New Zealand Employment Relations Authority Decisions

Harrison v Boyte (Auckland) [2017] NZERA 257; [2017] NZERA Auckland 257 (29 August 2017)

Last Updated: 13 September 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 257
3004593

BETWEEN CAROLINE HARRISON Applicant

A N D ARTHUR BOYTE First Respondent

A N D AG & DM BOYTE PARTNERSHIP Second Respondent

Member of Authority: Representatives:	Anna Fitzgibbon Robert Davies and Susan-Jane Davies,	Counsel	for
	Applicant Kate Ashcroft, Counsel for Respondents		
Investigation Meeting:	On the papers		
Submissions Received:	11 August 2017 from Applicant 24 August 2017 from Respondents		
Date of Determination:	29 August 2017		

COSTS DETERMINATION OF THE AUTHORITY

A. The respondents are to pay a contribution towards the applicant's costs in the sum of $10,000 together with the filing fee of $71.56 within 14 days of the date of this determination.

The substantive determination

[1] By way of a determination dated 28 July 20171, the Authority found that:

(a) Mrs Harrison was employed by the second respondent, AG & DM Boyte Partnership (the Boyte partnership) during the 2016/2017 dairy season on a casual basis;

(b) The Boyte partnership owed Mrs Harrison the sum of $10,103.40 in unpaid wages, public holidays and holiday pay due to her in respect of her employment;

(c) Mrs Harrison was unjustifiably dismissed by the Boyte partnership;

(d) The Boyte partnership was ordered to pay Mrs Harrison the sum of

$8,500 in compensation, $982.80 in lost wages and $303.10 in

KiwiSaver contributions;

(e) The Boyte partnership failed to keep and provide wage and leave records and a written individual employment agreement for Mrs Harrison. Accordingly, the Authority made an order that the Boyte partnership pay a fine of $1,000 in respect of these breaches.

[2] Costs were reserved and the parties were invited to exchange memoranda as to costs.

Submissions as to costs on behalf of Mrs Harrison

[3] Mr Davies on behalf of Mrs Harrison submits that Mrs Harrison's total costs for the time following a *Calderbank*2 offer made on 17 March 2017 to 21 June 2017, being the conclusion of the Authority's investigation meeting, amounted to $23,865 (excluding GST). Mrs Harrison seeks an award of two thirds of these costs. This amounts to $18,550.06.

[4] Mr Davies has copied to the Authority a letter that he sent to the solicitors acting for Mr Boyte, the first respondent and the Boyte partnership, the second respondent. The letter is dated 17 March 2017 and is marked *"without prejudice save as to costs"*. The letter contains a full and final settlement of the proceedings in return for a payment by the respondents of $9,250 for arrears of wages, annual and public holiday pay together with interest at the rate of 5% per annum until payment,

$2,000 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the

Act) and a contribution of $4,500 plus GST towards costs. The proposal was not accepted by the respondents.

Submissions as to costs on behalf of Mr Boyte and the Boyte partnership

[5] Ms Ashcroft for the respondents argues that this is not a case which merits an uplift in the Authority's normal daily tariff for costs. Ms Ashcroft says the respondents were given just one week to consider the *Calderbank* offer before it lapsed. One week was insufficient time to consider the offer and in any event the offer would more than likely have been rejected because the respondents did not agree there was an ongoing employment relationship.

Costs determination

[6] The Authority's power to award costs against a party is set out in clause 15 of

Schedule 2 of the Act which provides as follows:

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.

[7] The Authority is bound by the principles set out in *PBO Ltd v. Da Cruz*3 when setting costs awards. These include:

- There is discretion as to whether costs would be awarded and in what amount;
- The discretion is to be exercised in accordance with principle and not arbitrarily;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience are to be considered on a case-by-case basis;

• Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased 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;

• That costs generally follow the event;

• That without prejudice offers can be taken into account;

• That awards will be modest;

• That frequently costs are judged against a notional daily rate;

• The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[8] First, I accept that it is appropriate for the Boyte partnership to make a contribution towards Mrs Harrison's costs on the basis that costs follow the event. Mrs Harrison was wholly successful in her claims against the Boyte partnership.

[9] The starting point in awarding costs in the Authority where an investigation meeting has taken place is the daily tariff, which stands at $4,500 for the first day and

$3,500 for each subsequent day for matters lodged after 1 August 2016 (which Mrs Harrison's statement of problem was). The investigation meeting lasted two full days so the starting point in this matter is $8,000.

Should the daily rate be uplifted?

[10] Mr Davies advances two reasons for the Authority to uplift the daily rate. The first reason is that there was a "without prejudice offer" made by Mrs Harrison to settle the proceedings in advance of the investigation meeting.

[11] Mr Davies relies on the letter sent on 17 March 2017 to the solicitors acting for Mr Boyte and the Boyte partnership marked *"without prejudice save as to costs"*.

[12] *Ogilvy & Mather (NZ) Ltd v Darroch*4 sets out the two principal criteria that must be satisfied when a *Calderbank* offer is made, so as to ensure the recipient is not prejudiced unfairly by the offer, by undue pressure being exerted. These safeguards are as follows:

- A modicum of time for calm reflection, and the taking of advice, before a decision has to be made to accept an offer or reject it; and
- The offer must be transparent if the offeror is later to be given the protection of the *Calderbank* offer furnished.

[13] When I consider the *Calderbank* letter of 17 March 2017, I note that a one week timeframe was given to Mr Boyte and the Boyte partnership to consider and accept the offer.

[14] The offer in the letter made clear that, if the offer to settle was rejected, Ms Harrison would be seeking indemnity costs from the date of the letter if the matter proceeded and Mr Boyte and the Boyte partnership obtained *"an equal to or less favourable result"* than the offer of settlement. The letter referred to the principles in the *Calderbank* decision.

[15] Mr Boyte and the Boyte partnership were legally represented at the time of the offer. In my view 7 days was sufficient time to consider the offer without undue pressure.

[16] The letter also dealt with the issue of costs, so that Mr Boyte and the Boyte partnership would have understood that they could settle the entire proceedings by accepting the offer contained in the *Calderbank* letter of 17 March 2017.

[17] Whilst *Calderbank* offers were originally intended to be made by respondents, it is accepted that they may be sent and replied upon by applicants5.

[18] The Court of Appeal's injunction in *Blue Star Print (NZ) Ltd v Mitchell*6 to adopt a *"steely approach"* in considering *Calderbank* offers, has been confirmed in *Fagotti v. Acme & Co Ltd*7 to apply to the Authority.

4 [1993] NZEmpC 172; [1993] 2 ERNZ 943

5. *Richard and Jennifer Adams t/a Untouchable Hair and Skin v Shannen Brown* [2016] NZEmpC 13

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

[19] In the Authority's substantive determination, Mrs Harrison was awarded more than the $11,250 she was seeking in the *Calderbank* offer sent on her behalf. The respondents' ignoring of the offer was not reasonable in my estimation, given that Mr Boyte must have known that Mrs Harrison was sending him timesheets because she was performing work for the Boyte partnership for which she wished to be paid. The refusal to pay Mrs Harrison for her work and to disclaim her employment, amounted to an unjustified dismissal.

[20] I am satisfied that the *Calderbank* offer made by Mr Davies on behalf of

Mrs Harrison was valid.

[21] Mr Davies refers to Mr Boyte's conduct as being another reason for the Authority to increase the daily tariff. The conduct referred to by Mr Davies was primarily the way in which Mr Boyte conducted himself and responded to questioning during the Authority's investigation meeting. Mr Davies claims the conduct was unreasonable and increased costs.

[22] Mr Davies submits both reasons justify an uplift by the Authority to the daily tariff.

[23] I accept the Calderbank offer to be a factor supporting an increase in the daily tariff. I am not convinced Mr Boyte's conduct during the investigation meeting increased costs.

The amount of the "uplift"?

[24] Mr Davies submits that the uplift should result in an award of two-thirds of Mrs Harrison's actual and reasonable costs of $24,942.50 (not including GST) incurred from the time the *Calderbank* offer was made on 17 March 2017 to 21 June

2017, being the date the Authority's investigation concluded. This amounts to

$18,550.06.

[25] In addition, Mr Davies seeks a further $440, being two-thirds of Ms Harrison's

actual and reasonable costs ($660), incurred during the period 28 July 2017 to

10 August 2017 being the date from the Authority's determination to the date

Mrs Harrison's costs memoranda was due, should be payable together with $2,520.65

being GST on these amounts. The GST amounts are sought on the basis they are irrecoverable by Mrs Harrison as an individual.

[26] Mrs Harrison also seeks reimbursement of the Authority's filing fee of $71.56.

[27] I have reviewed the invoices from Mrs Harrison's lawyers. I consider the amount being sought on behalf of Mrs Harrison to be too high. There is no breakdown of the time and attendances and so it is difficult for the Authority to consider what amount of those legal services were spent on dealing with the respondents' approach to the case, a reason advanced by Mr Davies to justify an increase in the daily tariff.

[28] I am mindful that, although the Authority is to apply a steely approach, it must also abide by the principles of *PBO*, including that costs should be reasonable and awards modest. In light of this, I shall uplift the Authority's daily rate for the 2 day investigation meeting by $2000, from $8000 to $10,000. This figure takes into account GST, in accordance with *Banks v Hockey Manawatu Inc*8.

Order

[29] I order the respondents to make a contribution towards Mrs Harrison's costs in the sum of $10,000 together with the $71.56 filing fee. These costs are to be paid to Mrs Harrison no later than 14 days from the date of this determination.

Anna Fitzgibbon

Member of the Employment Relations Authority
