

BETWEEN	SHANE MCKEOWN Applicant
AND	UNIVERSAL COMMUNICATIONS GROUP NZ LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Emma Moss, Advocate for Applicant Blair Edwards & Anna Jackman, Counsel for Respondent
Costs Submissions	1 March 2018 from Applicant 5 February 2018 from Respondent
Determination:	6 March 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 8 January 2018 ([2018] NZERA Auckland 4), I found that the Applicant, Mr Shane McKeown, had not been unjustifiably dismissed from his employment by the Respondent, Universal Communications Group NZ Limited (UCG).

[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 2 days of meeting time.

[4] Mr Edwards and Ms Jackman, citing actual costs (post-mediation) of \$32,829.00 excluding GST, submit that \$19,061.00 of these costs were incurred between the date of the first Calderbank offer on 18 October 2017 to the date of the Determination. On this basis, UCG is seeking a contribution to costs of \$19,061.11 plus GST of \$2,859.15.

[5] Ms Moss, on behalf of Mr McKeown, submits that any uplift in the notional tariff in the Authority would have a significantly detrimental impact on him, and would be prohibitive.

Submissions for the Respondent

[6] Mr Edwards and Ms Jackman, on behalf of UCG, submit that UCG made two Calderbank Offers to Mr McKeown to resolve the matter prior to the substantive matter being heard.¹ A Calderbank Offer is an offer ‘without prejudice save as to costs’ offer.

The First Calderbank Offer

[7] The first Calderbank Offer (First Calderbank Offer) was made in a letter headed “Without prejudice save as to costs’ dated 18 October 2017. This provided that, on the basis that Mr McKeown withdraw his claim in the Authority, UCG would pay him the sum of \$5,000.00 within seven days of a settlement agreement being signed by the parties.

[8] This Calderbank Offer remained open for consideration by Mr McKeown until 26 October 2017, but was not accepted by Mr McKeown and it expired.

The Second Calderbank Offer

[9] UCG made a further Calderbank Offer to Mr McKeown on 14 November 2017. This Calderbank Offer to settle was made on the basis that UCG would make a payment of \$11,000.00 tax free pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) to Mr McKeown, plus an additional \$2,000.00 as a contribution to his costs.

[10] This Calderbank Offer was open for acceptance by Mr McKeown until 6 p.m. on 14 November 2017. It was rejected by Mr McKeown by email dated 15 November 2017 from Ms Moss on behalf of Mr McKeown.

[11] Mr McKeown was unsuccessful in his claim before the Authority.

[12] Mr Edwards and Ms Jackman submit that the Calderbank offers led to a more beneficial outcome for Mr McKeown.

Conduct of the Applicant

[13] Mr Edwards and Ms Jackman further submit that the conduct of Mr McKeown should impact on costs because it significantly increased the time and costs involved in the Investigation Meeting. Specifically by:

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

- the provision of irrelevant and unfocused witness statements;
- the late provision of one of these witness' statements, and the last minute advice that he would be unable to attend the investigation meeting;
- the vexatious raising of the issue of 'perjury';
- evasiveness by Mr McKeown and one of his witnesses concerning emails; and
- the failure to provide basic evidence to the Authority with respect to his claim for lost wages.

Submissions for the Applicant

[14] In support of her submission on behalf of Mr McKeown that costs should not be awarded at a level exceeding that of the normal daily tariff, Ms Moss submits that Mr McKeown's basis for rejecting the Calderbank Offers was:

- a) initially that he was seeking reinstatement as a remedy, and
- b) subsequently, after withdrawing the claim for reinstatement, he was seeking vindication and protection of his reputation in what he considered to be a small professional network. Consequently any agreement made on the basis of a Calderbank Offer would have failed to serve this purpose.

[15] Ms Moss submits that Mr McKeown's behaviour was appropriate in raising and pursuing his claim and did not lead to increased time and costs. Specifically:

- all submissions required were filed as per the Authority's timetable;
- the number of witnesses called by Mr McKeown were kept to a minimum to ensure the matter was heard in a timely manner;
- the evidence provided by the witnesses is not accepted as being irrelevant and unfocussed;

- the delay in giving evidence on the part of one of the Respondent's' witness was a greater contributory factor to the length of the meeting than that of the Applicant's witnesses; and
- the perjury matter was raised as a background issue rather than as a separate course of action.

[16] Ms Moss further submits that a costs award at the level claimed by UCG will result in considerable financial hardship to Mr McKeown who is of limited financial means.

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.

[20] It is a principle set out in *Da Cruz*⁴ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁵ at para [48] "*As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.*"

² [1996] 2 ERNZ 622

³ [2005] 1 ERNZ 808

⁴ [2005] 1 ERNZ 808

⁵ [2001] ERNZ 305

Determination

[21] I have carefully considered the submissions of the parties. It is incumbent upon me that I approach the question of costs in a principled manner and not arbitrarily. The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *Da Cruz*.

[22] I am minded to give weight to the matter of the Calderbank offers and to take them into consideration as a factor, noting the comment made by Judge Ford in *Foai v Air New Zealand Limited* that:⁶

...the making of such an offer does not in itself automatically result in a more favourable costs award. It is merely a discretionary factor.

[23] In this case there were two offers made to Mr McKeown which would have provided him with the opportunity to walk away from the prospect of litigation with financial payments. These were of considerable value in light of the fact that he was totally unsuccessful in his claim before the Authority.

[24] In *Bluestar Print Group (NZ) v Mitchell (Mitchell)* the Court of Appeal noted:

As this Court has previously said a “steely” approach is required. It has been repeatedly emphasised that 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.⁷

[25] I find that as such, the offers were of monetary value to Mr McKeown and: “amounted to a genuine compromise by the defendant”.⁸ On that basis I find they are a factor to be considered in setting the level of costs to be awarded to UCG.

[26] I have considered the submission that Mr McKeown’s rejection of the First Calderbank Offer was on the basis that he was seeking reinstatement, and that whilst he subsequently withdrew his claim for reinstatement, he was seeking vindication and this should be the basis for not taking into consideration the existence of the Calderbank Offers.

[27] Vindication can be a powerful motivation for proceeding with a claim, however I also note the Court of Appeal’s statement in *Mitchell*:

⁶ [2013] NZEmpC 50 at [17]

⁷ [2010] NZCA 385 at [20]

⁸ *O’Hagan v Waitomo Adventures Limited* [2013] NZEmpC 58 at [27]

We accept that 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. Thus the relevance of reputational factors means that cost assessments are not confined solely to economic considerations. But equally, an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the plaintiff.⁹

[28] Having considered the issues I have decided to give some weight to the existence of the Calderbank Offers on the basis that the Calderbank Offers, in particular the increased offer made on 14 November 2017 could be regarded as conveying an element of vindication to Mr McKeown.

[29] I have also considered the parties submissions on the conduct of Mr McKeown in the claim before the Authority, however I find there are factors on both sides and do not find this to be a factor that should impact on costs.

[30] I determine that the starting point \$8,000.00 should be uplifted to take into account the rejection of the Calderbank Offers and set the contribution to costs to be awarded to the Respondent at a level of \$21,920.15 (including GST) being the costs incurred following the First Calderbank Offer.

[31] Mr McKeown is claiming financial hardship and that consequently he would struggle to meet an award of costs above the usual daily tariff rate in the Authority. He has provided supporting documentation and a financial statement in support of that submission, specifically his current income and regular out-goings.

[32] As stated in the Employment Court case *Bishop v Bennet*: "*Assessment of the ability to pay requires consideration of the total financial position of the party concerned including both assets and liabilities and income and necessary expenditure.*"¹⁰

[33] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However I also note the observation of Judge Inglis in *Tomo v Chekmate Precision Cutting Tools Ltd*¹¹ at [22] 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

⁹ [2010] NZCA 385 at [19]

¹⁰ [2012] NZEmpC 5 at [30]

¹¹ [2015] NZEmpC 2

exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account.

[34] Having weighed all these considerations, I find that whilst UCG as the successful party is entitled to some award, this is a case in which it is appropriate for the Authority to use its discretion by lowering the contribution to costs because it is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings.

[35] As observed by Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*:¹² “...even an award of costs based on a low daily rate may not be feasible where the liable party does not have the means to pay...”

[36] However I find that in all the circumstances surrounding this case, UCG as the successful party is entitled to some recompense for costs above the normal daily tariff. In the circumstances I believe a contribution towards costs of \$12,000.00 is a reasonable contribution.

[37] Accordingly, Mr McKeown is ordered to pay UCG a contribution to costs in the sum of \$12,000.00, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[38] An arrangement may need to be made for Mr McKeown to pay the costs by way of instalments over several months. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are sought and cannot be agreed.

Eleanor Robinson
Member of the Employment Relations Authority

¹² Ibid at para [46]