

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2015] NZERA Auckland 236  
5532647, 5538331, 5539828**

BETWEEN

TERRY TIBBITTS  
Applicant

AND

EWP SALES NEW ZEALAND  
LIMITED  
First Respondent

UP2IT ACCESS HIRE LIMITED  
Second Respondent

Member of Authority: Eleanor Robinson

Representatives: Bridget Smith, Counsel for Applicant  
Rani Amaranathan, Counsel for Respondent

Costs Submissions 28 July 2015 from Applicant  
30 July 2015 from Respondent

Determination: 7 August 2015

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In a determination dated 30 June 2015 ([2015] NZERA Auckland 196) the Authority found in respect of the three joined cases before it, that in respect of file number:

- i. 5532647: The First Respondent EWP Sales New Zealand Limited (EWP) was in breach of clause 4 of a Record of Settlement by failing to pay Mr Tibbitts the sum of \$24,500.00, and awarded compliance plus interest and a penalty;
- ii. 5539828: The Second Respondent, UP2IT Access Hire Limited (UP2IT) had not underpaid Mr Tibbitts a contractual bonus payment but had in fact overpaid the bonus by \$15,154.75; and
- iii. 5538331: The Applicant, Mr Terry Tibbitts, was in breach of clause 6 of the Record of Settlement by breaching clause 28 Restraint of Trade of the EWP Employment Agreement No. 2, and awarded compliance and a penalty

[2] In that determination I stated at paragraph [127] that I was of the view that costs should lie where they fell, but if that was not the case, the parties would be able to settle this

issue between themselves. Unfortunately they have been unable to do so, and both parties have filed submissions in respect of costs.

### *Submissions of the Parties*

[3] The matter involved 2 days of meeting time. Ms Smith, on behalf of the Applicant, submits that the recommendation of the Authority in determination ([2015] NZERA Auckland 196 that costs should lie where they fall should be applied.

[4] Ms Amaranathan, for the First and Second Respondents, is seeking a contribution to costs to the Second Respondent, Up2IT, of \$1,400.00 being a sum proportional to the time spent on that part of the investigation meeting and as required subsequent to it, proportional to the normal daily tariff rate in the Authority of \$3,500.00 per day.

[5] In respect of the First Respondent, EWP, Ms Amaranathan accepts that both Mr Tibbitts and EWP had a measure of success, however submits that if Mr Tibbitts had complied from the outset with clause 6 of the Settlement Agreement, EWP would have paid the sum of \$24,500.00 due in accordance with clause 4 of the Settlement Agreement and both the claims by EWP and Mr Tibbitts would have been unnecessary.

[6] Ms Amaranathan further submits that EWP made a Calderbank<sup>1</sup> Offer, that is without prejudice save as to costs offer, to Mr Tibbitts by letter dated 24 February 2015 which could have placed him in a better position than he is as at present.

[7] The terms of the Calderbank Offer were that Mr Tibbitts would:

- Comply with a non-competition restraint contractual clause
- Comply with a non-solicitation restraint contractual clause
- Comply with a confidentiality obligations contractual clause
- Receive the sum of \$24,500.00 from the First and Second Respondents by 28 November 2015
- Pay the First and Second Respondents reasonable legal fees upon production of an invoice

[8] In accordance with determination [2015] NZERA Auckland 196 Mr Tibbitts was awarded the sum of \$24,500.00 plus interest, and was ordered to pay a \$10,000.00 penalty.

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<sup>1</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA)

Accordingly Ms Amaranathan submits that as a result of the determination, Mr Tibbitts is in a worse position that he would have been had he accepted the Calderbank Offer.

[9] Ms Smith, on behalf of Mr Tibbitts, submits that the Calderbank Offer was not a genuine offer in that the settlement was dependent on the actions of several third parties including Elevated Access New Zealand Limited, Ms Karen Williams, and Castle Access Equipment Limited who were not parties to the litigation. In that respect, it was not an offer capable of being accepted by Mr Tibbitts alone.

[10] Further Ms Smith submits that the terms of the Calderbank Offer were not sufficiently clear, precise and certain, citing disputes between the parties as to what constituted confidential information, who were the clients in question, the fact that it did not quantify the legal fees and disbursements sought, nor could Mr Tibbitts reasonably estimate them, such that it also fails as a genuine Calderbank Offer on those grounds.

[11] In response, Ms Amaranathan submits that the position of the third parties referred to in the Calderbank Offer is not relevant to whether Mr Tibbitts is now in a worse position that if he had accepted the Calderbank Offer since he did not accept it. His non-acceptance was based not on the fact of the third parties' involvement, but on the fact that he regarded any claim for breach of the restraint to be frivolous and vexatious, and that he denied taking or using confidential information.

[12] Consequently Ms Amaranathan is seeking full solicitor client indemnity costs to be awarded to EWP in the sum of \$10,908.00 plus GST, or in the alternative she submits that costs based on the usual daily tariff basis be awarded.

[13] Ms Smith points out that further offers to settle the proceedings were made by both parties subsequently to the Calderbank Offer and prior to the Investigation Meeting on 19 and 20 May 2015, these offers were made on the record and formed part of an agreed bundle of documents. On this basis, Ms Smith submits that it is appropriate that costs should lie where they fall.

## **Determination**

### **Costs in respect of file no: 5539828**

[14] The claim by the Applicant against UP2IT was wholly unsuccessful. Costs normally follow the event and I consider it appropriate that costs are awarded proportional to the time spent determining the issue in respect of the UP2IT bonus claim during and subsequent to the Investigation Meeting.

[15] I order Mr Tibbitts to contribute the sum of \$1,250.00 towards UP2IT's actual costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

**Costs in respect of File Nos: 5532647 and 5538331**

[16] It is necessary to consider what effect the Calderbank Offer should have upon the award of costs in this matter. A Calderbank Offer is a factor to be considered by the Authority in respect of costs.

[17] The Court of Appeal in *Health Waikato Limited v Van Der Sluis*<sup>2</sup> observed that: “the Calderbank letter field is fully discretionary”. The nature of this wide discretion is such that if the Authority awarded a lesser amount than the amount offered in the Calderbank Offer, there would be no absolute protection to the party which had made the offer in terms of costs. Equally, the Authority may take into consideration a Calderbank Offer when more has been awarded than was offered.

[18] In *Shanks v Agar*<sup>3</sup> Chief Judge Goddard noted that for a pre-trial offer, that is a Calderbank Offer, to be relevant in costs, it must be clear and transparent, and made in sufficient time for the other party to duly consider it.

[19] In this instance, whilst I accept that the Applicant is now in a financially worse position than he would have been had he accepted the Calderbank Offer, I also take into consideration the inclusion of third parties not party to the litigation and a degree of ambiguity in the Calderbank Offer, specifically concerning the issue of what constituted reasonable costs.

[20] I also consider it relevant that there were further offers to settle the proceedings by both parties prior to the Investigation Meeting on 19 and 20 May 2015.

[21] On this basis, I continue to be of the view that costs should lie where they fall in respect of the costs pertinent to files no: 5532647 and 5538331, and make no order for costs.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>2</sup> [1997] 10 PRNZ 514

<sup>3</sup> *t/a Rod Agar & Co* [1996] 2 ERNZ 578