

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

**[2022] NZERA 655
3150584**

BETWEEN PAUL MADDOCK
Applicant

AND THE PALLET COMPANY
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: John Wood, advocate for the Applicant
David Browne, counsel for the Respondent

Costs Submissions 5 December 2022 from the Applicant
23 November 2022 from the Respondent

Determination: 9 December 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 14 November 2022 ([2022] NZERA 594), the Authority found that the Applicant, Mr Paul Maddock, had been unjustifiably disadvantaged in regard to the latter part of a period of suspension, and awarded a penalty against the Respondent, The Pallet Company Limited (PCL), for failing to provide him with reasons for his dismissal in breach of s 120 of the Employment Relations Act 2000 (the Act).

[2] However Mr Maddock was unsuccessful in his claim of unjustifiable dismissal and of unjustifiable disadvantage in regard to the initial part of his suspension.

[3] Both parties therefore had a degree of success in the matter.

[4] In the substantive 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.

[5] The matter involved a day and a half of meeting time. Mr Wood, on behalf of Mr Maddock, is seeking a costs award of \$7,125.00 to be reduced by \$1,000.00 in respect of a

Calderbank Offer which was not accepted by the Applicant, making a contribution to costs claim of \$6,125.00.

[6] Mr Browne, on behalf of PCL is seeking a costs award of \$25,511.01 in respect of the substantial matter and \$700.00 in respect of the costs submissions.

The Calderbank Offer

[7] PCL made a Calderbank¹ offer, that is a “without prejudice save as to costs” offer by letter dated 13 August 2021. The Calderbank offer letter offered Mr Maddock the sum of \$6,000.00 in full and final settlement of all claims arising out of the employment relationship.

[8] The Calderbank offer remained open for acceptance until 18 August 2021. Mr Maddock did not accept it.

Submissions of the Applicant

[9] Mr Wood submits for Mr Maddock that the Authority’s determination that Mr Maddock was justifiably disadvantaged in regard to the latter part of his suspension and not unjustifiably dismissed was likely to have been finely balanced in both regards.

[10] It is submitted that to award costs against Mr Maddock would be to punish him again when he has suffered a consequence of the determination by not being awarded compensation for the unjustifiable dismissal claim and for part of the unjustifiable disadvantage claim.

[11] Further submitted is that the Applicant had incurred costs in connection with the preparation for two Respondent witnesses who did not attend the Investigation Meeting and whose non-appearance was not sought or notified prior to the investigation commencing.

[12] In respect of the Calderbank offer it is submitted that it came at a time when the Applicant had already commenced work on the preparation of the Statement of Problem.

Submissions of the Respondent

[13] The Respondent submits that both parties enjoyed a degree of success but submits that the Applicant lost the main issues in relation to termination of employment and the initial suspension.

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

[14] In relation to the Calderbank offer the Respondent submits that it was made approximately 26 days prior to the Applicant filing proceedings with the Authority and prior to any significant preparation for proceedings needing to be made.

[15] It is submitted that the Calderbank offer provided both vindication as sought by the Applicant and the amount that was offered was for more than 100 percent what the Applicant obtained from the Authority's determination.

[16] From the date the Calderbank offer was rejected by the Applicant the Respondent submits that it incurred total legal fees of \$25,511.10 (GST exclusive) as supported by the documents provided to the Authority.

Principles

[17] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

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.

[18] Costs are at the discretion of the Authority². The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*³.

[19] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

Costs Award

[20] In determination ([2022] NZERA 594 Mr Maddock was the successful party and awarded the sum of \$2,000 in respect of compensation.

[21] This was a one and a half day investigation so the starting point for costs is \$7125.00. Both parties have, as observed, had some degree of success, although the Respondent was successful in defending the major claim of unjustifiable dismissal and had partial success in regard to defending the unjustifiable disadvantage claim.

² *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

[22] In *Coomer v JA McCallum and Son* the Employment Court observed that in these cases of mixed success, the Authority must: “stand back and look at things in the round”.⁴ It is also important to note that Mr Maddock’s, albeit limited, success could not have been achieved without filing a case in the Authority.

[23] I consider the Calderbank Offer should be taken into consideration. It was made well in advance of the Authority’s investigation, and although I accept that some preparation of the Statement of Problem may have commenced, there was ample opportunity for it to have been considered by the Applicant prior to the non-acceptance of it.

[24] It is observed in relation to the Respondent’s claim for costs in respect of costs submissions, the Authority does not generally award costs on costs submissions, and I see no reason to make an exception in this case.

[25] Mr Maddock was partially successful in his disadvantage claim but was awarded significantly less than he would have gained had he accepted the Calderbank Offer.

[26] As has been observed in the Employment Court, the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted: the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered.

[27] Standing back and considering the matter in the round, I have had regard to the following in reaching a costs decision in this matter:

- i. principles set out in *Da Cruz*;
- ii. the fact that two Respondent witnesses did not appear without prior notification;
- iii. the partial nature of Mr Maddock’s success;
- iv. the success on the major unjustifiable dismissal claim by the Respondent;
- v. the time taken for the Investigation Meeting;
- vi. the Respondent’s view that costs should lie where they fall; and
- vii. the Calderbank offer.

[28] On the basis that the Employment Court has stated that mixed success is nevertheless success for the purposes of awarding costs, I consider that Mr Maddock should receive a costs award. However I consider that in the circumstances of this case, that should be at a minimal level only.

⁴ *Coomer v JA McCallum and Son Ltd* [2017] NZEmpC 156 at [43]

[29] I order PCL pay to Mr Maddock the sum of \$2,500.00 as a contribution to his actual costs pursuant to clause 15 of Schedule 2 of the Act.

**Eleanor Robinson
Member of the Employment Relations Authority**