New Zealand Employment Relations Authority Decisions

Pender v Lyttelton Port Company Limited (Christchurch) [2018] NZERA 1161; [2018] NZERA Christchurch 161 (6 November 2018)

Last Updated: 11 November 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH		
		[2018] NZERA Christchurch 161
		3023102
	BETWEEN	CARL PENDER Applicant
	AND	LYTTELTON PORT COMPANY LIMITED Respondent
Member of Authority:	Andrew Dallas	
Representatives:	Jeff Goldstein, counsel for Applicant	
Tim Mackenzie, counsel for Respondent		
Investigation Meeting:	On the papers	
Submissions received:	15 October 2018 from the Applicant 25 October 2018 from the Respondent	
Determination:	6 November 2018	
COST DETERMINATION OF THE AUTHORITY		

[1] By determination issued on 21 September 2018, the Authority made findings and gave orders about Carl Pender's employment relationship problem with the Lyttelton Port Company Limited.1

[2] The determination reserved costs but, as is the usual approach of the Authority, encouraged the parties to resolve the issue themselves. The determination included an indication that, if asked to determine costs, the Authority's assessment would begin at the applicable daily tariff of $4500.

1 *Pender v Lyttelton Port Company Limited* [2018] NZERA Christchurch 137

Mr Pender's position

[3] In a memorandum on costs subsequently lodged, Mr Pender, through his representative, said he incurred costs of $17,500 plus GST (translating from 46.67 hours at $375.00 per hour) and disbursements of $71.56 being the Authority's lodgement fee. The costs were said to be reasonably incurred.

Calderbank letter

[4] In addition to his memorandum, Mr Pender also provided a Calderbank letter which he caused to have issued on 11 April 2018. The letter contained an offer to settle all matters between the parties, including costs which would lie where they fall, provided Mr Pender was trained as a crane driver. The offer remained open for acceptance until 4pm, 20 April 2018. Lyttelton rejected the offer on 16 April 2018. Mr Pender said this rejection was unreasonable.

[5] Mr Pender said he received more in remedies from the Authority than he was prepared to accept in April 2018. For completeness, the Authority made what it termed "a good faith order" – in effect and in legal reality, a mandatory injunction in all but name which required Lyttelton to train Mr Pender as a crane driver. The Authority also awarded $800 as reimbursement for lost wages and compensation for hurt, humiliation and injury to feelings of $12,500.

[6] Placing reliance on the Calderbank offer in his memorandum, Mr Pender sought an uplift of the Authority's tariff to $15,000 plus GST of $2500 and $71.56 being the Authority's lodgement fee – his actual costs incurred after rejection of the offer by Lyttelton.

Lyttelton's position

Costs to lie where they fall

[7] Lyttelton's primary submission was, relying on the decision of the Court in *Vaughan v Canterbury Spinners Limited2*, that costs should lie where they fall on the basis Mr Pender's was a "test case". This was the only factor identified by either party that would have required a downward adjustment of the tariff.

2 EmpC Christchurch, CC18A/03, 29 October 2003

No or minimum uplift of the tariff

[8] Lyttelton advanced two alternative arguments as to why there should be no uplift of the tariff in favour of Mr Pender.

[9] First, relying on the Court's decision in *Stevens v Hapag-Lloyd (NZ) Limited3*, it said indemnity costs, effectively what was being sought by Mr Pender for the period post-rejection of the offer, should be reserved for "especially egregious" situations.4 Lyttelton queried the evolving nature of Mr Pender's case including the lodgement of several statements of problem and unsuccessful causes of action. It also appeared to query the amount of fees incurred after the investigation meeting.

[10] Second, Lyttelton said if the Authority did not accept Mr Pender's claim for effective indemnity costs, and given the "test" nature of the case, rejection of his offer was not unreasonable and the tariff should apply in the circumstances. Lyttelton said Mr Pender had also rejected its "drop-hands" offer – that is, both parties would walk away from the litigation without resolution but with costs lying where they fell.

[11] Ultimately, Lyttelton said if the Authority found its rejection of the offer was unreasonable, then any increase in the daily tariff should be modest and in the order of

$1000.

Evaluation

[12] The investigation meeting on 20 June 2018 lasted one day. The tariff for one meeting day is $4500. This figure is the appropriate notional tariff starting point for assessing costs in this matter.

3 [2015] NZEmpC 28; [2015] ERNZ 224

4 At [97]

The Calderbank offer

[13] I accept Lyttelton's submission that indemnity costs for be reserved for "especially egregious" situations. Mr Pender's is not one of these. However, his Calderbank offer, and Lyttelton's rejection thereof, does warrant consideration. The Court has said such offers should be taken into account in considering the relevant costs principles.5 Those principles normally require an uplift of the usual tariff, in the absence of any greater countervailing factors. Both parties could have been saved the cost and/or time of preparing for and attending the Authority investigation meeting if Lyttelton had agreed to Mr Pender's offer.

[14] In this regard, one issue not raised by Lyttelton about Mr Pender's offer – and, indeed, one which also touches on its own offer to settle – is whether such offers are effective in circumstances involving the operation of collective agreements. In *Chief Executive of Bay of Plenty District Health Board v New Zealand Public Service Association6,* the Court appears to have accepted a proposition that a Calderbank offer made in response to proceedings in the Authority relating to the operation of a collective agreement may not be effective as such.7

[15] However, in the present case, Mr Pender's proceedings involved several causes of action, in addition to those relating to the collective agreement, including personal grievances and an allegation of breach of good faith. Consequently, I find his offer was validly made. Further, Mr Pender's offer was made in writing and it was clear and complete. The offer was capable of acceptance by Lyttelton. Mr Pender made reasonable and realistic offer in the circumstances including offering to settle for less than that which he was ultimately awarded in the Authority.

5 *See, PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819 – 820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] - [108]

6 EmpC Auckland, AC 73/06, 13 December 2006.

7 At [49] - [50]

Lyttelton's other arguments

[16] I decline to accept Lyttelton's submission that Mr Pender, in effect, increased costs by lodging several statements of problem containing multiple causes of action. This is an easy criticism but one that is not justified in the circumstances. This was a complex case dealing with the intersection between breach of contract, the operation of collective agreements, personal grievances and allegations of breach of good faith. Mr Pender was also hamstrung in advancing his case, in my view, by the late-piece disclosure by Lyttelton to his solicitors of the assessment scores for crane driver training.

[17] I also decline to accept Lyttelton's submission this was a test case. It was neither advanced nor defended as such. Indeed, Lyttelton's own "drop-hands" offer, which was understandably rejected by Mr Pender, appears to contradict this submission. Furthermore, nothing in my view turns on the observation advanced by Lyttelton that Mr Pender received a significant invoice after the investigation meeting. In any event, this was likely the result of Mr Pender's solicitors' billing cycle.

[18] There are no other countervailing reasons why an uplift in the tariff should not be entertained by the Authority.

[19] So then, in all the circumstances of the case, including those identified in paras

[4] – [6] above, the appropriate uplift to the notional tariff is $3500. It is also appropriate to award Mr Pender $71.56 being the Authority's lodgement fee. This costs outcome did not provide Mr Pender with the cost award he was seeking but it is a significant increase on what would have been the expected award if made on a notional tariff basis only.

Goods and Services Tax on costs?

[20] While Mr Pender has sought GST on costs of $2500 in reliance on the Court's decision in *Judea Tavern Limited v Jesson8,* the exercise of the Authority's discretion to award costs under cl 15(1) of Schedule 2 of the Employment Relations Act 2000 is on the basis that the daily tariff of $4500 is an all-inclusive and GST neutral figure.

8 [2017] NZEmpC 120

Result

[21] The amount of $8000 plus $71.56 must be paid by Lyttelton to Mr Pender within 14 days of the date of this determination.

Andrew Dallas

Member of the Employment Relations Authority
