

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 6
3001233

BETWEEN ADAM LLOYD
Applicant

A N D HEALTHY BUSINESS
INVESTMENTS LIMITED (IN
LIQUIDATION)
Respondent

Member of Authority: David Appleton

Representatives: Anna Oberndorfer, Advocate for Applicant
Respondent no longer directly represented
Murray Allott, Liquidator for Respondent

Submissions Received: 4 December 2017 from Applicant
None received from Respondent

Date of Determination: 23 January 2018

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

[1] By way of a determination dated 7 November 2017¹ the Authority found that Mr Lloyd had been unjustifiably dismissed and had suffered unjustifiable disadvantage in his employment. He was awarded remedies subject to a reduction for contribution. I reserved costs and directed the parties to seek to agree how costs were to be dealt with.

[2] The parties appear not to have been able to agree how costs are to be dealt with and, in any event, the respondent went into liquidation on 11 December 2017. Upon learning of the

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liquidation, the Authority wrote to the liquidator, and the respondent's directors, to say that, notwithstanding the fact that the company has been placed into liquidation, that fact does not prevent the Authority from determining costs, as costs are a consequence of proceedings, and follow the event of the determination already issued prior to the company being placed into liquidation. In other words, s 248 of the Companies Act 1993 is not engaged to prevent a determination on costs. I rely on *Orakei Group (2007) Limited (formerly PRP Auckland Limited) v Hilton Doherty (No 2)*² in reaching this conclusion.

[3] I invited the liquidator to make submissions on costs and extended the respondent's timetable for doing so, taking into account in addition the traditional break over Christmas and the New Year summer period. However, the liquidator did not reply to the Authority and did not make any submissions and the extended deadline for doing so has now expired. Accordingly, I now proceed to determine the matter of costs.

[4] Ms Oberndorfer seeks an uplift from the Authority's usual daily tariff of \$4,500 for the first day of the investigation meeting on the basis of a 'without prejudice save as to costs' offer (henceforth referred to herein as a Calderbank offer for ease of reference) made by her on behalf of Mr Lloyd on 9 June 2017. In reliance of this offer, which she submits was unreasonably rejected by the respondent, Ms Oberndorfer seeks an increase of the tariff by \$2,250 to \$7,250, together with the reimbursement of the Authority's lodgement fee of \$71.56.

[5] The Calderbank offer offered to settle the proceedings for a payment by the respondent of \$13,500 together with costs of \$5,500 plus GST. This amounts to \$19,825. The Authority awarded Mr Lloyd a total of \$25,734.28. Mr Lloyd therefore had offered to settle proceedings for less than he was eventually awarded.

Discussion

[6] Applying the usual principles, first, I agree that a contribution towards Mr Lloyd's costs should be awarded to him as costs should follow the event, and I see no reason to disturb that principle in this case.

² 28 October 2008, WRC 5/08

[7] Second, I accept that the Calderbank offer satisfied the requirements of a valid without prejudice save as to costs offer. It was transparent and clear, dealing as it did with costs and a settlement sum separately, and it gave sufficient time for the offer to be considered (13 days). Whilst it did not spell out the consequences of an unreasonable failure to accept it, it was marked 'without prejudice save as to costs' and it was addressed to Mr Robert Thompson, the respondent's advocate at the time, and an experienced advocate who would have known exactly what those consequences could be, and would no doubt have explained them to the respondent's directors.

[8] The offer was rejected on two bases. The first that Mr Lloyd's claim was unmeritorious. The second was, essentially, that if Mr Lloyd won, the respondent would challenge the decision in the Employment Court, and would seek an order for security for costs, given that Mr Lloyd now lived in the UK. It was also stated that the Employment Court would require Mr Lloyd to appear in person, unlike the Authority which had allowed him to give evidence via Skype.

[9] Was this rejection of the Calderbank offer by the respondent reasonable? The first reason for rejection, that Mr Lloyd's claim lacked merit, was not found to be the case by the Authority. It cannot, therefore, be a justifiable reason not to take heed of the Calderbank offer. It was incumbent on the respondent to consider the offer with an open mind, and to objectively examine its chances of losing against Mr Lloyd.

[10] The second reason for rejection was simply a tactic. To declare that the respondent would challenge the Authority's determination if it lost, regardless of the reasons for it losing, and before the investigation meeting had even occurred, was simply an attempt to pressurise Mr Lloyd into withdrawing. Whilst this is not an unlawful tactic in any way, it is not sufficient to justify rejecting the Calderbank offer.

[11] I therefore conclude that the rejection of the Calderbank offer was not reasonable.

[12] As Ms Oberndorfer states, the Authority needs to adopt a steely approach when considering the effects of a valid Calderbank offer on the award of costs. I agree that it is appropriate to rely on the Calderbank offer, and its unreasonable rejection to justify an uplift in the daily tariff.

[13] However, it is also necessary to consider whether Ms Oberndorfer's costs are reasonable. She states that Mr Lloyd has been invoiced a total of \$9,911.88 plus GST. I agree that these costs are not unreasonable in light of the proceedings and what was required to do in progressing them.

[14] As Mr Lloyd will not be able to recover the GST element of the costs, as he is not, presumably, GST registered, his total costs bill has been \$11,433.16. He is therefore not seeking an award of costs on a total indemnity basis, but around 63% of his total costs. I believe that is reasonable. The uplift on the daily tariff is 50%. This is also reasonable. It is also reasonable to award him the cost of the lodgement fee of \$71.56 that he incurred in lodging his claim with the Authority.

Order

[15] I order the respondent to pay to Mr Lloyd the sum of \$7,321.56.

David Appleton
Member of the Employment Relations Authority