

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 85
5411132

BETWEEN

VANESSA KENNEDY
Applicant

A N D

ADVANCED HAIR STUDIO
LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Jeff Goldstein, Counsel for Applicant
Anneke Reid, Counsel for Respondent

Submissions Received: 21 May 2014 from Applicant
4 June 2014 from Respondent

Date of Determination: 10 June 2014

COSTS DETERMINATION OF THE AUTHORITY

I order that the respondent pay to the applicant the sum of \$14,000 as a contribution to her legal costs, together with disbursements in the sum of \$481.72.

[1] By way of a determination of the Authority dated 22 April 2014 ([2014] NZERA Christchurch 64) the Authority found that Ms Kennedy had been unjustifiably dismissed. She was awarded the gross sum of \$4,608 in lost wages, plus interest, together with the sum of \$6,000 for humiliation, loss of dignity and injury to her feelings, together with a penalty imposed upon the respondent, payable to Ms Kennedy, in the sum of \$1,000. A penalty of \$500 was imposed upon Ms Kennedy.

[2] Costs were reserved in the substantive determination, but the parties have been unable to agree how they should be dealt with between them. Accordingly, both counsel have served and lodged memoranda seeking a determination.

[3] Ms Kennedy's position is that the respondent should pay the sum of \$19,500 as a contribution towards her legal costs, together with disbursements in the sum of \$481.72 including GST. Mr Goldstein says that Ms Kennedy's total legal costs (excluding the cost of attending mediation) were \$22,200 excluding GST and disbursements.

[4] The respondent's position is that costs should lie where they fall.

[5] Ms Kennedy relies upon an email sent by Mr Goldstein to the respondent's counsel on her behalf marked *without prejudice save as to costs* (called here a Calderbank offer for short) and dated 11 March 2014. It rejected a previous Calderbank offer made by the respondent which offered \$7,500 in full and final settlement of Ms Kennedy's claims. Mr Goldstein's email, dated 11 March 2014, offered to settle all matters between the parties for the sum of \$10,000, payable under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act), together with a contribution towards her legal fees of \$5,000 plus GST. The offer was rejected by the respondent.

[6] Mr Goldstein reaches the sum of \$19,500 (which I believe is exclusive of GST) by arguing that all costs incurred by Ms Kennedy after expiry of the Calderbank offer should be paid by the respondent, which amount to \$17,500, together with a proportion of the costs incurred prior to the making of the offer; namely \$2,000. Mr Goldstein argues that Ms Kennedy was awarded more than the \$10,000 that she was prepared to settle for, and that she would be awarded more than \$5,000 in costs on the ordinary tariff approach because the investigation meeting lasted two days, and so she beat the Calderbank offer.

[7] Ms Reid for the respondent states that the Authority did not truly find in favour of either party, and that the determination was *a classic pyrrhic victory*. This assertion is based on the Authority's findings about Ms Kennedy's conduct during her employment. She also submits that the Calderbank offers have no relevance, and should not be taken into account. This submission appears to be made on the basis

that Mr Goldstein's Calderbank offer offered to settle for the total sum of \$15,000 (\$10,000 plus \$5,000 costs) and so was not beaten by the awards she received.

[8] Ms Reid also submits that any order that the respondent pay a contribution to the applicant would be *double victimising* the respondent.

The law governing the award of costs in the Authority

[9] The Authority's power to award costs derives from clause 15 of Schedule 2 of the Employment Relations Act 2000 (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.

[10] The Authority must follow the principles set out in *PBO Ltd v Da Cruz*, [2005] 1 ERNZ 808 when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. 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.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. 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.

[11] *Ogilvy & Mather (NZ) Limited v Darroch* [1993] 2 ERNZ 943 set out criteria that Calderbank offers should satisfy so as not to unfairly prejudice the recipient of the offer by exerting undue pressure. These safeguards have been identified as including:

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

[12] Mr Goldstein refers me to the *steely approach* that the Court of Appeal has advocated be adopted when determining costs in circumstances where a valid Calderbank offer has been made; *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385, citing *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA). However, the Employment Court has this year expressed doubts about such an approach in relation to costs awards in the Authority, in *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15, *Harvey Norman Stores (NZ) Pty Ltd v Boulton* [2014] NZEmpC 28 and, most recently, *Booth v Big Kahuna Holdings Limited* [2014] NZEmpC 43, ARC1/14.

Determination

Did the Authority find in favour of Ms Kennedy?

[13] The first issue to decide is whether the Authority found in favour of Ms Kennedy or whether there was a more neutral result, as Ms Reid implies on behalf of the respondent. The Authority's determination was soundly critical of the

disciplinary procedure followed by the respondent, which appeared to be solely focussed on facilitating a police investigation rather than complying with the requirements of New Zealand employment law. There was a clear finding of an unjustified dismissal and the remedies awarded to Ms Kennedy, including a penalty imposed upon the respondent, amounted to \$11,608.

[14] The finding against Ms Kennedy (to use a convenient shorthand) was that she contributed to the situation giving rise to the grievance, which resulted in a reduction in her remedies (save the \$1,000 penalty) of 20%. I also ordered that she pay a penalty of \$500 for having sought to solicit clients away from the respondent, which was a breach of good faith on her part.

[15] When I stand back and review these facts, I find that the outcome of the Authority's investigation meeting was much more than a pyrrhic victory for Ms Kennedy. When weighing the findings in favour of Ms Kennedy against the findings in favour of the respondent, Ms Kennedy clearly prevailed.

[16] In light of this, I do not accept that costs should lie where they fall. Indeed, this matter seems no different from the vast majority of cases in the Authority where an applicant recovers remedies subject to a modest reduction for contribution, but where costs are nonetheless awarded in favour of the applicant on the principle that costs follow the event. The even more modest penalty imposed upon Ms Kennedy does not disturb that principle applying in this case.

[17] The next question to consider is what those costs should be, and what effect the Calderbank offer has on those costs. The starting point is that Ms Kennedy would normally expect an award of \$7,000 as a contribution to her costs. This is on the basis of the Authority's standard daily tariff of \$3,500, and that the investigation meeting lasted a very little under two full days.

Was the Calderbank offer a reasonable one, and made in accordance with Darroch?

[18] The Calderbank offer was sent to the respondent's counsel at 3.28 on Tuesday 11 March 2014 and gave until 4pm on Thursday 13 March 2014 to accept it. The text of the Calderbank stated that the offer would expire at that time if no reasonable request for an extension was made and granted. In the context in which it was made, with experienced counsel acting for the respondent, it being the third Calderbank offer

made in a chain of offers, and contemplating an extension to the time limit, I believe that the respondent was not prejudiced by the two day time limit being given.

[19] I also believe that the offer was completely transparent, making clear what the offer was, including what costs Ms Kennedy wanted, and the basis of any settlement. It also set out the consequences of rejection of the offer, although the respondent's counsel would have been aware of that already.

[20] Finally, I believe that the offer to withdraw for a total sum of \$15,000, including costs, was not unreasonable in the context of the particular employment relationship problem under investigation and the stage reached in preparations for the Authority's investigation meeting.

[21] Therefore, I am satisfied that the Calderbank offer was reasonable and made in accordance with the *Darroch* principles.

Was the Calderbank offer beaten by the remedies recovered by Ms Kennedy?

[22] In my view it was. Ms Reid states that a total of \$15,000 was asked for in the Calderbank offer. However, this was divided into \$10,000 compensation and contribution to \$5,000 costs. Ms Kennedy was awarded more than \$10,000 in monetary terms, and is entitled on usual tariff principles to at least a further \$7,000 contribution to her costs. I therefore accept that she did beat the amount of the Calderbank offer.

[23] It is therefore likely to be true that, if the Calderbank offer had been accepted by the respondent, Ms Kennedy would have withdrawn her application and she would not have incurred a further \$17,500 in costs pursuing her application and applying for costs (although she would have incurred some further costs in finalising the settlement).

What contribution to Ms Kennedy's costs should the respondent make?

[24] Mr Goldstein is effectively seeking indemnity costs against the respondent for the period postdating the expiry of the Calderbank offer. No breakdown has been provided of the costs that have been incurred during that period, and so it is not possible to judge whether they have been reasonably incurred. On that basis alone, it would not be appropriate to award indemnity costs. However, I am also cognisant of

the approach normally adopted in the Authority, consistent with the principles of *Da Cruz*, that awards will be modest, and of the notes of caution signalled by the Employment Court against awarding indemnity costs in the Authority in *Mattingly, Boulton and Booth*.

[25] Therefore, I will not award indemnity costs against the respondent for the period postdating the expiry of the Calderbank offer. However, *Da Cruz* also recognises that without prejudice offers can be taken into account, and I believe that it would be appropriate to do so in this case. I believe that the most appropriate approach to take would be to increase the standard daily tariff to reflect the lost opportunity to settle the matter, and avoid the incurring of further significant costs, by the respondent declining to accept the Calderbank offer.

[26] I believe that a fair result would be for the daily tariff to be doubled, so that the respondent contributes \$14,000 to the total legal costs of Ms Kennedy. I do not believe that this *doubly victimises* the respondent, as it has not been victimised in the first place, and because it must take responsibility for refusing to accept a reasonable Calderbank offer to settle made shortly before the investigation meeting.

[27] I also order that the respondent pay Ms Kennedy's lodgement fee, hearing fee and service fees, totalling \$481.72.

Orders

[28] I order the respondent to pay to Ms Kennedy the following sums as a contribution to her costs and disbursements:

- a. The sum of \$14,000; and
- b. The further sum of \$481.72.