

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 52
3037731

BETWEEN DHARMENDRA MAHETA
 Applicant

AND AIRBUS EXPRESS LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Simon Laphorne, counsel for the Respondent

Costs Submissions 28 January 2020 from Applicant
 3 January 2020 from Respondent

Determination: 05 February 2020

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 6 December 2019 ([2019] NZERA 698), I found that the Applicant, Mr Dharmendra Maheta, had not been unjustifiably dismissed from, or unjustifiably disadvantaged in, his employment with the Respondent, Airbus Express Limited (SkyBus).

[2] 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.

[3] The matter involved a one and a half day investigation meeting.

[4] Mr Laphorne, on behalf of SkyBus, citing actual costs of \$30,710.51 plus GST is seeking a full reimbursement of those costs.

[5] Mr Maheta, submits that a modest award of costs only is appropriate.

Submissions for the Respondent

[6] Mr Laphorne submits that a full reimbursement of the Respondent's costs incurred since 19 July 2019 is in the amount of \$30,710.51, which sum was incurred following the making a Calderbank Offer.¹

[7] SkyBus claims that the amount is reasonable in light of the issues in the case and the time required to prepare for hearing. This included collating a common bundle of documents, attending upon witnesses and drafting witness statements, liaising with Mr Maheta's representatives, considering and responding to requests for disclosure from Mr Maheta, preparing for and attending the hearing and drafting legal submissions.

[8] The Investigation Meeting held on 23 June 2019 was adjourned at Mr Maheta's request as he advised that he intended to obtain forensic evidence of SkyBus's CCTV footage.

[9] It was reconvened on 11 November 2019 for a full day's investigation meeting.

[10] SkyBus submits that the Authority should grant an uplift in the daily tariff on the basis that Mr Maheta's conduct before the Authority justifies an uplift and on the basis of the Calderbank Letter.

[11] In respect of Mr Maheta's conduct it is submitted by SkyBus that:

- a. The adjournment of the first day of the investigation meeting was for Mr Maheta to obtain forensic analysis of SkyBus's CCTV Footage, which he subsequently failed to do;
- b. This delayed the matter for some four months and SkyBus incurred unnecessary legal costs preparing for, and attending, a second investigation meeting;
- c. Mr Maheta instructed five different representatives which necessitated SkyBus having to respond to repeated requests for disclosure of documents;
- d. SkyBus was required to make repeated requests to Mr Maheta for disclosure of mitigation documents which were relevant to his claims for remedies but Mr Maheta declined to disclose these until the investigation meeting held on 11 November 2019.

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

[12] Mr Laphorne submits that SkyBus made a Calderbank Offer to Mr Maheta to resolve the matter prior to the substantive matter being heard on 23 June 2019 in a letter headed 'Without prejudice save as to costs' dated 17 June 2019 (the Calderbank Letter). This provided that, on the basis that Mr Maheta accept its offer on a full and final basis, and discontinue his claim in the Authority, SkyBus would pay him the sum of \$1,500.00 (the Settlement Offer).

[13] The Calderbank Letter stipulated that the Settlement Offer would be paid within 21 days of the settlement being certified by a mediator from MBIE, and would be entered into without any admission of liability or fault by either party. Further that all aspects of the Settlement Offer would be confidential to the parties, and neither party would make disparaging comments about the other.

[14] The Settlement Offer was open for acceptance by 19 July 2019, but it was rejected by Mr Maheta.

Submissions for the Applicant

[15] Mr Maheta submits that costs should be awarded at a modest level. He submits that:

- a. SkyBus refused to participate in further mediation following the filing of an Amended Statement of Problem;
- b. The number of representatives for the Applicant should not have the effect of increasing costs for the respondent;
- c. The investigation meeting on 23 July 2019 was adjourned after a half day and therefore costs should only be incurred for a day and a half of investigation meeting time;
- d. The time given in which to consider the Calderbank Offer was too short and insufficient to allow due consideration; and
- e. SkyBus failed to make requested documents available to him.

[16] Mr Maheta submits that taking these factors into consideration, the notional starting point of \$4,500.00 for a one day investigation meeting should be reduced to reflect these factors and his personal financial circumstances.

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 Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*².

[19] 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.

Determination

[20] 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 modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee* at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”⁴

The Calderbank Offer

[21] Mr Maheta claimed that the time allowed for him to consider the Calderbank Offer was too short.

[22] The Calderbank Offer was made on 17 July 2019 and was sent to Mr Maheta’s representative at the time. It called for acceptance by 19 July 2019.

[23] Mr Maheta notes that his then representative is a busy barrister. It is a long held principle that knowledge acquired by an agent is imputed to his principal if the agent was at

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.

⁴ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305.

the time employed on the principal's behalf as noted by the Court of Appeal in *Jessel Properties v UDC Finance*.⁵

[24] Whilst I accept that it was a short time period in which to allow for Mr Maheta's representative to make Mr Maheta aware of the offer, it was nonetheless sufficient time for Mr Maheta to consider it.

[25] The Calderbank Offer offered an amount for Mr Maheta to settle the matter before he or SkyBus incurred further costs in the matter. In the event Mr Maheta rejected the Calderbank Offer and was wholly unsuccessful in his claim.

[26] I observe that the Employment Court noted that 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. As observed in *Lancom Technology Limited v Forman*:

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.⁶

[27] I consider that the Calderbank Offer is a factor that should be taken into consideration in determining the appropriate level of costs.

[28] The starting point for costs is the normal daily tariff as applied in the Authority. For a one and a half day hearing this equates to \$6,750.00. SkyBus is seeking \$30,710.51 plus GST by way of costs.

[29] Mr Maheta has submitted information in support of his claim that a nominal costs award is appropriate. He submits that, although he is currently employed and his wife has part-time employment, they are partially supported by their daughter's earnings.

[30] Their combined incomes cover most of the family's regular outgoings including monthly instalments, power, water and similar. However Mr Maheta submits that his personal financial position is very stressful and he is struggling to cover expenses. He has provided a recent payslip in confirmation of his earnings and a breakdown of his monthly expenses.

⁵ *Jessel Properties v UDC Finance* at [143].

⁶ *Lancom Technology Limited v Forman* [2018] NZEmpC 30 at [38].

[31] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However I note the observation of Judge Inglis that:

... the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account.⁷

[32] Having weighed all these considerations, I find that whilst SkyBus as the successful party is entitled to an award of costs in excess of the normal tariff, this is a case in which it is appropriate for the Authority to use its discretion by making an award that also recognises the financial hardship making an award of costs at the level submitted by SkyBus would mean for Mr Maheta.

[33] Mr Maheta is ordered to pay the SkyBus the sum of \$10,000.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[34] It may be that SkyBus is willing for Mr Maheta to make payment by instalments. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

Eleanor Robinson
Member of the Employment Relations Authority

⁷ *Tomo v Chekmate Precision Cutting Tools Ltf* [2015]EmpC 2 at [22].