

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 296
5364924**

BETWEEN LEO GALLAGHER
 Applicant

AND AUCKLAND PACKAGING
 COMPANY LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Costs Submissions 13 August 2012 from Applicant
 1 & 20 August 2012 from Respondent

Determination: 30 August 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2012] NZERA Auckland 258 the Authority found that the Respondent, Auckland Packaging Company Limited (APC), had justifiably dismissed and had not unjustifiably disadvantaged Mr Gallagher.

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and the parties have filed submissions in respect of costs.

[3] This matter involved 1 day of an Investigation Meeting, with written submissions being submitted subsequent to that. Mr Upton on behalf of the Respondent, citing actual costs of slightly in excess of \$10,500.00, is seeking a contributory towards costs of \$7,500.00 (excluding GST).

Submissions of the Respondent

[4] Mr Upton, in support of the level of the claim by the Respondent, submitted for the consideration of the Authority that account should be taken of:

- Preparation time: Mr Upton cited the Employment Court cases of *Carter Holt Ltd v Eastern Bay Independent Industrial Workers Union*¹ and *Chief Executive of the Department of Corrections v Taiwhiwhirangi*² in support of an additional award of costs in respect of preparation. In the latter case Shaw J, referring to an Authority case, said:³

”The case undoubtedly required considerable preparation including detailed analysis of closed circuit video footage. In these circumstances a realistic preparation is appropriate.”

- The fact that the Respondent made a Calderbank⁴ offer, that is a without prejudice save as to costs offer, to Mr Gallagher (the Offer). Mr Upton submits that the Offer was made by letter dated 24 April 2012 to settle proceedings, on the basis that:
 - APC would amend its records to reflect that Mr Gallagher had resigned rather than that he was dismissed;
 - APC would allow Mr Gallagher to tell third parties of his resignation;
 - APC would verify Mr Gallagher’s resignation to any third party and would also say that it did not provide verbal references and was therefore unable to comment further; and
 - There would be no issue as to costs.
- Mr Gallagher did not accept the Offer dated 24 April 2012 and since that date and the date of the Investigation Meeting on 27 July 2012 costs incurred by APC amounted to a maximum sum of \$7,490.00.

¹ [2011] NZEmpC 13

² [2008] ERNZ 73

³ Ibid at para [6]

⁴ *Calderbank v Calderbank* [1976] Fam 93 (CA)

Submissions for the Applicant

[5] Mr Gallagher submits that he is facing financial hardship and that a costs award would leave him facing bankruptcy.

[6] In support of this claim Mr Gallagher has filed personal financial documentation with the Authority and I accept that at this time Mr Gallagher is facing significant financial difficulty.

Principles

[7] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

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.

[8] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*⁵.

[9] The principles and the approach adopted by the Authority on which an award of costs is made are well settled: *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁶

[10] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁷ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁸ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.

[11] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a 1 day Investigation Meeting this would normally equate to an award of \$3,500.00.

⁵ [1996] 2 ERNZ 622

⁶ [2005] 1 ERNZ 808

⁷ [2005] 1 ERNZ 808

⁸ [2001] ERNZ 305

Determination

[12] I see no reason in the current case for departing from the normal level of awards made by the Authority on the basis of the level of preparation time undertaken by the Respondent, or for preparation of costs submissions. These actions are part of the normal Authority process, and in this case, there was nothing particularly complex in the nature of the matter before the Authority.

[13] However the reasonable and timely efforts to settle proceedings are of more persuasion. The Authority Investigation Meeting was held on 27 July 2012. The Offer dated 24 April 2012 was made well in advance of the Investigation Meeting and consequently before preparation costs had been incurred. There was ample time for the Applicant to consider the Offer prior to the Investigation Meeting.

[14] In considering the effect the Offer should have upon the award of costs in this matter, I take into consideration the Court of Appeal decision in *Aoraki Corporation Ltd v McGavin*⁹ in which the Court 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”¹⁰ offers, that is without prejudice save as to costs, 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.

[15] Additionally 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*.¹¹

[16] In the present case I take the notional daily rate of \$3,500.00 as the starting point for costs which should be awarded to APC. The following factors suggest that rate should be adjusted upward:

⁹ [1998] 1 ERNZ 601

¹⁰ *Calderbank v Calderbank* [1976] Fam 93 (CA)

¹¹ [2004] 1 ERNZ 172 (CA) at [53]

- Mr Gallagher rejected the Offer which was made almost three months prior to the Authority investigation meeting;
- The Offer put Mr Gallagher on notice that an increase in the daily tariff rate would be sought should the Offer be rejected, and
- Mr Gallagher was wholly unsuccessful in his claim before the Authority

[17] Factors suggesting that the rate should be reduced or remain the same are:

- The principle that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct; and
- The principle that costs awards are to be modest and reflect what is reasonably required in preparing an Authority investigation.
- Mr Gallagher's adverse financial situation.

[18] Weighing those factors in the discretionary exercise of awarding costs, I consider that the notional daily rate should be increased by \$1,000.00.

[19] Accordingly, Mr Gallagher is ordered to pay APC \$4,500.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[20] Mr Gallagher is to make the payment of costs by instalments of \$50.00 per week until such time as the costs award is paid in full. In making this decision I rely upon the decision of the Employment Court in *Tourism Holdings Ltd t/a Cl Munn v Charlesworth*¹² in which payment of costs by instalment was addressed by Travis J who stated;¹³

I find the jurisdiction to make the award payable by instalments from the wide jurisdiction to make costs award in the Act and the Regulations and, in particular, from s 189 of the Act which allows the Court to make orders, not inconsistent with this or any other Act or relevant agreements, as in equity and good conscience as it sees fit.

¹² [2012] NZEmpC 29

¹³ *Tourism Holdings* at para [52]

[21] In the event that the parties consider that there is evidence that the weekly amount should be varied, leave is reserved for the parties to return to the Authority.

Eleanor Robinson
Member of the Employment Relations Authority