

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 162  
5359701

BETWEEN RCG LIMITED  
Applicant  
A N D GLENN ANTHONY  
BERCICH  
Respondent

Member of Authority: David Appleton  
Representatives: John Burley, Counsel for Applicant  
Penny Shaw, Counsel for Respondent  
Submissions Received: 7 June 2013 from Respondent  
2 July 2013 from Applicant  
Date of Determination: 9 August 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The applicant must pay to Mr Bercich the sum of \$10,000 plus GST as a contribution to his legal costs.**

[1] By way of a determination of the Authority dated 22 February 2013 [2013] NZERA Christchurch 36, the Authority determined that Mr Bercich had breached express and implied terms of his employment agreement, as well as the duty of good faith owed to his employer, RCG Ltd, pursuant to s. 4 of the Employment Relations Act 2000. No damages were awarded to RCG Ltd because the Authority determined that the management agreement which the applicant had with the owners of the Bush Inn shopping mall, Connerronner Ltd, would have terminated in any event, regardless of Mr Bercich's actions.

[2] By way of a further determination of the Authority dated 9 May 2013 [2013] NZERA Christchurch 83, the Authority imposed penalties in the total sum of \$6,000 against Mr Bercich, to be paid to the Crown.

[3] The parties were invited to attempt to agree how costs were to be dealt with between them, but have been unable to do so. Accordingly, memoranda of counsel have been served and lodged.

[4] On 5 March 2012 Mr Bercich, through his counsel, made a Calderbank offer of \$12,000 to settle the proceedings against him. The letter, marked *without prejudice except as to costs*, stated that the applicant would have *considerable difficulty establishing that any breach by Mr Bercich was a substantial factor in causing RCG Ltd to lose the management agreement with Connerronner Ltd, if it was indeed still on foot*. The letter also stated that, *even if your client was able to establish a breach, then damages would not be able to be established. In these circumstances the proceedings appear vexatious*.

[5] On the basis of this letter, Mr Bercich seeks payment of his full legal costs on an indemnity basis from the date the offer in the letter expired until March 2013. These costs amount to \$15,000 plus GST.

[6] Mr Burley, on behalf of the applicant company, opposes this application, submitting that RCG Ltd is entitled to an award of costs having succeeded in its fundamental claims of breach against Mr Bercich. Mr Burley argues that the Calderbank letter should not have the effect of reversing the usual principle of costs following the event for the following reasons:

- (a) The offer was premised on the proceedings being vexatious, which they were not;
- (b) A Calderbank offer is just one factor going to the Authority's discretionary considerations in assessing any contribution to be made to the successful party's costs;
- (c) The penalties awarded against Mr Bercich were not *significantly* less than the monetary offer made in the Calderbank offer;

- (d) Mr Bercich's actions led to the proceedings being launched against him, and these actions were *disentitling* activities in terms of his indemnity costs claim;
- (e) The claim against Mr Bercich was not unmeritorious or pursued in a reprehensible way;
- (f) The applicant company was entitled to pursue Mr Bercich in order to obtain vindication of the decision to summarily dismiss him; and
- (g) The Calderbank offer was not realistic and reasonable, and did not address the essential and critical nature of the claims.

[7] Mr Burley submits in the alternative that, as each party achieved a measure of success, it would be appropriate for each party to bear its own costs.

#### **The principles to be applied in a costs determination**

[8] Costs are awarded in the Authority in accordance with the provisions of *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808. The principles governing the setting of costs awards in the Authority as promulgated in *Da Cruz* include:

- (a) There is a discretion as to whether costs would be awarded and what amount.
- (b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- (c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- (d) Equity and good conscience is to be considered on a case by case basis.
- (e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

- (f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- (g) That costs generally follow the event.
- (h) That without prejudice offers can be taken into account.
- (i) That awards will be modest.
- (j) That frequently costs are judged against a notional daily rate.
- (k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[9] The use of Calderbank offers in Authority matters is well established and, whilst the making of a successful Calderbank offer is not wholly determinative of how costs will be dealt with by the parties, it is an important factor which the Authority should bear in mind in determining costs.

[10] However, as such offers put pressure on an applicant, they must comply with certain basic safeguards so as not to unfairly prejudice the recipient of the offer. These safeguards have been identified in *Ogilvy & Mather (NZ) Limited v Darroch* [1993] 2 ERNZ 943 as including:

- (a) A modicum of time for calm reflection and the taking of advice before a decision has to be made to accept the offer or reject it;
- (b) The offer must be transparent if the offeror is later to be given the protection that a Calderbank offer furnishes.

[11] It is my view that the Calderbank letter sent by Ms Shaw to the applicant company's counsel complies with these principles. The letter indicates that it was sent by email on 5 March 2012 and that the offer was open for acceptance by the respondent until 5pm on 17 March 2012. Furthermore, the offer was transparent in that it made clear that the offer of \$12,000 was to be accepted *in full and final settlement of all matters arising out of* [Mr Bercich's] *employment relationship with RCG Ltd, including the current proceedings*. The letter did not spell out the consequences of non-acceptance (in terms of the possible effect on costs) but it was

marked *without prejudice except as to costs* and was addressed to experienced counsel.

### **Mr Burley's submissions**

[12] I should like to address each of Mr Burley's submissions in turn. First, I agree with Mr Burley that the proceedings by the applicant company against Mr Bercich were not vexatious. Mr Bercich did not apply for the proceedings to be struck out on the basis that they were vexatious, and, of course, I found that there had been deliberate, serious and sustained breaches by Mr Bercich of his duty of good faith against the applicant company. However, the fact that the Calderbank letter made an allegation that the proceedings were vexatious did not invalidate the offer, which was clearly stated. Lawyers often make statements in their negotiations which may contain elements of puffery, in order to bolster their clients' respective negotiating positions. Mr Burley would have known this, and I find it unlikely that RCG would have rejected the offer simply because of an allegation that their claims were vexatious. I therefore do not accept that this was a good reason to argue that the offer should not be taken into account.

[13] I also agree with Mr Burley that the claim against Mr Bercich was not unmeritorious or pursued in a reprehensible way.

[14] I also agree with Mr Burley that a Calderbank offer is just one factor going to the Authority's discretionary considerations in assessing any contribution to be made to the successful party's costs. However, it is an important factor. As I explain below, I do not accept that costs should be awarded to Mr Bercich on an indemnity basis, and I make that determination in the knowledge of the discretion available to the Authority. In making that decision, I accept Mr Burley's submission that Mr Bercich's actions led to the proceedings being launched against him (although I do not agree that these actions were *disentitling* activities in terms of his indemnity costs claim).

[15] However, I disagree with Mr Burley when he asserts that the penalties awarded against Mr Bercich were not *significantly* less than the monetary offer made in the Calderbank offer. First, the penalties totalled half of the sum that was offered to RCG by Mr Bercich in his Calderbank offer. Second, the penalties awarded by the Authority were to be paid by Mr Bercich to the Crown, not to the applicant company.

Therefore, I would say that the offer of \$12,000 represented a substantially and materially better opportunity for RCG than that which eventuated.

[16] As for the argument that the applicant company was entitled to pursue Mr Bercich in order to obtain vindication of the decision to summarily dismiss him, I take note of the Court of Appeal case of *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446, which Ms Shaw refers to me because it reiterated the *steely approach* previously emphasised by the same Court in *Health Waikato Limited v Elmsey* [2004] 1 ERNZ 172. *Bluestar* is also relevant to address the vindication point referred to by Mr Burley, as it addressed whether the Employment Court had erred by not taking into account a Calderbank offer which had not addressed the personal vindication elements of the plaintiff's personal grievance. The Court of Appeal held that the Employment Court had erred in principle in disregarding the Calderbank offer. It stated:

*[19] 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.*

*[20] We consider that the potential for vindication to be a relevant factor does not mean that the developed jurisprudence under the High Court Rules costs regime should be ignored. We reject Mr Churchman's submission that the principles applicable to Calderbank offers should be adjusted or ignored in employment cases merely because of the nature of the employment relationship and because employees may in certain cases be motivated in part by the desire for vindication. 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. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors. The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.*

[17] In light of *Bluestar*, I do not accept an argument that, as the Calderbank letter did not address vindication, it cannot be taken into account, or was entitled to be rejected or ignored by the applicant company. The principles set out in *Bluestar* apply equally in the Authority.

[18] Mr Burley's final point was that the Calderbank offer was not realistic and reasonable, and did not address the essential and critical nature of the claims. I must strongly disagree with this submission. The Calderbank letter summarised very cogently the fundamental difficulty faced by RCG in pursuing its damages claim against Mr Bercich. RCG was entitled to have a different view of its chances of success but a reasonable applicant could not ignore entirely the major stumbling block in its damages claim represented by its relationship with the owner of Bush Inn. Furthermore, the monetary offer was an entirely reasonable one and, implicit in the offer, was an acceptance by Mr Bercich that he had committed breaches of duty.

### **Determination**

[19] In light of these factors, I accept that the Authority should take into account the fact that a valid Calderbank offer was made and rejected and, as a result of that rejection, significant costs were incurred by both parties. I therefore accept that RCG should make a contribution to the costs of Mr Bercich.

[20] Turning to the principles of *da Cruz*, it is my view that it would not be appropriate to order RCG to pay Mr Bercich's costs on an indemnity basis. I reach this conclusion on the basis that the applicant company's claims were not vexatious or unmeritorious, that costs should not be used as a punishment, that costs awards should be relatively modest and that costs are frequently awarded on a daily tariff basis in the Authority.

[21] Having perused Ms Shaw's invoices, they do not appear to be unreasonable when the brief descriptions are scrutinised. I accept that defending the claims would have taken a considerable amount of preparation after the Calderbank offer had been rejected. In addition, the Authority's investigation meeting took up nearly three full days, and two separate sets of submissions were necessary from Ms Shaw.

[22] Taking all these factors into account, I believe that it would be appropriate for RCG Ltd to make a contribution to Mr Bercich's costs in the sum of \$10,000 plus GST. GST is added as Ms Shaw's invoices were addressed to Mr Bercich as an individual, rather than to his company, and so it is assumed that he must bear the GST element on the fees personally.

**Order**

[23] I order RCG Limited to pay to Mr Bercich the sum of \$10,000 plus GST as a contribution to Mr Bercich's legal costs.

David Appleton  
Member of the Employment Relations Authority