IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 379
3134596

BETWEEN	DU VAL MANAGEMENT LIMITED Applicant
AND	JAMIE HENDERSON First Respondent
AND	WILLIAM CORPORATION LIMITED Second Respondent

Member of Authority	Eleanor Robinson
Representatives:	Madeline Lister and William Buckley, counsel for the Applicant James Cowan, counsel for the First Respondent Gwen Drewitt and Alex Beale counsel for the Third Respondent
Costs Submissions	12 August 2021 from the Applicant 29 July 2021 from the First Respondent 29 July 2021 from the Second Respondent
Determination:	27 August 2021

COSTS DETERMINATION OF THE AUTHORITY

---

[1] In a determination dated 21 May 2021 ([2021] NZERA 218) the Authority determined that the applications for interim orders made by the Applicant should be declined. The parties were directed to mediation and it was noted that costs were reserved.

[2] On 6 July 2021 the Applicant informed the Authority that it wished to withdraw the proceedings against the First and Second Respondents.

[3] The parties subsequently discussed the issue of costs with a view to settling them without the intervention of the Authority, although they requested that the Authority set a timetable for submissions in the event that they were unable to reach an agreement.

[4] Unfortunately they were unable to reach agreement, and all parties have filed submissions in respect of costs.

[5] The application for interim orders was determined 'on the papers' which meant that no face to face investigation was involved and the matter was determined on papers including the statements of problem and reply, affidavit evidence and submissions from the parties.

[6] The First Respondent is seeking a contribution to costs award of $9,250.00 in total as supported by invoices.

[7] The Second Respondent is seeking a costs award of $25,388.59 plus GST.

[8] The Applicant considers that a reduction in the Authority's notional daily tariff should be applied.

Submissions of the First Respondent

[9] It is submitted on behalf of the First Respondent that he was the successful party in relation to the interim determination.

[10] It is submitted that the daily tariff rate of $4,500.00 should be increased to $6,750.00 on the basis that the First Respondent provided undertakings as indicated in the Authority's Minute dated 19 March 2021. This was prior to the matter being determined on 21 May 2021. It is submitted that the undertakings provided on 9 April 2021 protected the Applicant's interests on an interim basis and made the interim injunction hearing unnecessary.

[11] It is further submitted that the Applicant failed to accept a *Calderbank* Offer made in a letter headed 'Without prejudice save as to costs' to the Applicant on 22 April 2021.[1] The Calderbank Offer was an offer to settle the matter by way of the First Respondent providing undertakings to the Applicant. Accepting the Calderbank Offer would have avoided the need for both the interim injunction application and the substantive application.

[12] After the Applicant refused to accept the Calderbank Offer the First Respondent submits that he incurred costs of $2,500.00 in respect of preparation for the substantive matter.

Submissions of the Second Respondent

[13] The Second Respondent submits that it incurred the majority of its costs up to 30 April 2021 and the remainder after that date.

---

[1] *Calderbank v Calderbank* [1976] Fam 93 (CA)

[14] It submits that it had requested that mediation in April 2021 for this matter be joined with another mediation in a related matter (file no 3135080), however counsel for the Applicant refused the request. This meant that it incurred preparation for two separate mediations.

[15] The Second Respondent also submits that the Authority should consider the Calderbank Offer. Before the expiry of the Calderbank Offer it had incurred legal fees arising from preparation for and attendance at the first case management conference call, lodging a statement of problem, and an affidavit under urgency.

[16] After the expiry of the Calderbank Offer it incurred further costs in relation to preparation for and attendance at a second case management conference call, and drafting legal submissions for the interim injunction hearing.

[17] The Second Respondent further submits that the First Respondent had tried to resolve the matter at an early stage by the offer of voluntary undertakings which protected the Applicant's interests on an interim basis and made the interim injunction hearing unnecessary. Further the undertakings were given in advance of the parties incurring the costs of attending a directions conference and drafting and filing written submissions.

Submissions of the Applicant

[18] The Applicant acknowledges that the interim injunction was not granted but notes the observation by the Authority in the interim determination that was favourable to it. These being that the First Respondent may have mislead the Applicant as to the reason for his resignation which could be considered a breach of good faith.

[19] However the Applicant submits that in light of the Authority's indication that its substantive claims were unlikely to be heard before January 2022, any substantive determination in its favour would not protect its genuine commercial interests in the interim, being the period of greatest risk of a breach of the Restraints by the First Respondent. That was the basis for its decision to withdraw the substantive claim before the parties were required to incur the costs associated with the substantive proceedings.

[20] Counsel for the Applicant submits that it is well established that costs in the Authority will be modest.[2] Accordingly the costs awarded in respect of the Interim Determination should be significantly reduced, noting that the application was determined on the papers.

---

[2] *Elisara v Allianz New Zealand Limited* [2020] NZEmpC 13 at [28-29], citing *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* AC 2A/5 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

[21] It is submitted that only one affidavit was filed for each Respondent and the affidavits were relevant to the Applicant's application for interim injunctions. The affidavits were not required for a substantive hearing, particularly as no timetabling directions had been made by the Authority in relation to the substantive claims. Allowing costs in relation to an affidavit for the interim investigation which was applicable in the substantive investigation would be in effect to allow 'double-dipping'.

[22] It is submitted that the only work undertaken by the First and Second Respondents in relation to its substantive claims could possibly be the drafting of paragraphs within the Respondents' statements in reply which specifically relate to the Applicant's substantive claims. It is submitted that these would be minimal.

[23] It is further submitted as relevant to the issue of costs that there has been repetition/duplication in relation to this file and a related file because the matters involved a significant amount of repetition/duplication in terms of attendances and documents filed across matters 3134596 and 3135080.

[24] The Applicant submits that prior to making its decision to withdraw its substantive claims it made Calderbank Offers by letters dated 25 June 2021 to the Respondents in an attempt to reach an agreement with the Respondents to obtain some protection of its legitimate commercial interests and to resolve the matter of costs.

[25] It was following the unsuccessful negotiations that it withdrew its proceedings before the Authority and this in turn meant that the scheduled mediation on 12 July 2021 did not take place.

Principles

[26] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

> **15 Power to award costs**
>
> (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
>
> (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[27] Costs are at the discretion of the Authority[3].

---

[3] *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

[28] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*[4].

[29] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

[30] Of relevance in this instance is the principle that costs will be modest. The Employment Court further observed at para [47]:

> … we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.

Costs Award

[31] Costs incurred in relation to mediation are not usually taken into consideration by the Authority, and it is unusual for the Authority to allow preparation time per day of the investigation meeting.

[32] In this case there was an interim investigation which took place 'on the papers' and it is usual in such cases for the starting point for costs to be set at the rate of half a day at the normal daily tariff rate, this being $2,250.00.

[33] Costs are being sought by the Respondents in addition to those incurred for the interim investigations are based upon preparation for a substantive hearing. I note as significant that any preparation for the substantive hearing would have been carried out prior to the Authority making any timetabling directions in relation to that proceedings.

[34] It is also significant that there has been a duplication of the work needing to be carried out by the Second Respondent in respect of files 3134596 and 3135080

[35] Considering the Calderbank Offers which were made by the parties, that made by the Respondents was made prior to the interim investigation meeting, and the undertakings had also been provided by the First Respondent prior to the interim investigation taking place.

[4] *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

[36] The Calderbank Offer made by the Applicant followed the issuing of the interim determination, and before the withdrawal of its application to the Authority which negated the need for a substantive investigation.

[37] Whilst taking note of the comments made by Judge Inglis as regards the ameliorating of the '*steely*' approach noted in the judgment in *Stevens v Hapag-Lloyd (NZ) Ltd*[5] which referred to: "significant costs awards", I consider that *Calderbank* Offers may still be taken into consideration in the matter of costs in the Authority on the basis that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted[6].

[38] Taking all these considerations into account, I consider that a costs award of $5,500.00 in favour of the Respondents in appropriate.

[39] **I order Du Val Management Limited to pay Mr Henderson a contribution to costs in the sum of $3,500.00, and Williams Corporation Limited $2,000.00 in respect of this matter pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.**

Eleanor Robinson
Member of the Employment Relations Authority

---

[5] [2015] NZEmpC 137 at para [95]
[6] *Aoraki Corporation Ltd v McGavin*[6] [2004] 1 ERNZ 172 (CA) at [53]