New Zealand Employment Relations Authority Decisions

Wickman v Estate of Small (Auckland) [2013] NZERA 951; [2013] NZERA Auckland 455 (4 October 2013)

Last Updated: 5 June 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2013] NZERA Auckland 455
5397525

BETWEEN GLENN WARWICK WICKMAN Applicant

A N D THE ESTATE OF HENRY LESTER SMALL

First Respondent

PETER SMALL Second Respondent

Member of Authority: James Crichton

Representatives: Gregory Bennett, Advocate for Applicant

Matthew McGoldrick, Counsel for Respondent

Submissions received: 1 October 2013 from Applicant

5 September 2013 from Respondent

Date of Determination: 4 October 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In the substantive determination of 6 August 2013 issued as [2013] NZERA Auckland 339, the Authority rejected Mr Wickman's claim in its entirety and reserved costs.

The claim for costs

[2] The successful respondents seek an award of costs of $5,000 (exclusive of GST) which represents an uplift from the daily tariff of $3,500 which frequently forms the basis of the Authority's costs fixing approach.

[3] The uplift is justified by reference to a *Calderbank* offer made by the respondents to Mr Wickman, which was rejected.

[4] That offer was simply that Mr Wickman would not incur any liability for the respondents' continuing costs, or indeed at all, if he withdrew his proceedings at the point at which the *Calderbank* offer was made.

The response

[5] Submissions for Mr Wickman proceed on the footing that the notional daily tariff should apply without the uplift proposed by the respondents and suggests that the *Calderbank* offer made by the respondents was *not couched in the terms of a **Calderbank** offer*.

[6] That last point cannot be right; while the letter in question from the respondents' solicitors is not labelled *Calderbank* offer

or *without prejudice save as to costs* it does, nonetheless, make it abundantly clear in the text of the letter that a refusal by Mr Wickman to accept the offer will result in it being used in a costs fixing setting. The relevant portion of the subject letter reads as follows:

If your client does not accept this offer, and as a result of the Authority's determination he is unsuccessful, our client intends to claim costs against your client for all legal expenses it has incurred in defending its position.

Determination

[7] The law relating to costs fixing has been traversed in *PBO Ltd v. Da Cruz* *[2005] NZEmpC 144*; *[2005] 1 ERNZ 808* where the principles to be applied were clearly enunciated by the Employment Court. Both parties referred to that decision in their submissions on costs.

[8] Costs generally follow the event. Mr Wickman was completely unsuccessful. Therefore, on general principles, he ought to make a contribution to the costs incurred by the successful party.

[9] The successful party made a *Calderbank* offer which Mr Wickman rejected. The respondents say that because of that *Calderbank* offer, an uplift in the daily tariff approach is warranted. The Authority agrees. The law is clear that the Authority is to

apply a "steely" approach to costs fixing where there is an operative *Calderbank*

offer: *Bluestar Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385 followed.

[10] The Authority took a day to investigate this matter. Were it not for the *Calderbank* offer, the daily tariff of $3,500 would have been the appropriate start and finish point; however, given the existence of a *Calderbank* offer which was rejected by Mr Wickman, the law impels the Authority to allow an uplift.

[11] Accordingly, Mr Wickman is to pay to the respondents the sum of $5,000 as a contribution to the costs of the respondents in successfully defending Mr Wickman's claims.

James Crichton

Member of the Employment Relations Authority

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