

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 155
5399804

BETWEEN	NICHOLAS DUFFY First Applicant
	MICHAEL SPEIGHT Second Applicant
AND	CGML LIMITED First Respondent
	WILLIS STREET PARKING LIMITED Second Respondent

Member of Authority:	Michele Ryan
Representatives:	First and Second applicants in person Guido Ballara, Counsel for Respondents
Submissions received:	25 August and 20 September 2016 from the Respondent 2 September 2016 from the Second Applicant 19 September 2016 from the First Applicant
Determination:	16 December 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 8 July 2016¹ the applicants' personal grievances against the first respondent and the first applicant's claim against the second respondent were each dismissed.

[2] The respondents seek a contribution of \$30,000 towards costs, plus recovery of \$94.84 in disbursements. They refer to valid *Calderbank* offers, made to each of the applicants, (\$1,000 to the first applicant and \$750 to the second applicant) as justification for the uplift to a costs award.

¹ *Duffy v CGML Ltd* [2016] NZERA Wellington 80

[3] The applicants are no longer legally represented. Each individual provided a personal submission.

[4] The first applicant, Mr Duffy says he has remained unemployed since his dismissal and is considering bankruptcy. He is of the view that the respondents should contribute \$20,000 (or thereabouts) to his costs.

[5] The second applicant, Mr Speight, accepts that he must pay make some contribution to the first respondent but asks for the Authority to consider the time it took to have each applicant's case heard.

Principles

[6] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Employment Relations Act. The Authority has a wide discretion as to whether to award costs and if so, the quantum.²

[7] In determining how legal costs and expenses should be dealt with in this matter I have given particular regard to the principles that:

- costs generally follow the event and are modest;
- the use of the Authority's daily tariff applied to the number of days to investigate the claims is generally the starting point to an assessment.
- The Authority is then able to adjust an award upwards to downwards depending on the particular circumstances of the case.
- *Calderbank* offers may be considered as part of the circumstances of the case

Discussion

What is the effect of the Calderbank offers?

[8] In *Bluestar Print Group (NZ) Ltd v Mitchell*³ the Court of Appeal recognised in an employment context the use of *Calderbank* offers. It held:

*“that the public interest in the fair and expeditious resolution of disputes would be undermined if a party were to ignore a Calderbank offer without any consequences as to costs.”*⁴

² The relevant principles are set out in *PBO Ltd v Da Cruz* [2005] ERNZ 808

³ [2010] NZCA 385; [2010] ERNZ 446

[9] Mr Duffy says he was not motivated by vindication as reason to refuse the *Calderbank* offer. Rather, he says the offer made to him was not a serious attempt to resolve his claims. Mr Speight did not provide an explanation as to why he refused the offer.

[10] The applicants were represented by an experienced practitioner when the *Calderbank* offers were sent. I agree with submissions on behalf of the respondents that it must be taken that the applicants had been properly informed of the risk of liability as regards costs if they pursued their respective claims but were not successful.

[11] I note the offers *Calderbank* offers were made 6 months in advance of the Authority's investigation meeting and prior to scheduling requirements for the exchange of evidence began. I accept that the offer made to each of the applicants was by no means extravagant. However the offers been accepted, each applicant would have been in a better position than he now finds himself. The applicants' rejection of the *Calderbank* offers were unreasonable and is a factor I am obliged to take into account in my assessment.

[12] The respondents' request for costs of \$30,000 as a consequence of applicants' failure to accept the *Calderbank* offers equates to approximately 83% of the respondents' actual costs (GST exclusive). An award of that sum would have the effect of granting almost total indemnity to the respondents without regard to the nature of the case or the reasonableness of costs expended by the respondents. This methodology has a potential to create a disproportionate award and I am unwilling to agree to the approach.

[13] A better approach is to consider the factors set out below against my conclusion that the failure by each applicant to accept a reasonable *Calderbank* offer supports an uplift before reaching a final conclusion.

The Authority's approach to accessing costs

[14] The Authority's usual starting point is to assess the number of investigation days against the Authority's notional daily tariff at \$3,500 per day (the rate it was set at the time of the investigation meeting). The Authority's meeting was conducted

⁴ Ibid at [18]

over two days although each day of investigation ran well in excess of usual business hours. I consider the investigation meeting lasted the equivalent to 2.5 days. A tariff of \$8,750 is the starting point.

Costs generally follow the event

[15] Mr Duffy did not put forward a cogent explanation for why costs should be awarded to him in circumstances where his claims were unsuccessful. I have no basis to consider reversing the presumption that costs are generally awarded to a successful party and am unwilling to do so. The respondents were put to the expense of defending the applicants' claims and I find they are entitled to a contribution of the costs incurred.

Ability to pay

[16] An assessment of undue financial hardship requires consideration of the total financial position of the party concerned, including both assets and liabilities and income and necessary expenditure.⁵ Mr Duffy submits he is financially constrained but did not provide any evidence of his financial situation to allow the Authority to consider and assess his assertion. I cannot give any weight to this matter.

Determination

[17] Taking into account the *Calderbank* offers and that costs should follow the event, I consider an increase to the notional daily tariff to \$5,000 per day (\$12,500 over 2.5 days) is a reasonable uplift in all the circumstances. I am satisfied also that the respondents' disbursements were reasonable and should be reimbursed.

How best to apportion costs between the applicants.

[18] The applicants were made redundant following a restructuring by the first respondent. The evidence corresponding to those actions was largely similar and relevant to their respective unjustified dismissal claims.

[19] Both applicants raised claims of an unjustified disadvantage against the first respondent although the factual matrix surrounding those separate events was unique to each individual. Mr Duffy also had an arrears of wages claim against the second respondent.

⁵ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137 at [36]

[20] Mr Duffy's claims required a noticeably greater portion of time to investigate than those of Mr Speight. The respondents' request for a greater uplift in costs against Mr Duffy as compared to Mr Speight appears to recognise this factor. I am further unwilling to make an order against the applicants for joint liability where the evidence and complexity associated with their individual claims was markedly different.

[21] Finally, Mr Duffy takes issue with the way costs have been treated by the respondents. He notes that the invoices produced by the respondents' counsel were issued to the first respondent only and says these must be inaccurate and/or misleading. Mr Duffy will be aware, given his prior employment position, that the first respondent manages the second respondent. I do not find unreasonable for invoices to be sent to the controlling entity in these circumstances, nor does that factor alter the substance of this determination.

Orders

[22] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act I order:

- (i) Mr Nicholas Duffy to pay CGML Ltd the sum of \$7,500 towards the first and second respondent's costs plus \$47.42 in disbursements.
- (ii) Mr Michael Speight to pay CGML Ltd \$5,000 toward costs plus \$47.42 in disbursements.

Michele Ryan
Member of the Employment Relations Authority