

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 148
5343208

BETWEEN PETER JAMES WALKER
 Applicant

A N D FIRTH INDUSTRIES -
 A DIVISION OF FLETCHER
 CONCRETE &
 INFRASTRUCTURE
 LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: Peter Walker, In person
 Don Mackinnon, Counsel for Respondent

Submissions Received: 30 April 2013 and 17 May 2013 for Respondent
 14 May 2013 and 31 May 2013 for Applicant

Date of Determination: 19 July 2013

COSTS DETERMINATION OF THE AUTHORITY

Introduction

[1] In a determination dated 9 April 2013,¹ the Authority found that Mr Walker was unsuccessful with his claim against the respondent that he was unjustifiably dismissed. The parties were invited to resolve the matter of costs but have not been able to do so. Submissions have now been received from both parties, in anticipation of the Authority determining the appropriate costs to be awarded to the respondent.

¹ [2013] NZERA Christchurch 65

[2] The submissions for the respondent (Firth) acknowledge the principles set out in *PBO Ltd (formerly Rush Security) v Da Cruz*² and the daily tariff approach adopted by the Authority in regard to awarding costs. It is accepted that the current daily tariff is \$3,500 for each day of an investigation. However, Firth asks the Authority to make an order against Mr Walker for twice the usual daily amount: \$7,000. Two “without prejudice except as to costs” (*Calderbank*) offers, made to Mr Walker, are referred to and evidence of them has been produced. The first offer was made on 18 July 2011. It was for the sum of \$3,500 to be paid under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act); plus a contribution of \$1,500 towards Mr Walker’s costs. This offer was made before Mr Walker commenced proceedings in the Authority. He did not respond.

[3] One year later, Mr Walker commenced proceedings in the Authority on 17 July 2012. As Mr Walker was dismissed on 24 January 2011, and given he was seeking reinstatement as a remedy, the delay in commencing an action has not really been adequately explained. Nonetheless, Firth made a second “without prejudice” offer on 31 August 2012 for a sum of \$5,000 (under s.123(1)(c)(i)), plus \$1,500 towards costs. In the offer letter, to counsel for Mr Walker at the time, Firth informed:

Obviously, if the offer is not accepted and the matter proceeds to an investigation hearing, then we reserve the right to place this offer (and the offer made on 18 July 2011) before the Employment Relations Authority if your client is either unsuccessful in his claim or achieves an award at levels similar or lower than those set out in this letter. We will then be seeking an award of costs against Mr Walker covering Firth’s entire legal costs on a solicitor to client basis.

[4] Mr Walker responded on 16 October 2012. He declined the offer informing that he was seeking reinstatement as “the main remedy” and not money. In responding to Mr Walker’s rejection of the offer, Firth reminded Mr Walker of the possible consequences if he was unsuccessful with his claims before the Authority. The submissions for Firth say that there was no realistic prospect of Mr Walker being reinstated to his employment. It is said that he did not raise a claim for reinstatement for almost 3 months after his dismissal. Then having attended mediation on 30 June 2011, Mr Walker did not take any further steps to progress his claims until filing with the Authority on 17 July 2012.

² [2005] ERNZ 808

[5] In response to Firth's submissions regarding the *Calderbank* offers, Mr Walker refers the Authority to *Gaut v BP Oil New Zealand Ltd*³ where Judge Ford, in addressing the submissions for Mr Gaut, regarding the *Calderbank* offers that had been made to him, had this to say:

[23] In my view, however, the overriding consideration in any assessment of the *Calderbank* offers is the fact, forcefully advanced by Mr Jackson, that they did nothing to address the issue of reinstatement which was the primary remedy Mr Gaut was seeking at the time they were made. Mr Gaut was entitled to seek reinstatement under s 123(1)(a) of the Act and indeed, at the relevant time, s 125 of the Act specifically recognised reinstatement as the primary remedy. The Court heard compelling evidence about the unfortunate effects the summary dismissal had had on Mr Gaut and I accept that, at all material times, reinstatement was his primary concern. Against that background, it does not seem fair and just that Mr Gaut should now be penalised in terms of his entitlement to costs on the basis that he was not prepared to accept *Calderbank* offers which failed, in any way, to address his statutory entitlement to seek reinstatement.

[6] Judge Ford went on to hold that because the *Calderbank* offers made to Mr Gaut were silent in relation to the issue of reinstatement and offered him nothing (in monetary terms) in regard to the primary remedy of reinstatement that Mr Gaut was seeking, the Court considered: "...that it would be unjust to allow their existence to now dictate the outcome of his costs application". Hence no reduction was made in the costs award made to Mr Gaut on account of the *Calderbank* offers.

[7] Apart from the fact that Mr Gaut was moderately successful in the Court in that he was awarded \$4,747.33,⁴ (after having the remedies reduced by 40% because of his contribution), I conclude that the facts relating to Mr Walker's circumstances are quite different. Firstly, there is the considerable delay in regard to Mr Walker pursuing his claim in regard to the remedy of reinstatement. And of course, Mr Walker was entirely unsuccessful with his case in the Authority. Therefore, I accept the submission for Firth at (para 10), that the dicta of the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell*⁵ applies and the *Calderbank* offers made to Mr Walker should be taken into account when assessing the appropriate costs to be awarded.

³ [2011] NZEmpC 111

⁴ The *Calderbank* offer was for \$4,000 plus \$1,000 costs.

⁵ [2010] NZCA 385 at para [20]

[8] However, Mr Walker advances another argument. This is that he was an aided person under s. 45 of the Legal Services Act 2011 (the LSA). This provides that under subsection (2):

No order for costs may be made against an aided person in a civil proceeding unless the court [Authority] is satisfied that there are exceptional circumstances.

[9] But the matter is not as simple as that because while Mr Walker had initially been granted legal aid; via a letter dated 17 October 2012 from the Ministry of Justice, he was notified that his grant of legal aid had been withdrawn, on the ground that the Ministry had become aware of the second *Calderbank* offer made to him. Mr Walker was informed that:

We believe in the circumstances that this is a reasonable offer and that there are no continued prospects for you to pursue re-instatement under a Legal Aid grant.

And:

We consider that:

- you do not have reasonable grounds for taking a case to court, defending the case against you, or being involved in the case, or
- your situation makes it unreasonable or undesirable for you to still get legal aid

Mr Walker was informed that if he did not want the legal aid to be withdrawn, he had 24 days to tell the Ministry why. However, before the 24 days had elapsed, via another letter from the Ministry dated 1 November 2012, Mr Walker was informed that his lawyer had submitted a final invoice and his file was closed. Mr Walker applied for reconsideration of the decision on 6 November 2011 but was told on 12 November 2012 that he needed to apply on a “reconsideration form”. He did so and this was acknowledged by the Ministry on 26 November 2012; but Mr Walker was required to provide further information.

[10] However, as at the date of the investigation meeting with the Authority (20 November 2012) Mr Walker was not a legally aided person under the LSA. This is because the legal aid grant had been withdrawn on 17 October 2012. This was a real withdrawal, and not “technical” as Mr Walker suggests. The onus was on Mr Walker to convince the Ministry that it should reconsider and/or reverse the decision to withdraw legal aid. Mr Walker has not seen fit to reveal what the outcome of his

request for reconsideration was, but given the importance of this to his potential liability for costs, it can be reasonably assumed that he would have told the Authority if he had been successful. And given that he has not, I conclude that Mr Walker was not a legally aided person pursuant to s.45 of the LSA.

Determination

[11] Given the time lapse relating to the failure of Mr Walker's to advance his claims and the final outcome of the proceedings before the Authority, the Authority accepts the submission for Firth that Mr Walker unreasonably refused the second *Calderbank* offer that was made to him on 31 August 2012; hence an increase in the daily tariff that would normally apply to costs is warranted.

[12] Notwithstanding my conclusion that the usual daily tariff should be increased, Mr Walker submits that if the Authority finds that an award of costs to the respondent is appropriate and the Authority applies the daily tariff of \$3,500 for each day of hearing, then the investigation meeting was for only for half a day and hence an award of \$1,750 should apply. Apart from a break in proceedings, while the attendance of a witness for the respondent was awaited, the hearing continued through without a lunch break because it was practicable to do so. Nonetheless, Mr Walker is largely correct that the investigation meeting really only occupied little more than half a day in real terms.

[13] Taking all of the circumstances into account, including the unreasonable rejection of the second *Calderbank* offer by Mr Walker, the actual hearing time, and the fact that as of the date of the investigation meeting Mr Walker remained unemployed, I conclude that a costs award of \$3,500 is appropriate.

[14] Pursuant to clause 15 of Schedule 2 to the Employment Relations Act 2000, Mr Walker is to pay to the respondent the sum of \$3,500.00 as a contribution to the costs incurred by the company.

K J Anderson
Member of the Employment Relations Authority