IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2011] NZEmpC 62
CRC 13/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GREYMOUTH DENTAL CENTRE LIMITED Plaintiff
AND	RHONDA KAY BOWKETT Defendant

Hearing: By memoranda of submissions filed on 21 June and 9 and 10 August 2010

Appearances: Mark Henderson, counsel for plaintiff
Beverley Connors, counsel for defendant

Judgment: 13 June 2011

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff company has challenged a costs determination[1] of the Employment Relations Authority which awarded it $3,500 as a contribution towards its costs. The parties were agreed that the matter could be determined on an exchange of submissions without the need for a hearing.

[2] The award of costs arose out of an application by the defendant pleading two causes of action, unjustified dismissal and unjustified disadvantage. The defendant claimed that her resignation amounted to a constructive dismissal and that she had been demoted, which was the basis for her unjustified disadvantage claim.

[1] CA 58/10, 10 March 2010.

[3] The plaintiff counterclaimed for reimbursement of expenses for personal items that had been paid for by the defendant out of the plaintiff's business account.

[4] The Authority, in its substantive determination,[2] found that the defendant was not demoted and had no basis for an unjustified disadvantage claim. It also found that there was no basis for the defendant's complaint that her employer had undertaken a course of action with the deliberate purpose of inducing her to resign. It dismissed both her personal grievance claims.

[5] It found that there had been personal toll calls made by the defendant amounting to $27.71 and that that amount was paid on 22 June 2009. The Authority declined a claim for interest on that sum from the date of the resignation on 21 February 2008 until it was paid.

[6] The Authority found that an ink cartridge had been purchased for a dentist operating as an independent contractor out of the practice for the sum of $74.98 but that the plaintiff should pursue that sum from the dentist and not from the defendant.

[7] The Authority rejected the plaintiff's claim for $216.49 for the purchase of magazines ordered by the defendant, which the plaintiff claimed were not found in the reception area. The defendant's answer was that the magazines were purchased for the surgery but were discarded when they became worn. The Authority rejected the plaintiff's claim as not having met the requisite standard of proof. The Authority also rejected the plaintiff's counterclaim for a penalty for the defendant's alleged breaches of an implied term of her employment agreement concerning the authority she had for making the purchases in question.

[8] In the costs determination, the Authority took into account the plaintiff's submission that it was successful in repelling both personal grievance claims and the without prejudice, except as to costs, offer of $1,000 (the Calderbank offer). It determined that costs should follow the event, applied the principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*[3] and adopted a tariff-based approach. It

[2] CA 175/09, 13 October 2009.
[3] [2005] ERNZ 808.

noted the defendant's submission that the plaintiff's counterclaim had been largely unsuccessful and that costs had been increased by briefing out of town counsel. The hearing had taken place in Greymouth. It also noted that the defendant's claim for lost remuneration was abandoned at the investigation meeting and had that claim not been lodged, the outcome of mediation and the settlement offer may well have produced a different result. It rejected the plaintiff's claim for indemnity costs of $7,499.91 and awarded $3,500.

Submissions

[9] The plaintiff's first submission was that the Authority had erred in not awarding a higher amount of costs because it had not given proper weight to the Calderbank offer, dated 26 May 2009. Mr Henderson, for the plaintiff, submitted that if the defendant had accepted the offer, she would have been in a better position than she had achieved from the Authority's determination and this would have saved time and expense associated with the investigation. Mr Henderson addressed the principles that should govern costs set out in the *PBO* case.

[10] The Calderbank offer of a payment to the defendant of $1,000 and the abandonment of the counterclaim was sent by facsimile transmission on 26 May 2009. According to Mr Henderson's submission, it was rejected by the defendant two days later under cover of her solicitor's letter of 28 May 2009. A copy of that letter was not provided to the Court.

[11] The Calderbank offer had been open for acceptance until the close of business on 28 May. The short timeframe was said to be because of the need for the plaintiff to file its briefs of evidence in the Authority.

[12] Mr Henderson cited *Yun Yan Tian v Hollywood Bakery (Holdings) Ltd*[4] in which the Employment Court uplifted costs from a starting point of $6,400 to $15,000 to reflect the additional time incurred because of inadequate pleadings and the effect of a Calderbank offer. He also cited *T & L Harvey Ltd v Duncan*,[5] where

[4] [2010] NZEmpC 24.
[5] [2010] NZEmpC 36.

the Court reiterated the important role that Calderbank offers play and cited *Health Waikato Ltd v Elmsly*[6] where the Court of Appeal referred to the need for "steely responses"[7] by the Courts where claimants do not beat a Calderbank offer, as this was in the broader public interest. He also cited *Gates v Air New Zealand Ltd*[8] to the same effect. He submitted that the Calderbank offer was reasonable and the defendant had sufficient opportunity to consider the offer which she rejected two days later. He submitted the rejection was unreasonable and the plaintiff should be indemnified for its costs after the making of the offer.

[13] Mr Henderson also cited *Watson v New Zealand Electrical Traders Limited t/a Bray Switchgear*,[9] which was a challenge to a $2,500 costs determination of the Authority awarded on a tariff basis of between two and three thousand dollars for a one day investigation. The actual legal costs were just under $10,000 including GST. Chief Judge Colgan noted that the plaintiff grievant had made an initial Calderbank offer of a sum which was very close, although a little under the sum that was finally awarded by the Authority. He found that had that sum been paid by the defendant employer, it would have saved the parties significant legal costs. He found that there was an obligation, therefore, for the defendant employer to contribute significantly to the post offer costs that were incurred by the plaintiff as a result of the refusal to settle at an early stage. He found that the Authority's determination tended to indicate, by the absence of any real reference to this significant factor, that it had not taken this factor into account and had therefore determined the costs question erroneously. He also referred to the "more ... steely"[10] approach that the Court of Appeal in the *Elmsly* case had required and awarded $6,000.

[14] Mr Henderson submitted that the defendant's claim had initially included reimbursement for lost wages and, in spite of requests, no particulars were provided. The day before the hearing this claim was abandoned. Further, the defendant had initially named the plaintiff's director as the respondent in the Authority and this had

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[6] [2004] 1 ERNZ 172.
[7] At [53].
[8] [2010] NZEmpC 26.
[9] (2006) 4 NZELR 59.
[10] At [9].

to be changed. Mr Henderson submitted that both these factors justified an increase in the Authority's award. He submitted also that the plaintiff had been forced to prosecute unnecessarily its counterclaim in relation to the toll calls which was eventually conceded by the defendant and that should again result in an uplifting of costs.

[15] The plaintiff sought $5,912.50 being solicitor-client costs incurred by the plaintiff from the date of the Calderbank offer, and $2,000 as a reasonable contribution to the plaintiff's costs incurred before the offer was made. This was to cover the preparation of the briefs of evidence, the dealings relating to the incorrect naming of the respondent and the requirement to seek particulars of the lost remuneration.

[16] Ms Connors, on behalf of the defendant, in response, accepted that Calderbank offers can be taken into account but submitted that the offer was not reasonable due to the level of costs that the defendant had already incurred. The costs incurred to that point, she submitted, well exceeded the value of the Calderbank offer. She contended that counsel for the plaintiff was instructed as early as March 2009 and yet the Calderbank offer was not made until 26 May. By that stage, the defendant had already filed her briefs of evidence. She cited *Diver v Geo. Boyes & Co Ltd*[11] where, in the High Court, Penlington J observed that rejection of a Calderbank offer does not automatically expose the unsuccessful party to an award of indemnity costs but its rejection is one consideration when assessing the contribution to be made to the successful party.

[17] Ms Connors explained that although there were actual lost wages, in the interests of expediency, that claim was abandoned. She submitted that that should not be a feature to increase the award of costs.

[18] Mr Henderson in reply, submitted that the Calderbank letter did refer to costs as it was tendered on the basis that each party bear their own legal costs and, in any event, the defendant did not seek any further explanation in relation to the offer but simply rejected it two days later. He submitted that if the defendant had already

[11] CP 58/93, 20 May 1998 (HC).

incurred costs in excess of the value of the Calderbank offer this was unfortunate but that she took the risk, in rejecting the offer, that she would obtain more as a result of the determination. He submitted that because she did not, she must therefore bear the consequences of the additional wasted time. He submitted that as a matter of policy, litigants needed to have an economic means of limiting their exposure in litigation and there should be encouragement for the parties to settle. He submitted that the Calderbank offer should be given full effect and the costs uplifted to that claimed rather than the award of the Authority.

Discussion

[19] There is no issue that Calderbank offers can be taken into account by the Authority in exercising its wide jurisdiction to make an appropriate award of costs: see *Watson*.

[20] However, all the other cases cited by Mr Henderson as to the role of Calderbank offers relate to claims for costs in the Employment Court. As was noted in the *Hollywood Bakery*[12] case, the Court is bound by reg 68 of the Employment Court Regulations 2000 to take into account Calderbank offers. Regulation 68 provides that the Court:

> may have regard to any conduct of the parties tending to increase or contain costs, including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.

[21] That regulation clearly provides a discretion as to the extent costs should be uplifted. Before reaching the level of reasonable indemnity costs, the Court should take into account such matters as the amount in dispute, the ability of the unsuccessful party to pay an award, and whether there are non-monetary factors such as, for example, a desire for vindication.

[22] As to the Authority's role, in the recent decision of Judge Couch in *Metallic Sweeping (1998) Ltd v Ford*,[13] his Honour referred to the acceptance by the full

[12] At [13].
[13] [2010] NZEmpC 129.

Court in the *Da Cruz* case of the Authority's tariff based approach so long as it was not applied in a rigid manner without regard to the particular circumstances of the case. He noted that the Authority is not bound by the *Binnie*[14] principles which extend the range of costs which the Court may award beyond that which could reasonably be labelled as modest. In addressing a submission that the defendant had unreasonably rejected an offer of settlement and that therefore she ought to fully reimburse the plaintiff for all costs incurred in resisting her claims after that date, Judge Couch stated:[15]

> There is undoubtedly a good deal of weight in this submission but it is not automatic that a party who makes an offer of settlement which is unreasonably rejected is entitled to be indemnified for all subsequent costs. This is particularly so in the context of proceedings before the Authority. Such a claim will also be limited by the extent to which the costs subsequently incurred were reasonable.

[23] There is force in Ms Connor's submission that the Calderbank offer did not offer anything towards the costs that had already been incurred by the defendant and I note that the offer had a very narrow timeframe before it lapsed. The Authority did take into account the submissions on the Calderbank offer. I agree with the Authority that this offer was not determinative of the matter and it is necessary to stand back from the detail and to make an order that is fair and reasonable in all the circumstances.

[24] On the issue of the respective success of the parties, in substance, both failed in their claims before the Authority, except to the extent that the defendant had acknowledged liability of $27.71 for personal toll calls. To award the plaintiff indemnity costs on a Calderbank offer made on short notice would, in my view, be excessive in the circumstances of this substantively unsuccessful claim and counterclaim.

[25] Ms Connors submitted that an award of costs amounting to $7,912.50, in addition to costs on this challenge, would be punitive given the inquisitional nature of the Authority's investigation[16] and where the legislation as it then stood intended

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[14] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA).
[15] At [42].
[16] *Graham v Airways Corporation of New Zealand Limited* (2004) 7 NZELC 97,421 at [7].

the Authority to take a far less legalistic approach to employment dispute resolution. She submitted that the daily tariff was an appropriate starting point but that the following factor should reduce the amount of additional costs now being sought. The plaintiff engaged out of town counsel, which involved travelling time and travelling costs. Although there is no issue that the plaintiff could elect whatever representative it chose, she submitted that the defendant should not be held responsible for the additional costs associated with the decision.

[26] Mr Henderson submitted that the costs incurred were based on a modest charge out rate with a substantial reduction for the travel time. He referred to the invoices that were provided to the Court.

[27] I am satisfied that the costs incurred by the plaintiff were reasonable but are likely to have been more than what would have been incurred had local counsel been available. However, in smaller centres such as Greymouth, there may not be the same choice of experienced local counsel as there is in the larger centres. It was, therefore, appropriate for the plaintiff to have engaged Christchurch counsel.

[28] I am not persuaded that the plaintiff's seeking particulars of lost income and the defendant initially naming the wrong respondent involved time and attendances of such moment that the level of costs should be uplifted.

[29] The award made was a little above the usual daily tariff and therefore did have an element of an uplifting of costs because of the matters raised by the plaintiff. To have awarded more, however, would have been punitive in my view considering the lack of success of both parties. The challenge is therefore dismissed. I find that an award of $3,500 was appropriate in all the circumstances and confirm that the defendant is to pay that sum to the plaintiff as a contribution towards its costs.

Costs on the challenge

[30] As to the costs on this challenge, rather than put the parties to the additional expense of filing memoranda as to costs, and on the basis of my view that the challenge was finely balanced, I consider that each party should bear its own costs. If

that conclusion is unacceptable to either party then a memorandum as to costs should be filed and served within 30 days from the date of this judgment, with the other side having 21 days to reply.

BS Travis
Judge

Judgment signed at 12.45pm on 13 June 2011