IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2023] NZEmpC 98
EMPC 376/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	CAISTEAL AN IME LIMITED Plaintiff
AND	MARY-LOUISE FAITHFULL Defendant

EMPC 426/2022

IN THE MATTER OF	an application for a compliance order
AND IN THE MATTER OF	an application for costs
BETWEEN	CAISTEAL AN IME LIMITED Plaintiff
AND	MARY-LOUISE FAITHFULL Defendant

Hearing: On the papers

Appearances: D Angus, agent for plaintiff
J Hobcraft, counsel for defendant

Judgment: 22 June 2023

COSTS JUDGMENT OF JUDGE K G SMITH

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[1] On 30 November 2022, judgment was entered in a proceeding between Caisteal An Ime Ltd and Mary-Louise Faithfull.[1] Costs were reserved. The parties have been unable to reach agreement about them and Ms Faithfull has applied for an order in her favour.

[2] A brief discussion about what happened is required to place the costs submissions into context.

[3] Ms Faithfull's employment with Caisteal ended on 27 April 2020 following an exchange she had with the company's director, Darren Angus.[2]

[4] Ms Faithfull successfully pursued a personal grievance in the Employment Relations Authority. She established that she was a permanent employee and succeeded in her claim that she was unjustifiably dismissed. The Authority awarded her unpaid wages of $624.83 for a period of time immediately prior to her dismissal. Additionally, she was awarded compensation of $5,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and a further compensatory sum for lost wages arising from the dismissal of $2,480.

[5] Caisteal challenged the determination seeking to overturn the Authority's conclusions. Part of its challenge was to dispute the Authority's method used to calculate the wage component of the awards it made.

[6] The challenge was largely unsuccessful. The company failed to establish that Ms Faithfull was a casual employee as it claimed, or that the dismissal was justified. It achieved modest success in obtaining an alteration to the method used to calculate the unpaid and lost wages component of the awards. It showed that Ms Faithfull's average weekly pay was $231.16 not the $310 used by the Authority, so that the amount payable to Ms Faithfull for unpaid wages before her employment ended reduced to $427.73 and the eight weeks of lost wages payable became $1,849.28.

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1 *Caisteal An Ime Ltd v Faithfull* [2022] NZEmpC 216.
2 At [2].

[7] Before the judgment was issued Caisteal had paid Ms Faithfull the sums awarded by the Authority, which step was taken because enforcement action had begun. Taking into account the adjustments referred at para [6], the effect of the judgment was that Ms Faithfull was overpaid $827.82. The company demanded repayment. Ms Faithfull did not react to that demand quickly enough for the company and it took the step of filing in the Court an application for a compliance order. That application was withdrawn when Caisteal was repaid but the company sought an order that it be reimbursed for the filing fee that it paid.

[8] One other matter needs to be considered because it is relevant to the costs claim. Caisteal unsuccessfully applied for a stay of the Authority's determination.[3] The costs of that application were reserved to be dealt with as part of the costs of the proceeding.[4]

Ms Faithfull's costs claim

[9] Ms Faithfull considered she was entitled to costs because, at an early stage in the litigation, she made an offer to Caisteal to settle without prejudice except as to costs (a Calderbank offer).

[10] On 18 February 2022, Mr Hobcraft wrote to Caisteal offering a reasonably conventional settlement. The company was invited to withdraw and discontinue its proceeding, pay Ms Faithfull $5,000 under s 123(1)(c)(i) of the Act and contribute $1,000 including GST to her costs. The offer required the proposed payments to be made within 14 days of the agreement being signed by a mediator under s 149 of the Act.

[11] The offer was available for acceptance for a short time, until 5 pm on 21 February 2022. It was promptly rejected.

[12] Mr Hobcraft submitted that the Court should award costs to Ms Faithfull because the offer was more beneficial to the company than the limited success it achieved from the judgment. The total amount awarded to Ms Faithfull in the

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3 *Caisteal An Ime Ltd v Faithfull* [2022] NZEmpC 59.
4 At [32].

Authority was $8,104.83, which was adjusted in the judgment to $7,277.01, while the offer would have required payment of $6,000.

[13] A table of potential costs prepared using 2B costs under the Court's Guideline Scale was attached to Mr Hobcraft's submissions.[5] Category 2B was provisionally allocated to this proceeding following a discussion with Mr Hobcraft and Mr Angus during a directions conference. Mr Hobcraft's table amounted to $24,975.50, of which $4,541 was for the stay and a further $20,434.50 was for the substantive claim.

[14] Ms Faithfull could not claim the amounts calculated by Mr Hobcraft, because her actual costs for the substantive proceeding were lower. Instead, she sought costs of $4,541 for the stay and $10,000 for the substantive proceeding or such other sums as the Court deemed appropriate.

[15] Caisteal does not accept that Ms Faithfull should be awarded costs. Its submissions can be summarised as follows:

(a) Mr Hobcraft's letter was not a Calderbank offer because it breached the confidentiality of mediation.

(b) Mr Hobcraft's submissions misconstrued the effect of the Court's decision on the application for a stay.

(c) Success in the substantive proceeding was shared, and in all the circumstances costs should lie where they fall.

(d) Or, alternatively, notwithstanding the Supreme Court's decision in *McGuire v Secretary for Justice* as it applies to a claim for costs by self-represented parties who are not lawyers, the Court could exercise its discretion and award costs to the company.[6]

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5 "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

6 *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335.

[16] In addition to the summarised submissions, Mr Angus took issue with the accuracy of Mr Hobcraft's criticisms of the company's conduct. Those criticisms, and the disagreement between the parties that saw a related dispute dealt with in the High Court, are not relevant and do not need to be discussed any further.

Analysis

[17] The Court's power to award costs is conferred by cl 19 of sch 3 to the Act. Any party may be ordered to pay to any other party such costs and expenses as the Court thinks reasonable. Costs may be apportioned between the parties as the Court thinks fit.[7]

[18] The power to award costs is supplemented by reg 68 of the Employment Court Regulations 2000, under which the Court may have regard to any conduct of the parties tending to increase or contain costs. This power includes considering any offer made by either party to the other a reasonable time before the hearing to settle any or all of the matters at issue between the parties.

[19] While the Court exercises a discretion in awarding costs they usually follow the event so that the successful party is entitled to an award of them.

[20] In this case Mr Hobcraft relied on the Calderbank offer and *Bluestar Print Group (NZ) Ltd v Mitchell* to explain why Ms Faithfull is entitled to costs.[8] In *Bluestar*, the Court of Appeal considered a Calderbank offer relating to a claim before the Authority. The Court took reg 68(1) as its starting point and was satisfied that the Calderbank offer fell squarely within the regulation.[9] It then considered the High Court Rules 2016, which provide guidance about the Court's discretion when considering the effect of such an offer.[10] The public interest in the fair and expeditious resolution of disputes was said to be undermined if a party was able to ignore a

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7 Employment Relations Act 2000, sch 3 cl 19(1) and (2).
8 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446.
9 At [17].
10 At [18]; High Court Rules 2016, rr 14.10 and 14.11; applied via Employment Court Regulations 2000, reg 6.

Calderbank offer without any consequences as to costs.[11] The Court of Appeal commented that:[12]

> …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.

[21] Relevantly, the Court noted that the normal effect of a Calderbank offer is that the costs position is reversed for steps taken after the offer was made.[13]

[22] The first issue is whether the letter of 18 February 2022 was a Calderbank offer and, if it was, if that has any bearing on costs.

[23] The offer to Caisteal stated Ms Faithfull's willingness to fully and finally settle all disputes arising from the employment relationship. In six numbered paragraphs the offer set out the proposal that would, if accepted, achieve a comprehensive settlement.

[24] Mr Angus' criticism of the offer stemmed entirely from his assertion that it repeated one made during mediation and, therefore, that it breached the confidentiality applying to mediation. Regulation 68(2)(b) prohibits the Court when fixing costs from considering anything done in mediation.

[25] I do not agree that there was any impropriety in the offer even if it repeated something proposed in mediation. The letter did not contain any comment or information about the discussions during mediation and did not, therefore, infringe reg 68(2)(b). It was only Mr Angus' submission that disclosed what may have been discussed in that forum.

[26] There is nothing in the Act, or elsewhere, preventing Ms Faithfull from making an offer after mediation that repeats a proposal made during it. That was a tactical

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11 *Bluestar Print Group (NZ) Ltd*, above n 8, at [18]; referring to *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA); and *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276 (CA).

12 *Bluestar Print Group (NZ) Ltd*, above n 8, at [20].

13 At [24]. See High Court Rules 2016, r 14.11(3).

step open for her to take. It follows that Mr Hobcraft's letter was a Calderbank offer and is relevant to costs.

[27] Mr Angus made two further submissions. The first of them was that Mr Hobcraft misconstrued the judgment that dismissed the stay application. Mr Angus viewed that decision as more nuanced than Mr Hobcraft acknowledged; the company's application failed, he thought, on an assessment of the balance of convenience and not because of a "point of law". While not expressed quite in these terms, it would seem Mr Angus' point was that Ms Faithfull should not benefit from resisting the application for a stay because the judgment was finely balanced and might have gone either way. He considered costs should lie where they fall.

[28] I do not accept that submission. Caisteal took steps to attempt to prevent Ms Faithfull from benefitting from the Authority's orders pending the outcome of its challenge. The decision went against the company and does not need to be more closely examined than that. That judgment contemplated costs would be awarded and there is no reason in principle why that outcome should not be reflected in an order now.

[29] Mr Angus' second submission was in two parts. The first part was that the parties had shared or mixed success and it would be appropriate, therefore, for costs to lie where they fall. The second part appeared to be in the alternative, and it was that costs could be awarded to the company. To support that claim Mr Angus prepared a schedule on a 2B basis totalling $24,497.50, including allocating costs for the stay to the company.

[30] I am not drawn to either part of that submission. I do not accept that the result of the substantive judgment could be called shared or mixed success. A more accurate characterisation is that Caisteal enjoyed limited success confined to one aspect of its challenge. The company would not, in any event, have been awarded costs as calculated by Mr Angus. First, because it chose to represent itself and would therefore not be entitled to an order. Second, even if it had been represented, an order would not have included the application for a stay which the company lost.

[31] Having concluded that the letter of 18 February 2022 was a Calderbank offer, the issue becomes whether the Court's discretion should be exercised in Ms Faithfull's favour.

[32] I consider that in relation to the substantive proceeding the discretion should be exercised in Ms Faithfull's favour. Her settlement offer was made at an early stage before almost all of the steps in the litigation were taken. Had it been accepted that would have ended the dispute in a way that was more beneficial to the company than the outcome of the litigation. Both parties would then have been spared the costs and time they subsequently dedicated to the litigation.

[33] Some adjustments are required to Mr Hobcraft's table where it deals with the substantive proceeding before it can be used for comparative purposes. It wrongly included preparation for and appearance at a case management meeting but did not allow for additional attendances at directions conferences. Making these adjustments reduces the calculation to $19,359.

[34] Given Mr Hobcraft's advice about Ms Faithfull's actual costs an award under the scale, even as revised, cannot be made. However, I accept Mr Hobcraft's submission that the award should be $10,000 and make an order accordingly.

[35] An award of costs to Ms Faithfull for the stay application is appropriate for two reasons; she was successful and the application was pursued by Caisteal after the Calderbank offer was made.

[36] An adjustment is required to Mr Hobcraft's calculations for the stay by removing an entry for obtaining judgment without an appearance, which step was not required. Accepting that Category 2B is appropriate for all of the steps claimed, and making that adjustment, this amount becomes $3,824 which I consider should be awarded.

[37] The last issue is Caisteal's claim for costs, contained in the memorandum withdrawing the application for a compliance order, seeking to be reimbursed for the filing fee of $306.67. An order cannot be made because the proceeding was

misconceived. The substantive judgment was about a challenge under s 179 of the Act to the Authority's determinations. While its effect was to alter the amount Caisteal owed to Ms Faithfull the judgment stopped short of ordering her to pay the company anything. Ms Faithfull was not exposed to a compliance order made under s 139 of the Act because there was no order that she failed to comply with.[14]

[38] It follows that the company's claim would inevitably have failed and Ms Faithfull would not have been exposed to the risk of costs.

Conclusion

[39] Ms Faithfull's application for costs is successful and the company is ordered to pay her $13,824 as a contribution to her costs.

[40] The company's claim for costs arising from its application for a compliance order is dismissed.

[41] A claim was made by Ms Faithfull for the costs associated with making her costs claim. I am not satisfied that it would be appropriate to order further costs and they are not allowed.

K G Smith
Judge

Judgment signed at 4.30 pm on 22 June 2023

[14] Section 139(1)(b).