IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 177
EMPC 165/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CRAIG SOUTHALL Plaintiff
AND	MORGAN TUAU Defendant

Hearing: (on the papers filed on 3 and 16 September 2015)

Appearances: Ms L Tucker, counsel for the plaintiff

Judgment: 6 October 2015

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] In a determination of 10 April 2015,[1] the Employment Relations Authority (the Authority) considered a claim brought by Mr Morgan Tuau that he was unjustifiably dismissed from his job as a Farm Manager working for Mr Craig Southall, seeking remedies including lost remuneration, compensation and contribution to his legal costs. Mr Southall denied the claims and counter-claimed damages from Mr Tuau for his failure to teat spray cattle, and also claimed Mr Tuau was overpaid wages and holiday pay.

[2] The result of the investigation meeting was a determination that Mr Tuau was unjustifiably dismissed, that Mr Southall should pay Mr Tuau the sum of $2,550 without deduction within 28 days of the date of the determination, that the

1 *Tuau v Southall* [2015] NZERA Auckland 106.

counter-claims brought by Mr Southall against Mr Tuau be dismissed, and that costs be reserved.

[3] Subsequently the Authority considered an application for costs, brought by Mr Tuau. It was submitted that Mr Tuau had incurred costs of $7,625, and he sought a contribution of $3,500.

[4] In the course of the Authority's determination as to costs,[2] the Authority was required to consider two Calderbank offers which had been made by Mr Southall prior to the investigation meeting, the details of which are described more fully below. The Authority determined that it was reasonable for Mr Tuau to have rejected those offers.[3]

[5] The Authority concluded that whilst Mr Tuau was put to additional expense in responding to significant counter-claims against him which were wholly unsuccessful, Mr Southall had been put to unnecessary expense in preparing to defend an arrears of wages claim which was withdrawn by Mr Tuau shortly before the investigation meeting. The Authority determined that it was appropriate that Mr Southall contribute to costs incurred by Mr Tuau in the sum of $3,000; this sum was payable within 14 days of the date of the determination.[4]

The challenge

[6] Mr Southall brought a challenge to the costs determination, submitting in effect that the Authority had reached an incorrect conclusion regarding the Calderbank offers; that consideration also needed to be given to the fact that Mr Tuau had withdrawn his wages arrears claim shortly before the hearing which meant unnecessary costs had been incurred; and referring also to the fact that the Mr Tuau had filed and served his brief of evidence for the investigation meeting late.

[7] Mr Southall asserted that Mr Tuau should pay $12,547.16 in respect of the costs incurred by Mr Southall from the date of the first Calderbank offer to the date

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2 *Tuau v Southall* [2015] NZERA Auckland 155.
3 At [8] – [9].
4 At [14].

of the hearing relating to Mr Southall's defence of Mr Tuau's personal grievance; or an award should be made in such sum as the Court saw fit.

[8] Following service of the statement of claim, no statement of defence was filed or served for Mr Tuau. The Court accordingly directed that Mr Southall was entitled to a hearing of his challenge, it being proposed that this be dealt with on the papers by the filing and service of submissions and an affidavit in support which duly occurred.

[9] Subsequently, an opportunity was offered to Mr Tuau's counsel to file and serve submissions according to a strict timetable; that opportunity was not taken.

Evidence

[10] Mr Southall described the history of offers which were made to resolve the matter. He said that on 24 February 2015 he made an offer "for $5,000 in full and final settlement of all matters between the parties". The offer was contained in a letter sent by his lawyer to the lawyer acting for Mr Tuau. It did not state that it was in full settlement of all matters. Rather, the offer was put in this way:

> While our client is happy to defend this matter, he is mindful of the irrecoverable costs that will be incurred. On that basis, and purely as a pragmatic resolution, our client is willing to pay the sum of $5,000 under s 123(1)(c) to resolve matters, with a record of settlement being prepared by us in the usual manner.

[11] The offer was declined by Mr Tuau's lawyer:

> I refer to your letter dated 24 February 2015, in particular your client's offer of settlement. Plainly, it is not enough. That said, my client has contemplated settlement and keeps an open mind in that regard. If this matter is to settle, your client needs to put his best foot forward now and advance an offer of a reasonable amount, particularly having regard to legal costs that my client has already incurred. Statutory entitlements are also payable. …

[12] It appears there were then telephone discussions between the two lawyers on 17 March 2015, as a result of which Mr Southall's lawyer advanced another offer on a Calderbank basis. Mr Southall, in his affidavit, said this was "on the same terms as the earlier offer". In fact, the offer was put in these terms:

> As discussed our client is unwilling to offer any more than the $5,000 previously on the table (even getting him back to that level was a struggle). However we can confirm that this offer would include our client dropping his counter-claims against your client, both for the wage overpayment and for our client's losses arising out [of] his herd's high somatic cell count … this offer will remain open until it is otherwise withdrawn. …

[13] On 18 March 2015, Mr Tuau's lawyer advised that his wage arrears claim would be withdrawn.

[14] On the same day, Mr Southall's lawyer responded to this development in an email sent at approximately 4.00 pm, noting that a considerable time had been spent with regard to the now abandoned allegations of arrears. As a result, Mr Southall's attitude had "hardened", and "all offers" would be withdrawn, as from 5.00 pm that day.

[15] Although there were subsequent settlement discussions between the parties, these were unsuccessful.

Relevant principles

[16] The starting point is cl 19 of sch 3 of the Act, which confers wide discretionary powers on the Court in these terms:[5]

> **19 Power to award costs**
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> (1) The Court in any proceedings may order any party to pay any other party such costs and expenses (including expenses of witnesses) as the Court thinks reasonable.
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> (2) The Court 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.

[17] The discretion is to be exercised judicially and according to principle. As was confirmed by the full Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz,* cl 19 refers to proceedings in both the Authority and the Court.[6]

[18] That decision also approved the basic tenets which are appropriate for the Authority to apply when considering an application for costs in the Authority. These include:[7]

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[5] See also reg 68(1) of the Employment Court Regulations 2000.

[6] *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [12] – [13].

- There is a discretion as to whether costs would be awarded and what amount.
- The discretion is to be exercised in accordance with principle and not arbitrarily.
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessarily or unreasonable.
- That costs generally follow the event.
- That without prejudice offers can be taken into account.
- That awards will be modest.
- That frequently costs are judged against notional daily rates.
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[19] A full Court recently confirmed that these principles remain appropriate: *Fagotti v Acme & Co Limited*.[8]

[20] As was acknowledged by Judge Inglis in *Booth v Big Kahuna Holdings Limited,* "the legal costs of preparing for and attending an investigation meeting should be modest."[9] Parties who elect to incur costs in excess of the current notional daily rate of $3,500 "are entitled to do so, but cannot confidently expect to recoup any additional sums."[10]

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7 At [44].

8 *Faggoti v Acme & Co Ltd* [2015] NZEmpC 135, at [48] and [114].

9 *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4 at [15].

10 At [17].

[21] The relevant principles as to Calderbank offers are well known, and were conveniently summarised by the Court of Appeal in *Blue Star Print Group (NZ) v Mitchell*:[11]

> [19] We accept that there may be cases where vindication through seeking a statement of principle in the employment context may be relevant to the exercise of the Court's discretion. Thus the relevance of reputational factors means that costs assessments are not confined solely to economic considerations. But equally, an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the plaintiff.
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> [20] We consider that the potential for vindication to be a relevant factor does not mean that the developed jurisprudence under the High Court Rules costs regime should be ignored. We reject Mr Churchman's submission that the principles applicable to Calderbank offers should be adjusted or ignored in employment cases merely because of the nature of the employment relationship and because employees may in certain cases be motivated in part by the desire for vindication. As this Court has previously said a "steely" approach is required. 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. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors. The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

[22] With particular reference to costs in the Authority, this Court stated in *Mattingly v Strata Title Management Limited:*[12]

> [27] Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a "steely approach" ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court's observation in *Da Cruz* that Authority awards would be "modest". What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a de novo challenge, having regard to the circumstances of a particular case.

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[11] *Blue Star Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446, (footnotes omitted).

[12] *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15; [2014] ERNZ 1, (footnotes omitted).

[23] In *Fagotti*, a full Court confirmed that the remarks of the Court of Appeal about a "steely" approach to Calderbank offers expressed in *Bluestar Print Group* applies to the Authority's first instance jurisdiction as well as to the Court's appellate role.[13]

Calderbank offers

[24] I consider first the Calderbank offers which were made on behalf of Mr Southall.

[25] Although Mr Southall stated in his affidavit filed for the purposes of the challenge that the offer of 24 February 2015 was on the basis that it would be "in full and final settlement of all matters between the parties", as I have already observed that is not what the letter itself said. The material passage containing the offer has been reproduced above.

[26] The first offer did not state that it was to resolve all matters. Moreover, earlier in the letter, although passing reference was made to losses sustained by Mr Southall due to a failure to teat spray stock, or to notify Mr Southall that teat spray was needed, the focus of the letter when discussing the strengths and weaknesses of Mr Tuau's case related to his claim for unpaid wages and his alleged personal grievance.

[27] That there was some ambiguity in the offer is confirmed by the language used when the second offer was made on 17 March 2015. It was for the same amount as had previously been offered, but also made specific reference to a new matter, namely, the discontinuance of the counter-claims.

[28] It is evident from the Authority's substantive determination that the counter-claims were significant. Mr Southall called evidence from a witness who specialised in milk quality and the control of mastitis on dairy farms, who expressed a view that there were losses of $61,500 suffered by Mr Southall due to the fact that he had to have 73 cows culled as a consequence of mastitis, as well as costs associated with the treatment of the herd, and discarded milk arising from milk

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13 *Faggoti v Acme & Co Ltd,* above n 8, at [109].

quality issues. The Authority found that the factual basis for this opinion was not established on the evidence.[14]

[29] In my view, if a Calderbank offer is not clear about what is being proposed, it may be reasonable to reject it although that will depend on the extent to which the offer lacks clarity. In this instance, I find that the first Calderbank offer did not clearly state that the sum proposed included resolution of Mr Southall's counter-claims; it was not unreasonable for Mr Tuau to decline it.

[30] Turning to the second offer which was for the same sum and which now included resolution of Mr Southall's counter-claims, the evidence establishes that it was sent at 5.09 pm on 17 March 2015, and that at 3.58 pm on 18 March 2015 advice was given that it would be withdrawn unless it was accepted by 5.00 pm on the same day. At the time the second offer was made on 17 March 2015 the lawyer stated in her letter that the offer would remain "open until it is otherwise withdrawn". However, on 18 March 2015, Mr Tuau's lawyer was given advice that the offer had to be accepted within one hour. There is no evidence that Mr Tuau was capable of being contacted within that timeframe and that he would have had sufficient time to consider the matter and take advice.

[31] In *Shanks v Agar (t/a Rod Agar & Co),* the Court confirmed that for a Calderbank offer to be relevant to the assessment of costs, it must be clear and transparent and made in sufficient time to allow the employee to consider it and to take advice if necessary.[15] The recipient should be allowed "to calmly consider the offer before making a decision".[16]

[32] I find that the circumstances of the second offer did not facilitate such an opportunity, and that it was not unreasonable for Mr Tuau not to have responded within the timeframe set for acceptance.

[33] Accordingly, neither Calderbank offer was relevant to the assessment of costs in the Authority.

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[14] *Tuau v Southall*, above n 1, at [48]-[49].

[15] *Shanks v Agar (t/a Rod Agar & Co)* [1996] 2 ERNZ 578 at 581. See also *Okeby v Computer Assocs (NZ) Ltd* [1994] 1 ERNZ 613.

[16] At 582.

Other matters

[34] The next issue relates to the fact that Mr Tuau withdrew an aspect of his claim on 18 March 2015. Counsel for Mr Southall advises that approximately $1,045 was expended in answering that aspect of Mr Tuau's claim.

[35] I agree that as this was in the nature of a discontinuance, some allowance should be made for that factor. I shall return to this issue when making my overall assessment.

[36] The final matter raised for Mr Southall is that Mr Tuau failed to file his brief of evidence within the timeframe established by the Authority, in that it was filed and served two days late. No evidence has been provided as to the cost consequences of this failure. I accordingly make no allowance for this factor.

Conclusion

[37] Overall, Mr Tuau succeeded in establishing his alleged personal grievance. I consider it was appropriate for costs to follow the event. It is appropriate to apply the Authority's normal daily tariff of $3,500, as a starting point.

[38] Some discount for the discontinuance of one aspect of Mr Tuau's claim was also appropriate. In my judgment the allowance made by the Authority for this factor, $500, was reasonable.

[39] It follows that I agree with the conclusion reached by the Authority that Mr Southall should contribute to Mr Tuau's costs in the sum of $3,000.

[40] The challenge is dismissed.

[41] I make no order as to costs in respect of the challenge.

B A Corkill
Judge

Judgment signed at 4.15 pm on 6 October 2015