

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 512
5458952 & 5461955

BETWEEN ZOE CUMMING-STEWARD
Applicant in 5458952 and
Respondent in 5461955

AND TWENTY FIVE STATION
LIMITED T/A LAW DEBT
COLLECTION
Respondent in 5458952 and
Applicant in 5461955

Member of Authority: Robin Arthur

Representatives: Zoe Cumming-Steward in person
Natalie Tabb, Counsel for Twenty Five Station Limited

Submissions: 5 December 2014 from Twenty Five Station Limited and
9 December from Ms Cumming-Steward

Determination: 10 December 2014

COSTS DETERMINATION OF THE AUTHORITY

- A. Zoe Cumming-Steward must pay \$1250 to Twenty Five Station Limited (TFSL) as costs.**

- B. Payment of the costs of \$1250, and a penalty of \$750 ordered earlier, is to be made by the release to TFSL of \$2000 held on trust by an independent solicitor at the Authority's direction. The independent solicitor must send the trust funds of \$2000 (and any interest earned) along with an invoice for his fee (of up to \$250 including GST) to TFSL's solicitor within seven days of the date of this determination.**

- C. Ms Cumming-Steward must reimburse TFSL's solicitor for the amount of the independent solicitor's fee within seven days of**

being advised by TFSL's solicitor of the amount due.

Employment relationship problem

[1] The Authority found Zoe Cumming-Steward had breached the confidentiality term of a certified settlement agreement she made with Twenty Five Station Limited (TFSL) and ordered her to pay a penalty of \$750 for that breach.¹ A determination of costs was required because the parties were unable to resolve that remaining issue themselves.

[2] Under the settlement agreement Ms Cumming-Steward was entitled to a further \$2000 as the last instalment of a compensation payment. At the Authority's direction TFSL had paid that amount to an independent solicitor to be held in an interest bearing trust account pending the Authority's determination and further orders. This determination has dealt with the release and disbursement of those funds as part of resolving the costs issue.

[3] The earlier determination gave a preliminary view on an appropriate costs award. It suggested a reasonable contribution to TFSL's costs by Ms Cumming-Steward would be \$1250, based on the tariff for a half-day investigation meeting reduced to allow for her limited financial resources and for conduct by TFSL during the course of the matter that had unnecessarily increased costs.² As Ms Cumming-Steward also had to pay TFSL the penalty of \$750, payment of the costs and the penalty could then be achieved by releasing to TFSL the \$2000 held on trust. The overall result would be that Ms Cumming-Steward's entitlement to the last instalment of the compensation payment owed by TFSL would be extinguished in payment of the amounts she was due to pay TFSL as a result of the Authority's determination. She would however also have to pay the fee of the independent solicitor for holding the funds, with an invoice for those fees expected to be less than \$250.

[4] In its submissions on costs, TFSL (through counsel) did not support that proposal. Instead it sought of costs of \$5261.25 on a solicitor-client or 'indemnity' basis because Ms Cumming-Steward had not accepted settlement offers made to her

¹ [2014] NZERA Auckland 485.

² *PBO v Da Cruz* [2005] ERNZ 808, 819-820.

on 3 June and 30 June 2014. Those offers, made on a ‘without prejudice save as to costs’ basis, would have resulted in Ms Cumming-Steward receiving either \$1000 (the 3 June offer) or just under \$1800 (the 30 June offer, being the \$2000 held in trust less the independent solicitor’s fee of \$175 plus GST for holding and disbursing the funds). Both offers were made on the basis that they had to be accepted on the day they were made. The 3 June offer was sent at 11.13am to Ms Cumming-Steward’s representative, Danny Gelb, with a 2pm deadline. The 30 June offer was sent to Mr Gelb at 10.24am with a 3pm deadline. Mr Gelb expressly rejected the 3 June offer on Ms Cumming-Steward’s behalf and made a counter offer for a larger amount. There appeared to be no response made to TFSL’s 30 June offer.

[5] Ms Cumming-Steward made her own costs submissions – a three paragraph email – in which she said she could not afford to have Mr Gelb represent her any more. She described hearing about the 3 June offer by way of a phone call from Mr Gelb during her lunch break at the new job she had by then. She said she felt under pressure from the deadline only one hour away and did not know what to do. Her submission did not refer to the 30 June offer but said she did not think it was fair that she should have to pay any more than the Authority member had suggested in the earlier determination (being less than \$250 for the independent solicitor’s fee).

Costs principles applied

[6] The Authority’s discretion to award costs is exercised with the guidance of established principles considered on a case by case basis.³ A tariff-based approach is used with an unduly rigid approach avoided by adjusting the tariff up or down according to relevant principles and the particular circumstances of the case.

[7] Without prejudice offers (commonly referred to as *Calderbank* offers) may result in an upward adjustment of the tariff. The particular offers made in this case warranted no such adjustment. The narrow window of three hours on 3 June and five hours on 30 was not a reasonable period for the offers to be held open in circumstances where Ms Cumming-Steward, at that time, had a representative who needed to contact her, explain the offer, provide advice and give her some opportunity to reflect on it before deciding. I was not persuaded TFSL’s submission that what it

³ *PBO v Da Cruz* [2005] ERNZ 808, 819-820.

euphemistically described as its “*relatively short*” time frames for acceptance of the offers were a result of “*the Authority’s timetables*”. There were two clear working days (and a weekend) between the setting of the timetable on 29 May (including a direction to lodge the instalment funds on trust) and the deadline to do that on 3 June. It was in TFSL’s hands (from the end of an Authority case management conference held with the representatives on the afternoon of 29 May) to have made an offer earlier than the late morning of the day on which it was directed to lodge those funds.

[8] The *bona fides* of those offers as genuine attempts to settle the matter was further undermined by the language used in them. The 3 June offer began with a paragraph attacking Ms Cumming-Steward honesty, including the phrase “*again her honesty is being called into question*”.

[9] Although the investigation meeting finished mid-afternoon I took a half-day as the starting point for costs to be assessed on the basis of the daily tariff (that was \$1750). Entirely speculative allegations by TFSL’s principal John Campbell about Ms Cumming-Steward’s conduct on two points had the effect of unnecessarily lengthening the investigation meeting. Allowing TFSL costs in respect of that time would be unreasonable. An unsubstantiated allegation by Mr Campbell that Ms Cumming-Steward had damaged the tenancy debt collection business of TFSL by contacting real estate agents required additional questioning time with him, Ms Cumming-Steward and the one witness who was actually a real estate agent, Derryn Mayne. More time was wasted by Mr Campbell’s unsubstantiated allegation that Ms Cumming-Steward was in some direct way responsible for allowing the theft of a charity box from the office reception counter. Neither allegation assisted with determining the real issue of whether or not Ms Cumming-Steward had breached confidence by disclosing terms of her settlement agreement to a third party.

[10] I have also borne in mind that costs are not to be used to express disapproval of the unsuccessful party’s conduct – here Ms Cumming-Steward’s conduct in breaching confidence – because she has already ‘paid the price’ for that error in the penalty awarded against her. While, according to her evidence at the investigation meeting, Ms Cumming-Steward now has a full-time job I understood her means to pay a substantial costs award to be relatively limited. I concluded it was consistent with equity and good conscience in this case, and the principle that costs awards

should be modest, for the event of TFSL's success overall to be marked by an award of costs of \$1250 and for Ms Cumming-Steward to pay the cost of the independent solicitor's fee for holding funds on trust.

[11] It was also consistent with the caution given by the Employment Court in *PBO v Da Cruz* that parties needed to ensure costs being incurred were reasonable in light of the amount likely to be recovered. In this case the most TFSL could have hoped for was an order allowing it not to pay the last instalment of \$2000 and a penalty (that a review of case law would have indicated was likely to be in the range of \$500 to \$1000). Spending around twice that amount on legal costs in pursuit of that goal was its own choice, not one for which Ms Cumming-Steward should bear the whole amount.

Resulting orders

[12] The penalty and costs Ms Cumming-Steward owes to TFSL are to be paid by the independent solicitor releasing the \$2000 (and any interest earned) held on trust to TFSL's solicitor within seven days of the date of this determination. I have so ordered.

[13] The following steps are also ordered to meet the fee of the independent solicitor for his work in holding the funds:

- (i) The independent solicitor is to send a fee for the invoice (of up to \$250, including GST) to TFSL's solicitor, Ms Tabb.
- (ii) Ms Tabb is to advise Ms Cumming-Steward of the exact amount due (by email to her) and to pay that invoice in the normal way.
- (iii) Ms Cumming-Steward is to pay the amount of the invoice to Ms Tabb within seven days of being advised of the amount due.
- (iv) Leave is reserved to Ms Tabb to apply to the Authority for further orders in the event that Ms Cumming-Steward has not paid the amount due within those seven days (including an order for any additional costs incurred by Ms Tabb in doing so).

[14] It is important that Ms Cumming-Steward comply strictly with the requirement to pay the amount due to Ms Tabb when advised of it.

[15] The Authority has appreciated the assistance of David Liu, a partner of Yu Lawyers, in acting an independent solicitor and holding funds in trust at the Authority's direction.

Robin Arthur
Member of the Employment Relations Authority