

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 430
5452498**

BETWEEN DANIEL HARDING
Applicant
AND M.S.J. LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Dean Organ, Advocate for Applicant
Mark Nutsford, Advocate for Respondent
Costs Submissions 9 September 2014 from Applicant
14 October 2014 from Respondent
Determination: 20 October 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 15 September 2014 ([2014] NZERA Auckland 382), the Authority found that the Applicant, Mr Daniel Harding, had been justifiably dismissed from his employment by the Respondent, M.S.J. Limited (MSJ)

[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 both parties have filed submissions in respect of costs.

[3] The matter involved 1 day of meeting time. Mr Organ on behalf of Mr Harding, citing actual costs of \$3,750.00 in respect only of the Authority hearing (excluding GST) is seeking a contribution towards the actual costs in the sum of \$3,000.00, a sum set below the normal daily tariff rate in the Authority of \$3,500.00 per day.

Applicant's submissions

[4] Mr Organ submits that it was always clear that MSJ owed wages to Mr Harding, however there was a refusal to pay the outstanding wages until June 2013 and then only after Mr Harding had filed proceedings and pursued the matter, causing him unnecessary expense.

[5] Mr Organ acknowledges the evidence filed during the course of the Investigation Meeting as to MSJ's precarious financial situation, but observes that it establishes only MSJ's non-compliance with its obligations to pay other creditors including the IRD, and as such, this evidence does not on its own establish a lack of financial resources or financial instability; or that MSJ was unprofitable.

[6] It is further submitted that refusal to pay other creditors should not compromise MSJ's obligations to Mr Harding.

Respondent's submissions

[7] Mr Nutsford, on behalf of MSJ, submits that the evidence filed during the course of the Investigation Meeting established that MSJ's financial situation was precarious, and that there were mitigating circumstances for the non-payment of wages which were resolved shortly after MSJ had sought professional assistance.

[8] Mr Nutsford submits that MSJ made a Calderbank¹ offer, that is a without prejudice save as to costs offer, to Mr Harding by letter dated 20 June 2014 (the First Offer).

[9] In the First Offer MSJ offered the sums of (i) \$2,036.00 in respect of lost wages to be paid within 7 days of mediation; (ii) \$3,000.00 in respect of compensation pursuant to s123(1)(c)(i) of the Employment Relations Act 2000 (the Act) to be paid on or behalf 20 August 2014; and (iii) \$2,500.00 plus GST in respect of the costs incurred to be paid in two instalments on receipt of a tax invoice.

[10] Mr Nutsford submits that as soon as it became clear that a speedy resolution would not be possible, the outstanding wages were paid immediately to Mr Harding.

[11] A counter-offer was subsequently received from Mr Harding, which requested payment in full rather than by the timetabled instalment dates proposed for payment.

[12] As a result, MSJ made a revised Calderbank Offer (the Second Offer) dated 11 July 2014 which reiterated MSJ's genuine commitment to make the proposed sums in accordance with the proposed instalment timetable. The Second Offer was refused by Mr Harding.

Determination

[13] The Authority Investigation Meeting was held on 28 August 2014. Both the First Offer and the Second Offer were made well in advance of the Investigation Meeting. I

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

consider that there was therefore ample time for Mr Harding to consider the First and Second Offers prior to the Investigation Meeting.

[14] It is necessary to consider what effect the First and Second Offers should have upon the award of costs in this matter. The Court of Appeal in *Health Waikato Limited v Van Der Sluis*² observed that: “*the Calderbank letter field is fully discretionary*”.

[15] 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.

[16] The Court of Appeal in *Aoraki Corporation Ltd v McGavin*³ 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.

[17] 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*.⁴

[18] In my determination I observed that this was: “*an appropriate case for letting costs lie where they fall*”. However Mr Harding has chosen not to adhere to my observation and is seeking costs, as is his right as the successful party in the matter.

[19] The principles governing an award of costs as set out by the Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* It is a principle that costs normally follow the event⁵, and I do not find that this is a case in which that principle should be displaced.

² [1997] 10 PRNZ 514

³ [1998] 1 ERNZ 601

⁴ [2004] 1 ERNZ 172 (CA) at [53]

⁵ *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[2005] 1 ERNZ 808

[20] Turning to consideration of the First and Second Offers in relation to Mr Harding's claims for a costs award, I find that the First and Second Offers were a genuine and in terms of the sums offered, realistic attempt to resolve the matter without further expenditure on litigation made at a relatively early stage in the proceedings. I have concluded that the First and Second Offers should be given due weight.

[21] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings, and in my determination I acknowledged that the financial circumstances of MSJ warranted the payment of the sums awarded to Mr Harding by way of instalments.

[22] In these circumstances, recognising MSJ's financial situation, and taking a: "*more steely*" approach to the First and Second Offers, I consider it appropriate to lower the daily tariff below the sum claimed by Mr Harding, and order that MSJ make a contribution to Mr Harding's costs in the sum of \$1,250.00 costs, pursuant to clause 15 of Schedule 2 of the Act



Eleanor Robinson
Member of the Employment Relations Authority