New Zealand Employment Relations Authority Decisions

Hawtree v Spotless Services (NZ) Limited [2011] NZERA 369; [2011] NZERA Wellington 90 (26 May 2011)

Last Updated: 22 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 90 File Number: 5302247

BETWEEN

Val Hawtree Applicant

AND

Spotless Services (NZ) Limited Respondent

Member of Authority: Representatives:

Denis Asher

Jamie Waugh for Ms Hawtree Paul McBride for the Company

Submissions received:

24 May 2011

Determination:

26 May 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] Following an investigation on 27 April 2011, and in my determination dated 6 May ([2011] NZERA Wellington 74), I found that Ms Hawtree was not entitled to a retirement gratuity but that she had been unjustifiably disadvantaged by the Company. I awarded the applicant $3,000 compensation for humiliation and hurt.

[2] Costs were reserved as requested.

The Applicant's Costs Submissions Summarised

[3] In submissions received on 18 & 24 May 2011 Ms Hawtree confirmed she was seeking reasonable costs on the ground that, as she was partially successful in her claim, costs should follow the event in the usual way.

[4] A *Calderbank* letter was received by Ms Hawtree from the Company dated 18 March 2011 offering payment of $3,000 under s. 123 (1) (c) (i) of the Employment Relations Act 2000 (copy attached to submission). In assessing the *Calderbank* offer the Authority should take into account whether any non-monetary factors are involved: *T & L Harvey Ltd* v *Duncan* [2010] NZEMPC 36; *Mitchell* v *Blue Star Print Group (NZ) Ltd* unreported, Shaw J, 19 March 2009, WC 2/09.

[5] In this case the *Calderbank* offer was for the same amount of compensation awarded by the Authority. However, importantly, the Authority's determination vindicated Ms Hawtree's position in that wrong doing was found on behalf of the Company; a consideration not addressed by the *Calderbank* offer.

[6] Ms Hawtree's actual costs total $7314 (invoices attached).

[7] Consistent with the statement of problem, the Authority found that, specific to Ms Hawtree, agreement had been reached by the applicant and her manager that she would receive a retiring gratuity if she retired.

The Company's Costs Submissions Summarised

[8] The Company says there is no basis for the applicant to be awarded costs and seeks costs for itself on the grounds it was successful in defending the applicant's substantive claims and by reason of the *Calderbank* offer dated 18 March 2011 for the same sum awarded Ms Hawtree by the Authority.

[9] The Company necessarily incurred costs defending the claim for payment of a retiring gratuity, which was discontinued at the Authority's investigation. The respondent's position in respect of that claim was entirely vindicated.

[10] The claim for compensation for humiliation, etc had a number of parts, including a claim for not receiving a gratuity the applicant was not entitled to. What the Authority awarded compensation for was another matter again, arising out of a finding there was no clear advice there was no entitlement.

[11] The applicant received no more money at hearing than what she had previously been offered by the Company.

[12] The claim by the applicant that non-monetary factors (in particular vindication) should override the *Calderbank* offer is entirely contrary to the law. The Court of Appeal specifically overturned one of the cases relied on: see *Bluestar Print Group NZ Ltd* v *Mitchell* [2010] NZCA 385. It specifically found vindication is not a significant factor, rather the dollar figure is all important. In that same judgment the Court of Appeal mandated the courts (including the Authority) to take a *"steely"* approach to *Calderbank* offers - ordering significant costs where parties fail to recover more at hearing that they were earlier offered.

[13] In any case, there was no vindication of the applicant's fundamental claim: if anything the Company's position was vindicated in that regard.

[14] A contribution to costs incurred defending the claim down to the date of the *Calderbank* offer of $1,000 is sought.

[15] A full costs award is sought as a result of Ms Hawtree's rejection of the Company's *Calderbank* offer of $5750 plus GST is sought (invoices attached).

[16] Should the Authority not be minded to award full costs then a substantial award is sought.

Discussion and Findings

[17] The Authority's discretion with which to award costs is now well settled and typically follows the event: *PBO Limited (formerly Rush Security Limited)* v *Da Cruz*

[2005] NZEmpC 144; [2005] 1 ERNZ 808.

[18] The investigation into this problem took less than half a day. At its core was a comparatively simple issue that agreement had been reached by Ms Hawtree and her manager that she would be paid a retirement gratuity if she retired.

[19] The Company's *Calderbank* offer anticipated that, if accepted, its terms *" ...*
and any settlement (would be) accompanied by full and final settlement, confidentiality, and withdrawal of the proceeding in the Authority with no order as to costs" (attachment of 18 March 2011 to applicant's costs submissions of 18 May 2011).

[20] In *Bluestar* (above) the Court of Appeal accepted, *"...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"* (par 19), but it also observed that *"... the potential for vindication to be a relevant factor does not mean that the developed jurisprudence ... should be ignored"* (par 20).

[21] What drives this whole issue is the clear appreciation *" ... that the public interest in the fair and expeditions resolution of disputes would be undermined if a party were to ignore a Calderbank offer without any consequences as to costs"* (par 18, Bluestar, above).

[22] As the Court of Appeal did in the *Bluestar* (above) case, *" . it is . necessary to measure the degree of success ... achieved ..."* (par 24). Ms Hawtree failed in her claim that the respondent breached an explicit term of her employment agreement; however, she succeeded with the claim that the Company created a legitimate expectation a retirement gratuity would be paid. Unlike the facts in *Bluestar* (above), where Mr Mitchell was offered a *Calderbank* settlement in excess of what he won in the Employment Court, the compensation awarded the applicant in respect of her success proved to be the same as that offered a month prior to the investigation, $3,000.

[23] As the Court of Appeal observed, *"The normal effect of a Calderbank offer is that the costs position is reversed. In this case,* (Bluestar) *did not seek costs, but rather contended that the costs order against* (it) *should be reversed. We agree. Bearing in*

mind the offer, the timing of the offer and other factors relevant to the outcome of the claim, we are satisfied that there should have been no award of costs against (Bluestar) *in the Employment Court"* (par24, Bluestar, above).

[24] This is a finely balanced case, because the *Calderbank* offer matched the amount awarded the applicant. I am therefore satisfied that, consistent with the Bluestar principles summarised above, and the Court of Appeal's direction that courts should take a *"steely"* approach to *Calderbank* offers, that costs in this instance should lie where they fall.

Determination

[25] The parties' costs are to lie where they fall.

Denis Asher

Member of the Employment Relations Authority
