

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 101
5407704

BETWEEN PETER OTTO SCHULTZ

AND M.R. and R.P. and E.F. VIGIS
 trading as
 EXPRESS SUPPLIES
 Respondent

Member of Authority: K J Anderson

Representatives: S Austin, Advocate for Applicant
 S Schofield, Counsel for Respondent

Submissions received: 22 January 2014 from Respondent
 4 February 2014 from Applicant

Determination: 19 March 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 17 December 2013¹ the Authority found that the applicant was not unjustifiably dismissed or unjustifiably disadvantaged in his employment; and his dismissal on the grounds of redundancy, was something that a fair and reasonable employer could do in the circumstances. The parties were invited to resolve the issue of costs but have not been able to do so. Submissions on costs have been lodged by the parties in anticipation of the Authority determining this matter.

[2] The respondent seeks a contribution to the costs incurred in the sum of \$3,400. Reference is made to a *Calderbank*² offer made to Mr Schultz on 17 April 2013, well before the investigation meeting that was held on 22 August 2013. The terms of the offer were that the respondent would pay to Mr Schulz the sum of \$3,400 plus a contribution of \$1,600 (plus GST) towards his costs. The offer was left open until five

¹ [2013] NZERA Auckland 576

² *Calderbank v Calderbank* [1975] 2 All ER 333

working days before the Authority's investigation meeting but was not accepted by Mr Schultz. Neither was any counter-offer made.

[3] The submissions for the respondent acknowledge the principles established by *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.³ One of these principles is that without prejudice except as to costs offers can be taken into account by the Authority when exercising its discretion when considering an appropriate costs award. The Authority is also referred by the respondent to the approach of the Court of Appeal in a judgment pertaining to *Bluestar Print Group (NZ) Ltd v Mitchell*⁴ where it was stated that:

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

[4] While the Authority has had the opportunity to consider the evidence of both parties when determining the validity of Mr Schultz's claims, given the overall circumstances, including the fact that he was totally unsuccessful, it has to be said that the *Calderbank* offer was reasonable and that by not accepting it, Mr Schultz was on notice that it could subsequently be taken into account in a costs setting.

[5] The investigation meeting effectively occupied half of one day. Therefore, applying the usual tariff based approach (\$3,500 for one day of hearing) adopted by the Authority, a costs award of \$1,750 would be appropriate as a base figure and then the *Calderbank* offer can be taken into account in regard to whether the award should be increased.

[6] The submissions for Mr Schultz point to his impecuniosity as well as the difficulty that he faces in regard to obtaining new employment. It is submitted that costs should lie where they fall. However, it is well established that where impecuniosity is pleaded, evidence of this must be provided; such as bank statements and other relevant material, as evidence of the financial status relied upon when advancing a hardship argument. No such evidence has been produced by Mr Schultz.

³ [2005] ERNZ 808

⁴ [2010] ERNZ 446

Determination

[7] It is not the role of the Authority to impose further hardship upon a dismissed employee whom has pursued unsuccessful claims. And while I have considered the appropriateness of accepting the respondent's submissions in regard to an increased award of costs, on the basis of the overall evidence and my general awareness of the circumstances of Mr Schultz, I conclude that the facts of this particular matter only warrant an application of the usual tariff approach that applies to a half day investigation meeting.

[8] Pursuant to clause 15 of the Second Schedule of the Employment Relations Act 2000, Mr Schultz is ordered to pay to the respondent the sum of \$1,750.00.

K J Anderson
Member of the Employment Relations Authority