

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 193
5379240

BETWEEN JAMES WEST
 Applicant

AND PYNE GOULD
 CORPORATION LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Jeff Goldstein and Linda Ryder, Counsel for Applicant
 Malcolm Crotty, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received by: 30 August 2013

Date of Determination: 13 September 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] Costs were reserved by the Authority in *West v. Pyne Gould Corporation Limited* [2013] NZERA Christchurch 139 (date of determination 9 July 2013). Both parties are seeking costs.

[2] First Pyne Gould Corporation Limited (PGC) has applied for costs based on Mr West failing to accept a *Calderbank* offer. It is seeking \$146,155.35 costs and \$557.80 disbursements (involving Counsel's travel) incurred since the *Calderbank* offer. The basis of the offer was full and final on all claims.

[3] Second Mr West has submitted that as he was successful in his application and no special circumstances exist to depart from the general rule of applying costs to a successful party it is appropriate that costs should be awarded in his favour. Mr West has acknowledged the *Calderbank* offer and asked the authority to itemise the success and lack of success of the claims individually.

[4] Both parties agree that costs in the Authority are made in accordance with the Full Court decision *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

Background

[5] The Authority's investigation meeting was scheduled for two days, 26 and 27 February 2013. The parties subsequently exchanged written submissions. The costs incurred by Mr West including mediation were \$24,543.00 (inclusive of GST). The actual costs were supported by relevant invoices. Mr West's representative estimates that the costs of mediation would have only been \$500 of that invoice. For Mr West two representatives were involved in the matter for preparation and attendance at the Authority's hearing.

[6] Disbursements have also been incurred by Mr West for the filing fee of \$71.56 and hearing fees \$306.66 in respect of the second hearing day. He seeks reimbursement of the expenses.

[7] PGC's total actual costs amount to \$251,382.79 (including GST), but since 13 August 2012 the costs incurred amount to \$146,155.35 plus disbursements. One representative attended the Authority's investigation meeting for PGC, and another has been involved in the background in the preparation of the statement in reply and response to the application.

[8] On 13 August 2012 PGC offered to settle all Mr West's claims, namely the personal grievance claim, his claim for unpaid annual leave and his claim for an executive bonus. Mr West was given four days by PGC to consider the offer.

[9] The following key elements of the offer were:

- a. The payment of \$112,000 (gross or net not clear) to settle Mr West's personal grievance claim;
- b. The sum of \$69,350.00 gross for the executive bonus claim;
- c. The payment of Mr West's annual leave entitlement, but less the deduction of overpaid salary from 16 April 2012. Mr West was

paid until 7 May 2012. The value of the deduction will be at least two weeks' pay. The sums were not quantified at the time.

[10] In total the offer was for \$185,662.50 gross (13 August) including costs of \$3,750. Mr West responded to the offer on 17 August 2012, and accepted the settlement terms offered except for the method of the payment of the bonus. In a draft settlement proposal Mr West amongst other things put the settlement in the following terms:

- a. \$82,500 gross tax and \$30,000 compensation payment for the personal grievance;
- b. the outstanding annual leave entitlements up to and including the Termination date less the deduction of any salary overpaid since 16 April 2012;
- c. the \$3,750 plus GST costs.
- d. the offer of \$69,350 net of taxes on account of the contractual bonus.

[11] The difference between the parties appears to be \$22,885.50 using Mr West's itemised assessment, and \$52,086.03 using PGC's assessment on the whole amounts.

[12] The counter offer was rejected by PGC on 23 August 2012 and the parties proceeded to an investigation meeting in the Employment Relations Authority on all the matters.

Determination

[13] I have considered the *Calderbank* offer and the parties' assessments of the merits of the claim.

[14] I am not convinced that Mr West's approach to breaking down the individual parts of his claim to measure the offer and the result is correct. The offer was a take it or leave it offer requiring acceptance in full and final settlement of all matters, which is entirely permissible.

[15] While the offer was made on the basis of being without prejudice, save as to costs, it was not valid because the offer was not certain and clear in respect of the sums to be taxed and the amounts to be paid as net sums and there were no calculations for the holiday pay. I do accept that experienced Counsel were involved, but given the offer and counter offer a transparent offer did not emerge. Indeed while Mr West complains that the time (4 days) was not enough time to reply, I note that a full response with a counter offer was made in the time available. The lack of detail on the sums for payment on the statutory entitlements to holiday pay and interest and the deduction is an important omission, I hold. On the face of it the offer appears to have been a reasonable offer to settle, but I hold it is invalid for consideration for¹ costs because it was not clear and certain on the sums. The method of payment still needed to be sorted with proper calculations on the holiday pay and deduction to allow acceptance. There was no agreement from either party on reasonable differences that needed to be sorted on the mix of compensation, lost wages and holiday pay for the *Calderbank* offer to be effective, I hold. PGC's outright rejection of the outstanding issues on amounts was unreasonable without the detail. I hold that the offer was not capable of immediate acceptance and 4 days to respond was inadequate in these circumstances because no settlement was achievable without the detail, I hold.

[16] Therefore, I hold that costs are to follow the event for Mr West in regard to the successful outcome he achieved.

[17] PGC refused to pay the full entitlement to Mr West of the holiday pay claim and I am satisfied Mr West was put to the expense of pursuing the claim for the recovery of that sum. Without the Authority's involvement I hold that that sum would not have otherwise been paid until absolutely necessary by PGC and with an order to do so and when it was holding out over 2 weeks' pay.

[18] Mr West was not successful in relation to the claim for the executive bonus. I accept that this was a genuine claim. It was of importance to both parties. There is a large sum of money involved (\$140,000 gross) and the issue was genuinely unable to be resolved between the parties, notwithstanding an attempt by both of them to settle. Because the matter was dismissed Mr West's outcome was financially less than the

¹ *Morrison v Design Plus Build Ltd* [2010] NZERA Christchurch 164; *Te One A Mara Ltd v Olsen* [2012] NZEmpC 176.

offer made to settle it, but given the importance to both parties there was a principle being argued here with the benefit of a financial reward for Mr West if he was successful.

[19] The respondent acknowledged its potential liability and risk in the matter.

[20] The principles of *Da Cruz* apply. As such this is a matter for the notional daily tariff to apply for two days of investigation meeting (\$7,000). The next question is whether or not the tariff should be increased as requested by both parties. Factors that I have taken into account are:

- a. That Mr West was put to the costs to pursue his entitlements; particularly the statutory holiday entitlements that were only paid during the course of the Authority's investigation meeting;
- b. That Mr West was entitled to bring a genuine claim for a personal grievance, which he was able to successfully prove and establish his claims for lost wages and an amount of compensation;
- c. That there were difficulties involved to get PGC to attend mediation without the intervention of the Authority;
- d. That Mr West had to file a statement of problem to obtain a direction for the parties to attend mediation, and the parties were directed to attend mediation, but where the matter needed to be referred back to the Authority for further directions and thus Mr West incurred more costs;
- e. That Mr West needed to get directions on discovery, the preparation of the bundle or documents and the timetabling for the filing of witness statements against PGC;
- f. That there needed to be additional telephone conferences for case management of the Authority's investigation.
- g. That disbursements relating to Counsel's travel must be borne by the party which chooses to use out of town Counsel. In this case

there was nothing exceptional as to why this was required for me to depart from the usual practice of covering it in the tariff.

- h. That if final submissions on the parties' arguments and issues cannot be done on the day it is routine for a request for submissions to be put in writing and this is incorporated in the tariff. The time available could have dealt with submissions.

[21] I have decided to leave the tariff at \$3,500 per day. Therefore, I award Mr West \$7,000 costs plus \$71.56 filing fee and \$306.66 hearing fees.

Authority's Order on Costs and fees

[22] Pyne Gould Corporation Limited is to pay Mr James West \$7,000 costs, \$71.56 filing fee and \$306.66 hearing fees.

P R Stapp
Member of the Employment Relations Authority