

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 160
3000117

BETWEEN JEREMY SAYER
 Applicant

A N D FIVEFIFTEEN HOLDINGS
 LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Cherilyn Walthew, Advocate for Applicant
 Charlie Arms-Harris, Counsel for Respondent

Submissions Received: 13 September 2017 from Applicant
 13 September 2017 from Respondent

Date of Determination: 26 September 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of this matter,¹ I declined Mr Sayer's claims for a personal grievance and payment of holiday pay. I did find in his favour for wage arrears of \$2,239.00 (gross). I also reserved costs in the hope that the parties would be able to reach agreement. The parties have not been able to agree and both parties seek costs.

[2] Mr Sayer says I should award costs to him, as he was successful with his wage arrears claim.

¹ [2017] NZERA 141

[3] Fifteen says I should award costs to it on an indemnity basis because it made a Calderbank offer to Mr Sayer, which he unreasonably rejected and did not better in my determination.

[4] My power to award costs is set out at clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The principles and approach to be adopted in respect of this power are well settled². Based on clause 15 and the relevant case law³, the first issue for me to consider in this application is whether costs should follow the event or be awarded to Fifteen based upon Mr Sayer's rejection of the Calderbank offer.

Should costs follow the event – an analysis of the Calderbank offer and applying equity and good conscience

[5] On 10 February 2017, Fifteen's counsel wrote to the advocate for Mr Sayer outlining an offer to settle Mr Sayer's claims. That offer was payment of \$2,239.00 (gross) for the claimed wage arrears. The offer expressly excluded any payment for costs and was to settle all claims, including costs, made by Mr Sayer in the Authority. The offer was made "without prejudice save as to costs", that is it was a Calderbank offer.

[6] The effect of a Calderbank offer is that the offeror may subsequently rely on the offer to seek costs if the offer is unreasonably rejected and the rejecting party does not obtain a better result in the subsequent determination.

[7] *Ogilvie & Mather (NZ) Ltd v. Darroch*⁴ establishes the two principal criteria that must be satisfied when a Calderbank offer is made. These are:

² *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808, reaffirmed by the Full Court in *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135

³ See also *Victoria University of Wellington v. Alton-Lee* [2001] ERNZ 305, *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28

⁴ [1993] 2 ERNZ 943

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

[8] I am satisfied that the offer made by Fifteenteen was a valid Calderbank offer.

[9] However, that does not resolve this issue. I must consider whether the applicant's rejection of the offer was reasonable.

[10] In this case the Calderbank offer did not include any element for costs incurred by Mr Sayer in pursuing his wage arrears. Applying the principles in *Jackson v Moyes Motor Group Ltd*⁵ Fifteenteen must satisfy me that the offer is reasonable, particularly as in this case, where there is no costs.

[11] The other issue for me with this matter is that Fifteenteen withheld Mr Sayer's final pay, the amount of which was not in dispute. It purported to do so on the basis of a deductions clause in the employment agreement – a clause that was not valid to constitute written consent to the deduction. And, in my view that was obvious from the clause itself and the relevant case law. Fifteenteen should not have done this and should not have then used payment as leverage to settle all of the claims made by Mr Sayer. As much as Fifteenteen may have considered it was owed money by Mr Sayer and his claims were spurious, he was entitled to be paid and he should have been paid.

[12] So, I have two considerations. One, the Calderbank is effectively based on a minimum entitlement – this is similar to an employer saying I will pay you minimum wage so long as you do not bring a claim against me for other matters – and that cannot be right. Two, there is no element of the Calderbank offer that covers the costs Mr Sayer had incurred in pursuing his minimum entitlement.

⁵ [2005] ERNZ 504

[13] For these two reasons, the Calderbank offer was not reasonable.

[14] As the Calderbank offer was not reasonable, it was not unreasonable for Mr Sayer to reject it. As a result, the Calderbank offer does not impact on the costs in this matter.

[15] So, the principle that costs should follow the event applies.

[16] In *Health Waikato Ltd v Elmsly*⁶ William Young J noted that:

[35] Costs usually follow the event. In most cases it is clear who has been successful in litigation and thus prima facie entitled to an award of costs. But cases where the parties have mixed success are by no means rare and in such instances it is not necessarily easy to determine who "won" the case so as to be entitled presumptively to costs.

[17] This is the difficulty with this case. Both parties had an element of success, Mr Sayer with his wage arrears claim and Fivefifteen by defending the unjustified dismissal and holiday pay claims.

[18] The best way to resolve this is to consider that costs are discretionary and my award should be consistent with the equity and good conscience jurisdiction of the Authority.

[19] Again, I am persuaded by the fact that Mr Sayer had to pursue a minimum entitlement – his final pay, over which there was no dispute, except for a meritless set-off or right to deduct allegation. Applying equity and good conscience, I believe Mr Sayer should be awarded costs for having to pursue this claim.

[20] Mr Sayer is entitled to costs for being successful with his wage arrears claim.

⁶ [2004] NZCA 35

Assessing quantum of costs – the application of the daily tariff or an alternative approach

[21] The Authority normally deals with costs by applying the daily tariff⁷, which is currently \$4,500.00 for the first full day of an investigation meeting. However, in this case given the circumstances that is not appropriate - it would be disproportionate to award Mr Sayer \$4,500.00 for the costs incurred for his wage arrears claim when it only took part of the investigation meeting. Further, it would be artificial to try to reduce the daily tariff based upon Fifteenteen's success in defending the personal grievance and holiday pay claims.

[22] In this case, I will simply award a sum I believe appropriate for Mr Sayer's wage arrears claim. The factors relevant to this include:

- (a) Costs awards in the Authority will be modest;
- (b) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- (c) Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;
- (d) A decision on quantum should be also in line with principle and not determined arbitrarily bearing in mind the equity and good conscience jurisdiction of the Authority.

[23] Weighing these factors, particularly that costs should be modest, that costs should not be used in this instance to punish Fifteenteen for its conduct and considering what costs would be reasonable or necessary for the wage arrears claim, I conclude that Mr Sayer is entitled to \$750.00 for costs he incurred.

⁷ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808, reaffirmed by the Full Court in *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135

Determination

[24] Fifteenteen Limited must pay Mr Sayer \$750.00 as a contribution to his costs. It must also pay him the filing fee of \$71.56.

Peter van Keulen
Member of the Employment Relations Authority