

the defendant.

[38] The plaintiff says, however, that the principal remedy he sought was reinstatement. In Mr Anderson's email rejecting the defendant's offer, this is the reason given for not accepting it. As reinstatement was rejected by the Authority as not "remotely practical or reasonable"11, this cannot be taken into account in assessing the benefit to the plaintiff of taking the matter to a hearing.

[39] The plaintiff says further that, even if he was not reinstated, he wanted vindication of his position by a public statement from the Authority that he had been unjustifiably dismissed. As the Authority did reach this conclusion, it raises the question how such non-monetary considerations are to be assessed when deciding whether the outcome following a hearing was more beneficial to the plaintiff than

the monetary offer made.

9 *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) at [53].

10 Ibid.

11 At [48] of the determination.

[40] In the passage from the decision in the *Bluestar* case set out above, the Court of Appeal took the view that vindication may be inferred from the payment of a reasonable sum in compensation12. For that inference to be drawn by a third party, however, the fact of the payment and the amount of it would need to be known. The obvious difficulty with taking that approach in this case is that the offer was made subject to a condition of confidentiality. While payment of $8,000 in compensation would have been reasonable, no inference of vindication could be drawn by anyone other than the parties because they could not be told about it. In particular, had the

plaintiff accepted the offer, he would have been unable to tell prospective employers about it.

[41] There is also authority for the proposition that the principles usually applicable to *Calderbank* offers ought not to apply in the same way to offers conditional on confidentiality. In *Rapana v McBride Street Cars Ltd13* Asher J said:

[22] The *Calderbank* offer was made with a denial of liability and on condition that the existence of the settlement and its terms would be confidential to the parties and their advisers. The District Court Judge noted, "In my view, the conditional nature of the offer precluded it from being a true *Calderbank* offer". It was not simply an offer of $5,000. It was an offer of $5,000 together with some further terms, one of which, the confidentiality clause, was significant and possibly onerous. It would be quite understandable that a party might want to publicise a settlement. This is particularly so in a case such as this, which apparently involved issues of misuse of powers. A party wishing to have the benefit of a *Calderbank* offer should make a monetary offer without significant conditional terms.

[23] The appellant has observed that the Crown might well not have insisted on the confidentiality stipulation in a subsequent negotiation. However, this observation does not resolve the problem. Of course, any stipulation including the monetary offer in a *Calderbank* offer can be the subject of further negotiation. The basis upon which *Calderbank* offers are approached is that they stand alone, and the Court will not speculate as to what reasonable negotiations might follow.

[24] For this further reason the *Calderbank* offer cannot be seen as a more generous proposal than McBride's entitlement at the time. McBride was entitled at all times to a public judgment or outcome. Ms Rapana was seeking to impose a term to thwart this, and which she did not achieve, namely confidentiality.

12 At [19].

13 Dunedin CIV 2007-412-118, 1 May 2007.

[42] On any view of it, the significance of this factor in the exercise of the Court's overall discretion to award costs must reflect the extent to which the plaintiff actually achieved vindication through the Authority's determination. It is clear from the determination that the Authority found the dismissal unjustifiable very largely, if not entirely, on procedural grounds. On the other hand, the Authority was critical of the plaintiff's conduct. This was reflected in the high degree of contribution attributed to him. The net benefit to the plaintiff in terms of reputation and vindication was relatively small.

[43] In the final analysis, considerable weight must be given to the *Calderbank* offer made by the defendant but I do not go as far as the Authority did. In all the circumstances, a just outcome is that no award of costs should be made in respect of the proceedings before the Authority.

Summary

[44] In summary, my decision is:

(a) The challenge succeeds to an extent.

(b) There will no order for costs relating to the proceedings before the

Authority.

(c) Pursuant to s 183(2) of the Act, the costs determination of the

Authority is set aside and this decision stands in its place.

Costs

[45] Both counsel made submissions about costs in this proceeding. Although the plaintiff has been successful in his challenge, the final outcome is what both parties

adopted as their fall back position. I make no order for costs in the Court.

Signed at 3.00 pm on 12 September 2013.

A A Couch
Judge
