

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 12
5573189

BETWEEN JANICE GUISE
 Applicant

AND SPOTLESS FACILITY SERVICES
 (NEW ZEALAND) LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Jills Angus Burney, Counsel for Applicant
 Guido Ballara, Counsel for Respondent

Submissions Received: 15 December 2017 from Applicant
 22 November 2017 and 26 January 2018 from
 Respondent

Determination: 5 February 2018

**COSTS DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

[1] On 10 October 2017 I issued a determination in which I dismissed Ms Guises' claims she had been unjustifiably dismissed, unjustifiably disadvantaged and underpaid on ANZAC day 2015.¹

[2] Costs were reserved and Spotless, as the successful party, now seeks a contribution toward those it incurred defending the claims.

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim.² From there adjustments may be made depending on the circumstances.

[4] The investigation took a day which would, applying the tariff which applied to matters lodged when this was, see a contribution in the order of \$3,500.

¹ [2017] NZERA Wellington 103

[5] Spotless, however, asks I exercise my discretion and order the payment of a significantly greater sum. It seeks \$14,000.

[6] In doing so it notes submissions were prepared after the investigation which effectively increased the hearing time and that this occurred at Ms Angus Burney's request. More importantly, reliance is placed on a Calderbank dated 24 March 2017 and the principle a steely approach is required when considering a Calderbank and its effect.³ In *Bluestar Print* the Court of Appeal, when considering the principles application in the employment jurisdiction, stated:

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. 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) [*of the Employment Court regulations*]. It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.⁴

[7] That the principle extends to the Authority was confirmed in *Fagotti*⁵ at [109].

[8] The Calderbank in question was dated 24 March 2017 which was prior to the lodging of witness statements and the bulk of Spotless' costs being incurred. It offered Ms Guise \$3,000 along with a written apology for any distress she may have felt. While receipt was acknowledged there was no formal response.

[9] Ms Guise takes issue with the fact some of the evidence was not disclosed in a timely manner with particular reference to elements of Ms Early's evidence.⁶ Issue with taken with the fact Spotless was aware of discrepancies between Ms Early's written statement at the time of the events which led to the dismissal and subsequent

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

³ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 (CA)

⁴ Above n 3 - paragraph [20] in full

⁵ Above n 2

oral statements but did not disclose that prior to mediation. It is stated that had that been disclosed ...*it is doubtful that Ms Guise would have continued with her litigation.*⁷

[10] Ms Guise goes on to say Spotless has, by withholding material information at a formative stage in proceedings, contributed significantly to an escalation in its own costs and to Ms Guises' substantial costs.⁸ It is also suggested the piecemeal disclosure of evidence renders the Calderbank invalid as the offer could not be properly considered with incomplete knowledge.

[11] Perhaps more importantly it is submitted Ms Guise will be unable to meet a costs award given her precarious financial situation. This assertion is supported with both an affidavit and a bank statement. In summary the evidence is Ms Guise is unable to work due to illness and survives on a sickness benefit. Her income totals some \$264 per week.

[12] Rent, power and food account for \$235 which leaves some \$30 a week to cover extant debt and significant costs obtaining medical treatment. It is stated these outgoings exceed the funds available and this is alleviated by contributions made by family from time to time. Insurances' have now been cancelled and there is no property that can be used to realise funds. The bank statement illustrates a precarious situation.

[13] Indeed Ms Guise submits:

... in view of the genuine and reasonable claims that the applicant brought in this matter and the genuine efforts made to resolve the matter in the knowledge that she and her representatives' held, that in the first instance, given the respondent's conduct withholding material evidence, an award of costs should be made to the applicant.⁹

[14] That is followed by advice those costs exceed \$24,000 and over \$16,000 of that was incurred after mediation. It is then noted if costs are not ordered in Ms Guises' favour an alternate would be to order costs lie where they fall.

[15] In reply Spotless comments on the issues surrounding Ms Early's evidence and the fact there was no response to the Calderbank before commenting on the

⁶ Above n 1 at [7]

⁷ Applicant's submission at [5]

⁸ Submissions at [6]

⁹ Applicant's submission at [16]

impecuniosity argument. Spotless closes by asking for an additional amount to cover the cost of providing this last response.

[16] Considering first the question of in whose favour an award of costs, if any, should be made.

[17] A fundamental principle applying to the determination of costs in all New Zealand courts is they follow the event. The party who fails should pay costs to the party who succeeds.¹⁰

[18] The simple fact is Ms Guise was wholly unsuccessful. It is Spotless who succeeded and to whom an award of costs is due.

[19] The argument the Calderbank should be rendered nugatory as it could not be properly considered by reason of Spotless' withholding of information is undermined by the fact there was no response. I also note the information played no part in the decision to dismiss as Spotless did not know of the relevant information when that decision was made and Spotless justified its decision on the information it had at the time. As to the effect of the information's withholding I agree with Spotless' submission it could not have made a difference.¹¹

[20] Given the bulk of Spotless' costs were incurred after the tendering of a Calderbank that would clearly have placed Ms Guise in a better position than that she found herself in as a result of the determination the critical issue is how to balance the principle of adopting a steely approach against her situation.

[21] As was said in *Leota v Chief Executive of the Ministry of Social Development* the real issue is whether Ms Guises' financial position means the imposition of a figure which would, in light of the Calderbank, justly compensate Spotless might cause Ms Guise a degree of hardship which is excessive or disproportionate.¹²

[22] While Ms Guises' affidavit portrays a fraught position its content is untested though it appears to be supported by the bank statement. That said I do not know if this is Ms Guise's only account and the position portrayed is undermined to some extent by the submission which indicates she is somehow paying off her own costs

¹⁰ *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109 at [8]

¹¹ Respondent's reply submission of 26 January 2018 at [6] to [12]

¹² [2017] NZEmpC 18 at [11]

which exceed \$24,000. If she can do that it would appear to me she is under an obligation to also recognise the duty to Spotless that arises by virtue of its success. That said I do accept the evidence is she is in a position of hardship though I am unsure of just how extreme.

[23] Having considered the principles, the submissions and the facts as I know them I consider this is an instance in which the Calderbank should be recognised to some extent. Having also perused other determinations of the Authority I conclude an increase in the order of 50% appropriate.

[24] For the above reasons I order the applicant, Janice Guise, pay the respondent, Spotless Facility Services (New Zealand) Limited, the sum of \$5,250.00 (five thousand, two hundred and fifty dollars) as a contribution toward the costs Spotless incurred in successfully defending Ms Guises' claim.

M B Loftus
Member of the Employment Relations Authority