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Online Contractors Limited v Wetere (Auckland) [2017] NZERA 63; [2017] NZERA Auckland 63 (10 March 2017)

Last Updated: 17 March 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 63
5558530

BETWEEN ONLINE CONTRACTORS LIMITED

Applicant

AND KIRA WETERE Respondent

Member of Authority: Eleanor Robinson

Representatives: Stephen Tee, Counsel for Applicant

Greg Bennett, Advocate for Respondent

Costs Submissions 16 February 2017 from Applicant

None from Respondent

Determination: 10 March 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 23 January 2017 ([2017] NZERA Auckland 17), I ordered that the Respondent, Mr Kira Wetere, was to pay the Applicant, Online Contractors Limited (Online), the sum of \$44,000.00 plus interest in respect of an unpaid loan made to him by Online.

[2] I further ordered that Online was to pay Mr Wetere the sum of \$11,854.04 plus interest in respect of unpaid holiday pay.

[3] In that 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 Online have filed submissions in respect of costs.

[4] The matter involved 1 day of meeting time.

[5] Mr Tee, on behalf of Online submits that it made two Calderbank1 offers, which are

‘without prejudice save as to costs’ offers, to Mr Wetere and is seeking an uplift in the normal daily tariff rate of \$4,500.00 on that basis.

[6] Mr Tee is also seeking an uplift in costs to take account of the time which elapsed since the first Calderbank offer was made in December 2014, the benefit Mr Wetere derived in obtaining an interest free loan from April 2012, and the benefit he derived from the fact that the loan enabled him to buy a house, his cynical conduct in leaving employment with Online without warning shortly after obtaining the loan, and his subsequent unreasonable behaviour thereafter.

[7] Mr Tee, citing actual costs of \$13,684.69 incurred since the first Calderbank letter was sent, is seeking a contribution to costs in the sum of \$7,500.00.

Calderbank Offers

[8] Mr Tee submits that Online made two Calderbank Offers to Mr Weterere. The first was made on 9 December 2014 and was headed: “*Without Prejudice Save As To Costs*”. In that letter Online offered to accept a payment of \$24,000.00 from Mr Weterere to settle the matter on a full and final basis

[9] The first Calderbank Offer expired and Online made a second Calderbank Offer to Mr Weterere 6 October 2015, again headed: “*Without Prejudice Save As To Costs*”. In that letter Online offered to accept a payment of \$24,000.00 from Mr Weterere to settle the matter on a full and final basis and provide to release of the caveat secured over his property

[10] The second Calderbank Offer also expired without acceptance.

Determination

[11] 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, and I therefore consider each relevant ground for uplift separately as appropriate.

[12] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da*

*Cruz*². It is a principle which is set out in that case that costs are not punitive in nature.

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

² [2005] NZEmpC 144; [2005] 1 ERNZ 808

[13] Considering the basis for uplift in the normal tariff rate in the Authority, I am minded to give weight to the matter of the two Calderbank Offers.

[14] Whilst taking note of the comments made by Judge Inglis as regards the ameliorating of the ‘steely’ approach noted in the judgment in *Stevens v Hapag-Lloyd (NZ) Ltd*³, I also take note of the full Employment Court judgment in *Fagotti v Acme & Co Ltd*⁴ in which it was stated:

[109] We do not agree with the defendant’s submission that the remarks of the Court of Appeal about a “steely” approach to Calderbank offers expressed in Bluestar Print Group applies only to Employment Court proceedings and not to matters before the Authority. That submission cannot, logically, be correct. The vast majority of matters in which Calderbank offers are considered by the Employment Court are in proceedings brought to the Court by a

challenge to the Authority’s determination. Calderbank offers are most usually made before the Authority’s investigation meeting. So it

follows that the Court of Appeal’s remarks about the fortitude with

which they are approached, should apply also to Calderbank offers before an Authority investigation meeting. They are, therefore, applicable also to the Authority’s first instance jurisdiction as well as to the Court’s appellate role in the same cases.

[15] I consider that Calderbank Offers may still be taken into consideration in the matter of costs in the Authority on the basis 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 impacted⁵.

[16] The Calderbank Offers were both made well in advance of the Investigation Meeting and there was therefore ample time for Mr Weterere to consider them fully prior to taking any part in that proceeding. The Calderbank Offers would have allowed him to resolve the matter in a sum \$12,631.51 less than the net amount awarded.

[17] Costs normally follow the event and on the basis of the normal daily tariff rate of

\$4,500.00 applied in the Authority, this equates to \$4,500.00.

[18] I determine that that starting point should be uplifted to take into account the rejection of the First and Second Calderbank Offers.

³ [2015] NZEmpC 137

⁴ [2015]m NZEmpC 135

⁵ *Aoraki Corporation Ltd v McGavin*⁵ [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) at [53]

[19] Whilst I accept there is some basis for uplift in costs on the secondary grounds submitted by Mr Tee, I take into consideration the respective awards of interest to the parties which goes some way towards ameliorating those factors.

[30] Mr Wetera is ordered to pay Online \$6,500.00 towards its legal costs pursuant to- clause 15 of Schedule 2 of the [Employment Relations Act 2000](#).

Eleanor Robinson

Member of the Employment Relations Authority

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