

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 163
5583042

BETWEEN ALAN WINN
 Applicant

A N D SPOTLESS FACILITY
 SERVICES (NZ) LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: David Beck, Counsel for Applicant
 Guido Ballara, Counsel for Respondent

Submissions Received: 11 August 2016, from the Applicant
 13 July 2016, from the Respondent

Date of Determination: 21 September 2016

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 15 June 2016¹ I determined that the applicant, Mr Alan Winn, had not been unjustifiably dismissed by the respondent, Spotless Facility Services (NZ) Limited (Spotless). I also determined that Mr Winn's conditions of employment had not been disadvantaged by an unjustified action of Spotless. As a final matter I determined that Spotless had not breached the duty of good faith in carrying out a restructuring exercise and deciding to terminate the employment of Mr Winn.

[2] In my determination I reserved costs in the hope that the parties would be able to settle the issue between them. They have been unable to do so and Mr Ballara on behalf of Spotless has filed submissions seeking costs. Mr Beck, on behalf of Mr Winn, has responded to the application for costs.

¹ [2016] NZERA Christchurch 86

[3] Spotless seeks costs from Mr Winn and submits that an order of costs should be \$10,000 plus disbursements. Mr Ballara's primary submission in this respect is that Mr Winn unreasonably refused two *Calderbank* offers made by Spotless and as he failed to better those offers a "steely" approach should be adopted to justify an award of \$10,000 plus disbursements for costs.

[4] Mr Beck says that costs should lie where they fall or in the alternative if costs are to be awarded against Mr Winn then I should adopt a reduced daily tariff when calculating the amount. His submissions include:

- (a) Mr Winn is to be regarded as blameless and has not engaged in any misconduct which led to the termination of employment, his role having been disestablished and his employment having been terminated by reason of redundancy;
- (b) No exceptional circumstances exist or have been made out by Spotless's submissions that would warrant a higher than usual award;
- (c) There was a significant factual issue at stake in this matter which although decided in Spotless' favour was not a clear issue that leads to the presumption that Mr Winn's claim was frivolous or vexatious. Mr Beck refers to specific paragraphs of my determination in which I accept that Spotless caused some initial confusion by the manner in which it presented its restructuring proposal. He says it was therefore reasonable for Mr Winn to form a view that he had a claim for unjustified dismissal;
- (d) Whilst there was an exchange of *Calderbank* offers, negotiations for settlement of this matter broke down as Spotless consistently failed to address Mr Winn's concern over legal costs. And, in any event, in all the circumstances a "steely" approach to *Calderbank* exchanges is not something that the Authority is bound to adopt;
- (e) As both parties chose to take a principled rather than a pragmatic approach in what turned out to be a reasonably finely balanced fact inquiry, they should each bear their own costs;

- (f) In any event, regardless of the legal issues, Mr Winn's current financial situation means he will struggle to meet any significant order of costs in favour of Spotless.

[5] The two *Calderbank* offers referred to in both sets of submissions are offers made by Spotless to Mr Winn. The first was made on 18 December 2015 offering to pay the sum of \$3,000 in full and final settlement of his claim. Mr Beck responded to that offer on behalf of Mr Winn and rejected it, offering to accept \$4,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) together with \$4,445 plus GST as a contribution to legal costs and an apology for the manner in which the restructuring was handled causing unnecessary distress.

[6] The second *Calderbank* offer was made on 19 January 2016, and was an offer to pay \$5,000 to settle the matter, inclusive of costs and included that Spotless would make a formal apology as requested.

[7] That second *Calderbank* offer was rejected by Mr Winn on the basis that the financial component was insufficient as it did not acknowledge his legal costs so far.

Costs

Principles

[8] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*². The principles and the approach to be adopted by the Authority have been reaffirmed recently by the Full Court in *Davide Fagotti v. Acme & Co Ltd*³.

[9] Based on clause 15 and *Da Cruz*, *Fagotti* and other relevant Employment Court and Court of Appeal decisions⁴, the approach to be adopted by the Authority includes:

- (a) An award of costs is discretionary and the exercise of that discretion should be made in accordance with principle and not arbitrarily;

² [2005] 1 ERNZ 808

³ [2015] NZEmpC 135

⁴ *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

- (b) The decision to award costs is consistent with the equity and good conscience jurisdiction of the Authority but equity and good conscience should be considered on a case-by-case basis in terms of the award of costs;
- (c) Costs will generally follow the event but in some instances this will not be the case where, for example, the nature of the case is such that costs should lie where they fall or alternatively where an applicant has not bettered the terms of a *Calderbank* offer which he or she unreasonably rejected prior to the investigation meeting;
- (d) Once a decision has been made by the Authority to award costs in favour of one party then the starting point for quantum is the daily tariff. It is open to the Authority to depart from applying the daily tariff in appropriate circumstances where, for example, indemnity costs may be appropriate or actual costs incurred since the rejection of a *Calderbank* offer are more appropriate. However, the standard approach is to start with the daily tariff and then consider whether that tariff should be applied on an increased, decreased or standard basis dependent on a number of factors. The factors relevant to the consideration of the increase or decrease of the daily tariff include:
 - (i) Costs awards in the Authority will be modest;
 - (ii) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
 - (iii) 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;
 - (iv) Without prejudice offers can be considered;
 - (v) Impecuniosity of the other party may be relevant;
 - (vi) 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.

Calderbank offers

[10] *Ogilvie & Mather (NZ) Ltd v. Darroch*⁵ establishes the two principal criteria that must be satisfied when a *Calderbank* offer is made. These are:

- (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.

[11] The other relevant consideration in respect of a *Calderbank* offer is the question of whether the offer was unreasonably rejected by the recipient.

Discussion

[12] I am satisfied that the two *Calderbank* offers made by Spotless meet the criteria set out in *Ogilvie*. I am also satisfied, notwithstanding Mr Winn's concern over costs, that he unreasonably rejected the second *Calderbank* offer. This is particularly so in light of the fact that that offer contained to some extent the vindication he may have been seeking in his claim because Spotless was prepared to give him an apology in the terms he sought.

[13] On this basis, I am obliged to apply the principles that attach to *Calderbank* offers; adopting a "steely" approach as counsel for Spotless correctly identifies.

[14] However, some caution needs to be adopted in that "steely" approach. That steely approach does not necessarily apply to quantum but rather the principle that costs should be awarded against a party who unreasonably rejects a *Calderbank* offer and then does not better it in the determination.

[15] The "steely" approach principle arises out of *Blue Star Print* where the Court of Appeal rejected the 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 or because an employee might be motivated in part by the desire for vindication. The Court of Appeal reiterated that a "steely" approach is required. The Court then went onto state at para.[20]:

⁵ [1993] 2 ERNZ 943

It has been repeatedly emphasised that the scarce resources of the Court 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.

[16] In *Fagotti*, the Full Bench of the Employment Court rejected a submission that the Court of Appeal's remarks about the steely approach to *Calderbank* offers expressed in *Blue Star Print* applies only to the Employment Court and not to matters before the Authority. The Court stated at para.[109]:

The vast majority of matters in which *Calderbank* offers are considered by the Employment Court are in proceedings brought to the Court by a challenge to the Authority's determination. *Calderbank* offers are most usually made before the Authority's investigation meeting. So it follows that the Court of Appeal's remarks about the fortitude with which they are approached, should apply also to *Calderbank* offers before an Authority investigation meeting. They are, therefore, applicable also to the Authority's first instance jurisdiction as well as to the Court's appellate role in some cases.

[17] On this basis I have to reject Mr Beck's submission that the "steely" approach is not something that should be adopted by the Authority. The Employment Court's direction is clear. However, it is my view that the "steely" approach applies to the principle of awarding costs and not to the amount of costs that should be awarded. It is notable that the Court of Appeal in *Blue Star Print* said when discussing the "steely" approach, that a defendant should not be further penalised by an award of costs in favour of the plaintiff.

[18] This sits with the further reasoning of the Full Court in *Fagotti* where prior to endorsing the "steely" approach in the Authority, the Court had reaffirmed the principles of *Da Cruz* and agreed with the views of Judge Inglis in *Stevens* where Her Honour said at paras.[94]-[95]:

... proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical. It is a first instance hearing that is not intended to have the trappings of the more formal, procedurally constrained processes of the Court. It is plain (including from the Authority's informed assessment of the appropriate notional daily rate, currently set at \$3,500) that the Authority is not intended to be an overly legalistic costly forum. This ought, in ordinary

circumstances, to reduce the amount parties may reasonably be expected to expend on legal resources. While it is each party's right to instruct counsel and (if they do) to instruct counsel of their choosing, and to apply significant legal resources in pursuit or the defence of a claim in the Authority in the first instance, that is a choice they make including having regard to the generally applied daily rate.

...

In my view it would generally be inconsistent with the statutory imperatives underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority. ...

[19] It follows that adopting a steely approach to *Calderbank* offers cannot mean that a high quantum of costs must be awarded against that party. Rather a number of factors must be considered in terms of quantum (as I have expressed above) bearing in mind Judge Inglis' observation that it would be inconsistent with the statutory imperatives for significant costs awards to be imposed on unsuccessful litigants in the Authority.

[20] Therefore, it is my conclusion that I should award costs in favour of Spotless. This is not a case that would justify costs lying where they fall. Costs are to be awarded in favour of Spotless because of both the principle that costs will normally follow the event and Spotless was completely successful in defending the three elements of the claim brought by Mr Winn. In addition, there is of course the *Calderbank* offer that was unreasonably rejected and then not bettered in my determination.

[21] Turning to quantum of the award of costs, I am not satisfied that there is a reason that I should depart from the daily tariff. That is there is no basis to award indemnity costs. Nor is there a basis on which I should award actual costs from the date of rejection of the *Calderbank* offer or even a percentage of those costs.

[22] The applicable daily tariff for this matter is \$3,500. The investigation meeting for this matter lasted one full day so \$3,500 is my starting point. I must now consider whether I decrease or increase the daily tariff.

[23] I have already addressed the point but reiterate that costs awards should be modest. I keep this in mind when considering whether to modify the daily tariff.

[24] The actual costs incurred by Spotless were \$11,500 plus GST and disbursements of \$679.06. These disbursements were primarily made up of airfares

and accommodation for counsel who travelled from Wellington to attend the Authority investigation meeting in Christchurch. The Authority investigation meeting took one full day and I accept that \$11,500 is a reasonable sum for an experienced counsel to charge for a one day investigation meeting with three claims, a reasonable amount of factual dispute and standard legal issues in respect of claims arising in a restructuring setting.

[25] There is no behaviour by Mr Winn to justify an increase in the daily tariff and conversely no behaviour by Spotless that would suggest that I should decrease the daily tariff.

[26] The *Calderbank* offer that was unreasonably rejected becomes relevant again as part of my second analysis as to quantum. However, I have already rejected that I should adopt a steely approach and apply some harsh formula in respect of the *Calderbank* offer. In my view, the unreasonable rejection of a without prejudice offer does, however, give a basis on which I should consider an uplift in the daily tariff. The Full Bench of the Employment Court's analysis that a \$1,000 uplift in respect of the daily tariff applying against a party who unreasonably rejected a *Calderbank* offer was appropriate is persuasive. In this case, I believe the unreasonable rejection of the second *Calderbank* offer does justify uplifting the daily tariff to \$4,500.

[27] Finally, when considering quantum, I turn my mind to equity and good conscience and consider whether, in all the circumstances, an award of \$4,500 for Spotless is appropriate. Mr Beck on behalf of Mr Winn says essentially he is impecunious and that an award of costs against him would be a hardship. There is, however, no evidence submitted by the way of affidavit or otherwise that supports this. That might have been useful if it is the case and in the absence of such evidence I am not minded to consider it to carry any great influence in the question of the quantum here.

[28] Mr Beck has also submitted that Mr Winn was not unreasonable in pursuing a claim particularly in light of my comments about the fault of Spotless when it commenced the restructuring process. I do not accept that that justifies a change in my view on the daily rate being increased by \$1,000. Put simply, there may have been some confusion caused by Spotless that I identified in my determination. This was not enough to substantiate either personal grievance or the alleged breach of the

duty of good faith. It may well have been a basis on which Mr Winn can now point to and say he was justified in pursuing to some extent his claim, but, even if this is right, it does not override the fact that he chose to pursue a claim which he ultimately lost having rejected a *Calderbank* offer.

[29] Standing back and weighing all of these matters, I consider that an award of costs in favour of Spotless in the sum of \$4,500 is appropriate.

[30] Counsel for Spotless has also submitted that it should be paid disbursements in this matter. As I have already indicated those disbursements primarily relate to the travel costs associated with Wellington counsel attending in Christchurch. These are not disbursements for which an award of costs would normally be made. Whilst a party can choose to instruct the counsel of its choice, if it chooses to instruct counsel in Wellington to attend a matter in Christchurch when there are many capable and experienced counsel in Christchurch who could have attended to this matter then it must bear the cost of travel⁶. This case did not contain any great factual difficulties or legal issues requiring any particular expertise from Mr Ballara that counsel in Christchurch could not have addressed. I decline to make any award for the disbursements sought.

Peter van Keulen
Member of the Employment Relations Authority

⁶ See *Banks v Hockey Manawatu Inc* [2016] NZEmpC 97