

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2016] NZERA Auckland 79  
5552850**

BETWEEN                      CATHERINE STORMONT  
   Applicant  
  
AND                                PEDDLE THORP AITKEN  
   LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Catherine Stewart, Counsel for Applicant  
   Ashley Sharp, Counsel for Respondent  
  
Costs Submissions            4 March 2016 from Applicant  
   19 February 2016 from Respondent  
  
Determination:                11 March 2016

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

[1]        In a determination dated 22 January 2016 ([2016] NZERA Auckland 28), I found that the Applicant, Ms Catherine Stormont, had been not unjustifiably dismissed from her employment by the Respondent, Peddle Thorp Aitken Limited (Peddle Thorp).

[2]        I also addressed the issue of bonus calculation and determined that there had been no breach of the good faith duties owed to Ms Stormont by Peddle Thorp, nor had Peddle Thorp breached the Employment Agreement.

[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 Mr Sharp on behalf of Peddle Thorp, has filed a submission in respect of costs.

[4]        The matter involved 3 days of meeting time. Mr Sharp is seeking either costs on an indemnity costs basis of \$39,372.90 (exclusive of GST), or alternatively, a contribution to costs in the sum of \$29,100.00 (consisting of \$3,160.00 in respect of wasted costs incurred by the Respondent arising out of an Amended Second Statement of Problem, and the additional

sum of \$26,410.00 being 2.5\* the normal daily tariff rate in the Authority as a result of an uplift based on several factors).

Submissions for the Respondent

- *Applicant's Conduct*

[5] The Respondent cites the Applicant's uncompromising attitude throughout proceedings as exemplified in her refusal to follow a direction of the Authority contained in paragraph [105] of determination [2016] NZERA Auckland 28 which stated:

*I determine that the bonus due to Ms Stormont in respect of the year ended 31 March 2011 is to be calculated in accordance with the Clarifications Conditions in the Specific Conditions of Employment, utilising the formula:*

<i>Client Revenue (i):</i>	<u>XXXXXX</u>
<i>Less: Staff salaries including Ms Stormont (ii)</i>	<u>(XXXXXX)</u>
<i>Share of direct and office overheads (iii)</i>	<u>(XXXXXX)</u>
<i>Profit for 20% bonus calculation (vi)</i>	<u>XXXXXX</u>

[6] The refusal was based upon the Applicant's decision to appeal that determination in its entirety.

- *The Second Amended Statement of Problem*

[7] Mr Sharp submits that the second amendment of the Statement of Problem increased costs on the basis that it included a claim for unjustifiable dismissal. At that stage Ms Stormont had been dismissed at the date the first Amended Statement of Problem had been lodged, but did not include a claim for unjustifiable dismissal which was not made until the subsequent amendment in the Second Amended Statement of Problem. This meant that the Respondent, which had filed an Amended First Statement in Reply, incurred additional costs in re-drafting a considerably expanded Second Statement in Reply.

[8] It is further submitted that the Applicant's claim for the remedy of damages for a breach of good faith was in the nature of a remedy claim requiring the application of 'new law' and should have properly been the subject of an application to the Authority for removal to the Employment Court.

- *Calderbank offers*

[9] Mr Sharp submits that Peddle Thorp made two Calderbank<sup>1</sup> offers, which are ‘without prejudice save as to costs’ offers, to Ms Stormont.

[10] The first Calderbank offer (First Calderbank Offer) was made in a letter headed “WITHOUT PREJUDICE SAVE AS TO COSTS’ dated 25 November 2014 which set out an offer of payment to Ms Stormont of \$40,000.00 under s 123(1)(c )(i) of the Employment Relations Act 2000 (the Act).

[11] The First Calderbank Offer letter stated that that offer was open for acceptance for 7 days until the close of business on 2 December 2014. The Applicant rejected the First Calderbank Offer.

[12] The second Calderbank offer (Second Calderbank Offer) was made following mediation on 11 December 2014 in a letter dated 12 December 2014. It also was headed “WITHOUT PREJUDICE SAVE AS TO COSTS’ and set out an offer for payment in the sum of \$25,000.00 pursuant to s 123 (1)(c )(i) of the Act in respect of the redundancy personal grievance, and \$15,00.00 pursuant to s 123(1)(c )(i) of the Act in respect of the bonus matter, a total of \$40,000.00.

[13] The Second Calderbank Offer letter stated that the offer was open for acceptance for 48 hours until 5.00 p.m. on 13 December 2014. The Applicant rejected the Second Calderbank Offer.

[14] At the point at which the First and Second Calderbank Offers had been made, no legal costs had been incurred.

- *Complexity*

[15] Mr Sharp submits that the legal issues in the case were slightly more complicated than those normally encountered in the Authority involving contractual interpretation and matters arising in terms of the Contractual Mistakes Act.

- *Other costs*

[16] Mr Sharp further submits that costs were increased by:

---

<sup>1</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA)

- The involvement of the consultant Ms Woods as holder of documentary evidence and attendance at the Investigation Meeting as a witness;
- The involvement of an expert witness, Mr Geoffrey Walker, to rebut expert evidence introduced by the Applicant; and
- Non-chargeable time spent by Mr Terence Barnes, partner of Peddle Thorp, to address the matter and assist Counsel in preparation for the Investigation Meeting,

Submissions for the Applicant

[17] The Applicant submits that this is case in which costs should lie where they fall, or in the alternative, should be modest.

- *Applicant's Conduct*

[18] The Applicant submits that it is clearly established case law that: "*costs are not to be punitive or an expression of disapproval of a party's conduct*"<sup>2</sup> and that the Applicant's conduct in the case was at all times reasonable and did not unnecessarily increase the time or costs associated with the matter.

- *The Second Amended Statement of Problem*

[19] The Applicant submits that the Applicant filed two separate claims as she wished to have these matters dealt with separately. It was at the direction of the Authority that the two matters were combined and this in turn mandated a second Amended Statement of Problem.

[20] It was necessary for the Respondent to reply to both claims and therefore more likely than not that the Respondent claims would be lower than they would have been had the matters been dealt with in separate proceedings.

- *Calderbank Offers*

[21] It is submitted that it is not appropriate for the Authority to have the same '*steely*' approach to Calderbank offers as is appropriate before the Employment Court, citing the

---

<sup>2</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808

observation by Judge Inglis in *Stevens v Hapag-Lloyd (NZ) Ltd*<sup>3</sup> that: “it will generally be inconsistent with statutory imperative underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority ...”.

[22] The Applicant submits that the Calderbank Offers did not confer upon her a greater benefit than that provided by the determination when taking the foregoing of notice period into consideration and the subsequent calculation of bonus payment by the Respondent following the Authority’s determination as \$25,000.00, which was higher than the amount assigned to a the bonus element of the Second Calderbank Offer of \$15,000.00.

[23] In addition the Calderbank offers required the two issues to be dealt with together rather than as two separate claims.

- *Costs*

[24] It is submitted that both the costs claimed in respect of the time spent on the matter by Ms Woods is in the nature of human resources costs and cannot be claimed in these proceedings.

[25] Similarly Mr Barnes’ time is ‘executive time’ and not normally claimable.

### **Determination**

[26] 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.

[27] As regards the conduct of the Applicant, I note that she has chosen not to follow the direction of the Authority contained at paragraph [105] of determination [2016] NZERA Auckland 28 in light of her decision to appeal that determination.

[28] I observe that it was at the request of the Applicant herself that the Authority determined how her bonus should be calculated. The Authority having complied with the request, the Applicant is now apparently unprepared to comply with the direction of the Authority. However that is a matter for the Court to address should it choose to do so. I do not attach weight to it in terms of the appropriate amount of a costs award consideration.

[29] I do not take into consideration the conduct of the Applicant during her employment relationship with the Respondent, other than as it has been addressed in the determination

---

<sup>3</sup> [2015] NZEmpC 137 at para [95]

[2016] NZERA Auckland 28. During the Investigation Meeting, I do not consider that the Applicant's conduct gave grounds for an uplift in costs.

[30] In regard to the Second Amended Statement of Problem, and the comment by Ms Stewart that the two claims were combined at the direction of the Authority, I observe that it is the role of the Authority to: "*deliver speedy, informal and practical justice to the parties in any matter before it*"<sup>4</sup>.

[31] In a situation which involves claims arising from an employment relationship between the same parties within the same period of employment, it is both practical and speedy to combine the two claims for investigation, and may well result in lower costs for the parties involved.

[32] I also note that Ms Stormont's employment was terminated in March 2015. The First Amended Statement of Problem was filed in the Authority on 10 June 2015 which was some time after the redundancy situation which was the subject of the unjustifiable dismissal claim. The claim for unjustifiable dismissal was not raised until the Second Amended Statement of Problem was filed on 31 July 2015.

[33] Whilst I accept the right of an applicant to amend claims at any stage prior to the matter being investigated, I also observe that in this case the circumstances which gave rise to the claim of unjustifiable dismissal were within the purview of the Applicant at the time of filing the First Amended Statement of Problem. In addition the applicant had the benefit of being advised by experienced Counsel prior to the dismissal, and subsequently.

[34] It would therefore have been appreciated by the Applicant that the filing of a Second Amended Statement of Problem raising a claim not addressed in the First Amended Statement of Problem in respect of which the Respondent had filed a First Amended Statement in Reply, would have necessitated the Respondent incurring additional costs in responding to the unjustifiable dismissal claim in the Second Amended Statement of Problem.

[35] I am also minded to give weight to the matter of the Calderbank offers.

[36] 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*<sup>5</sup> which referred to '*significant costs awards*', 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

---

<sup>4</sup> Regulation 4(c) Employment Relations Authority Regulations 2000

<sup>5</sup> [2015] NZEmpC 137 at para [95]

the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted<sup>6</sup>.

[37] The Calderbank Offers were both made well in advance of the Investigation Meeting and there was therefore due time for the Applicant to consider them fully prior to taking any part in that proceeding. They offered more to Ms Stormont than was awarded to her in determination [2016] NZERA Auckland 28,

[38] As regards the costs incurred in respect of Ms Woods, Mr Walker and Mr Barnes, I accept that increased costs should not be taken into consideration in respect of executive time, however the costs of an expert witness may be recognised as an appropriate disbursement.

[39] In considering whether a full reimbursement of the disbursement is appropriate in this case<sup>7</sup>, I note that the evidence of Mr Walker was necessary in light of the expert evidence of Ms Stormont's expert witnesses, one of whom was present at the Investigation Meeting, and of assistance in circumstances in which the Applicant had applied for the Authority to determine how her bonus was to be calculated.

[40] In all the circumstances, I determine that costs follow the event and as such Peddle Thorp is entitled to costs. The starting point for a 3 day investigation on the basis of the normal daily tariff in the Authority is \$10,500.00.

[41] I determine that that starting point should be uplifted to take into account the increased costs incurred as a result of the Second Amended Statement of Problem, the rejection of the First and Second Calderbank Offers, and the complexity of the claims which involved the consideration of analyses provided by expert witnesses.

[30] Ms Stormont is ordered to pay Peddle Thorp \$21,000.00 costs, pursuant to clause 15 of Schedule 2 of the Act, and \$11, 078.17 as disbursements.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

---

<sup>6</sup> *Aoraki Corporation Ltd v McGavin*<sup>6</sup> [2004] 1 ERNZ 172 (CA) at [53]

<sup>7</sup> *Detection Services v Pickering* [2013] NZ EmpC at [46]