

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA52/10
5141683

BETWEEN MARK SCRAGG
 Applicant

AND McALPINE HUSSMANN
 LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Michael Bradley, for Applicant
 Jo Phipps, for Respondent

Submissions received: 22 December 2009 and 28 January 2010, from Applicant
 28 January and 4 February 2010, from Respondent

Determination: 8 February 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 9 December 2009 (AA440/09) I found McAlpine Hussmann had unjustifiably dismissed Mr Scragg and made an award in his favour of \$5000 pursuant to section 123(1)(c)(i) of the Act to be reduced by 20% for contribution. Costs were reserved and the parties invited to attempt to resolve this issue themselves. Memoranda have been filed setting out the parties' respective positions in respect of costs.

[2] In his memorandum to the Authority Mr Bradley advises Mr Scragg's costs in relation to this matter total \$3,257.49 including GST and filing fee. He seeks an order for a contribution to those of costs of between \$2000 and \$3000 on the following grounds:

- The Authority found in favour of Mr Scragg;
- The awards made in his favour negate the effect of McAlpine Hussmann's 3 June Calderbank offer;

- Mr Scragg reasonably rejected the Calderbank offer because, at that time, he understood his claim for lost wages stood as he had not yet had confirmation from ACC of earnings related compensation; and
- The Calderbank offer did not address the personal element of vindication at the heart of Mr Scragg's personal grievance: *Mitchell v Blue Star Print*, Judge Shaw, WC 2/09, 19 March 2009.

[3] Ms Phipps submits an award of costs in favour of McAlpine Hussmann is warranted because:

- A valid Calderbank offer was made for \$5000 on 3 June 2009;
- The offer of \$5000 exceeds the award of \$4000;
- At the time the offer was made Mr Scragg knew or ought to have known he was entitled to earnings related compensation backdated to the end of his employment and that his claim for lost wages could not succeed; and
- Mr Scragg's reliance on the *Mitchell* principle is disingenuous – his primary motivation was monetary compensation.

Determination

[4] *PBO Ltd v Da Cruz*¹ sets out the appropriate principles to be applied by the Authority in exercising its costs discretion. These include that without prejudice offers may be taken into account.

[5] The Calderbank offer was valid and is properly taken into account in an assessment costs. If Mr Scragg had accepted that offer the subsequently incurred costs of this litigation would have been avoided and he would have been \$1000 better off.

[6] At the time the Calderbank offer was made it was a certainty that Mr Scragg would receive backdated earnings related compensation. He was aware of this when he declined the respondent's settlement offer. It is also apparent that that Calderbank offer, as in *Mitchell*, would not address Mr Scragg's desire for clarification of the

¹ [2005] 1 ERNZ 808

reasons for his dismissal. The challenge to the ostensible reason for his employment ending – frustration of contract – was an important element of this matter for Mr Scragg.

[7] Taking all these factors into account it is appropriate that no award of costs is made.

[8] **Costs to lie where they fall.**

Marija Urlich

Member of the Employment Relations Authority