IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 92
ARC 45/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	ARTHUR (HATA) KAIPARA Plaintiff
AND	CARTER HOLT HARVEY LIMITED Defendant

Hearing: By memoranda of submissions filed on 16 April and 24 May 2012

Appearances: Stan Austin, advocate for plaintiff
Daniel Erickson, counsel for defendant

Judgment: 13 June 2012

COSTS JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] The successful defendant (CHH) seeks an order for contribution to its costs following the Court's judgment of 5 March 2012[1] dismissing the plaintiff's challenge. The Court reserved costs and invited the parties to attempt to settle these. They have been unable to do so, and this supplementary judgment is necessary.

[2] The Court has received comprehensive submissions from the parties: Mr Erickson's run to 14 pages with attachments extending to more than twice that number. Mr Austin's submissions run to 10 pages and his attachments are even more voluminous.

[3] It is worthwhile reiterating what the Court noted at [74] of its primary judgment on the matter of costs:

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[1] [2012] NZEmpC 40.

> Without determining either whether an award is warranted and, if so, the amount of that award, it may assist the parties in their negotiations on this issue if I indicate that there are two elements that have arisen in the course of the case that may affect costs. The first is Mr Kaipara's impecuniosity. Very unfortunately, the evidence establishes that the circumstances of his dismissal, his age, his relevant experience, and where he lives, have all combined to make it very difficult for him to obtain any more than occasional casual work since his dismissal. The other relevant factor is that, although I have concluded that Mr Kaipara was suspended and then dismissed justifiably, CHH's compliance with its obligations of good faith information sharing (and in particular under s 4(1A) of the Act) were less than they should have been and the result might not have been the same for the company had Mr Kaipara's position been disadvantaged thereby.

[4] The defendant seeks an award of costs of $44,074.44, said to represent 80 per cent of its actual and reasonable costs in the litigation, and an award of disbursements amounting to $438.47.

[5] To determine issues around Calderbank offers said to have been made in the proceeding, it has also been necessary to refer to the Authority's costs determination which dealt with CHH's entitlement to costs to that point in the litigation.

A brief background

[6] This application raises an interesting and potentially important issue about the effect, if any, of Calderbank offers made in proposed settlement of proceedings in the Authority where it has made a costs determination. Can such offers, dealt with in a determination against which there has been no challenge or cross challenge by the successful employer, be taken into account by the Court?

[7] In the course of preparing the parties' cases for the Authority's investigation, CHH's solicitors made a Calderbank offer to Mr Kaipara's advocate in a letter marked "Without Prejudice Except as to Costs" on 16 November 2010. CHH offered to settle Mr Kaipara's claims by the payment of a sum of money to him which would be inclusive of his costs to the date of the offer and in return for which Mr Kaipara would withdraw his proceeding before the Authority with no issue as to costs. CHH proposed that the terms of settlement be confirmed by a Department of Labour mediator under s 149 of the Employment Relations Act 2000 (the Act). The

offer, which remained open for acceptance until 5 pm on 24 November 2010, concluded:

> This offer is made on a *"without prejudice except as to costs"* basis. It is reasonable (and arguably generous) in terms of quantum and timing. In these circumstances, should Mr Kaipara reject this offer and either be unsuccessful in his proceeding or receive less in the way of financial remedies than the amount offered, this letter will be placed before the Authority when it comes to determine the issue of costs.

[8] Mr Kaipara rejected this offer but made a counter-offer, the detail of which is of no concern to this judgment. In response to that counter-offer, however, CHH's solicitors renewed their Calderbank offer by letter of 25 November 2010, still before the Authority's investigation meeting. It was, in essence, a repeat of the offer previously made and was said to remain open for acceptance until 5 pm on 2 December 2010. This renewed offer was also rejected by Mr Kaipara.

[9] On their face, there can be no criticism of the adequacy of the Calderbank offers as to such essential ingredients as time of expiry, inclusiveness of costs, and the clarity of what was offered. The only question, therefore, is whether an offer made specifically for the purpose of settling litigation in the Authority and which was taken into account by it can, without more, be taken into account a second time on a challenge (appeal).

[10] The Authority investigated Mr Kaipara's grievances and determined that he had been disadvantaged and subsequently dismissed justifiably.[2] It reserved questions of costs and, after having received submissions from the parties' representatives (including submissions on the fact and effect of the Calderbank offers referred to above), issued a determination on costs on 28 July 2011,[3] awarding CHH $6,000 (plus $83.80 disbursements), which was to be payable by Mr Kaipara.

[11] Although the Authority's costs award was affected potentially by Mr Kaipara's challenge in this Court, the judgment confirmed that award. There was no cross challenge or other appeal by CHH against the Authority's award of costs in its

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[2] [2011] NZERA Auckland 219.
[3] [2011] NZERA Auckland 338.

favour and no suggestion by the company that the Authority had failed to take into account properly the Calderbank offers which had been made.

Calderbank offers

[12] The position is governed by statute, regulation and authoritative case law in this jurisdiction, and is informed by judgments in others.

[13] First, cl 19(1) of Schedule 3 to the Act provides as follows:

> The court in any proceedings may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the court thinks reasonable.

[14] This very broad discretionary power has been added to by reg 68(1) of the Employment Court Regulations 2000 (the Regulations) which provides:

> In exercising the court's discretion under the Act to make orders as to costs, 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.

[15] The reference in the regulation to "a reasonable time before the hearing" tends to indicate that it refers to the proceeding before the Court rather than to the previous proceeding before the Authority from which it may be derived. It is arguable that a party which might wish to rely upon a Calderbank offer in proceedings in the Court would make it or renew it "a reasonable time before the hearing" in the Court and the absence of doing so may mean that the effect of the earlier Calderbank offer is confined to the proceedings in the Authority.

[16] On the other hand, however, it is difficult to imagine in practice why a party such as CHH in this case, which had been successful in the Authority, would (or would again) make an offer of settlement rather than rely upon its success in the Authority and the reasoning for that. In most cases, the risks of litigation that a Calderbank offer seeks to ameliorate will be less when one is defending what is essentially an appeal from an independent and reasoned decision. One might ask rhetorically why should CHH have again offered to settle Mr Kaipara's claims for

money when it had a decision from the Authority saying that it was justified in suspending and dismissing him and did not need to pay him money.

[17] Acknowledging that there is authority for the proposition that a challenge against an Authority determination is a separate proceeding,[4] the defendant says nevertheless that the challenge relates to the same "matter" as was before the Authority.[5] The defendant submits that any offer to settle the matter which is the subject of proceedings before the Court can be taken into account notwithstanding it was made in the earlier and "technically separate proceeding". Counsel for the defendant points to that part of reg 68 set out at [15] which provides for consideration of Calderbank offers and refers to offers to "settle all or some of the matters at issue between the parties" rather than specifically referring to a settlement of the proceeding before the Court.

[18] A similar issue to that raised by this case was addressed by the High Court in *Tournament Parking Limited v The Wellington Company Limited.*[6] A plaintiff in civil proceedings in the District Court had made a Calderbank offer to settle the proceedings at that stage. The offer was not accepted and the plaintiff was successful in the District Court. The appellant in the High Court was the unsuccessful defendant in the District Court. Its appeal was successful in the High Court and it submitted, on the question of costs, that the Calderbank offer which had been made but rejected in the District Court, was irrelevant in determining costs in the High Court. That is, in essence the question in this case before me.

[19] The respondent's argument in the High Court was that the District Court trial and the subsequent appeal were part of the same proceeding in the sense that if the Calderbank offer had been accepted before the hearing in the District Court, neither that nor the appeal from it would have taken place. Therefore the Calderbank offer was said to be relevant to High Court costs.

[20] The High Court referred, of course, to rr 14.10 and 14.11 of the High Court Rules that deal expressly with Calderbank offers. Miller J concluded that the High

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[4] *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585 at [21].
[5] *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533, [2001] ERNZ 660 (CA) at [4].
[6] HC Wellington CIV-2009-485-2508, 19 October 2010.

Court Rules did not apply because the offer was made in proceedings before the District Court that were not governed by the High Court Rules. Despite that, however, the Judge took into account the Calderbank offer in fixing costs in the High Court.[7] It held that the underlying philosophy of Calderbank offers and their consequences applied as much in proceedings before the District Court as before the High Court. There is, however, with respect, no detailed analysis of the principle by which a Calderbank offer made in a proceeding at first instance from which the appeal was derivative, could and should be taken into account in determining costs on that appeal.

[21] An important distinguishing element is that a challenge by hearing de novo in the Employment Court is not the same as an appeal in the High Court from a judgment of the District Court. If, as the Judge concluded in *Tournament Parking*, the rules governing appeals in the High Court were not those which governed the same case but at first instance, the distinction must be more marked in this jurisdiction where parties may elect, in effect, to start again by a challenge and electing a hearing de novo under s 179 of the Act.

[22] Next, the Court of Appeal has addressed Calderbank offers in relation to proceedings in this Court on a number of occasions including in *Health Waikato Ltd v Van der Sluis*.[8] At lines 34 and following the Court of Appeal stated:

> Calderbank letters should be governed, at least primarily, by whatever the authors of such letters actually say; bearing in mind the proper need, in a discretionary area, for clarity ("transparency"). In the absence of specific rules, others should not be artificially imported. Calderbank letters can readily spell out whether or not pre-offer costs are included and, if so, whether on a specified or "reasonable" basis. … That is the proper "transparent" approach which should be encouraged. We do not, of course, altogether rule out the possibility of implication one way or the other, as a matter of interpretation on ordinary principles. We do not agree, however, that there should be an implication that costs down to date of offer are to be paid in addition to amounts offered, simply because nothing else is said. Where nothing is said, the authors fairly bear the burden.

[23] The same might be said in respect of the issue currently before the Court, that is that if it was intended to extend the Calderbank offer to any subsequent challenge

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[7] At [4].
[8] [1997] ERNZ 236 (CA) at 244.

to the Authority's determination, the authors of it would have said so and such should not otherwise be implied.

[24] The issue is also touched on in a series of judgments in this jurisdiction in proceedings involving Mr Chen and the New Zealand Sugar Company Limited. Before his claim that he had been disadvantaged unjustifiably in his employment was investigated by the Authority, the employer made a Calderbank offer which was rejected. The Authority subsequently dismissed Mr Chen's grievance and made a costs award in favour of the employer which took into account the rejected Calderbank offer.[9] Mr Chen appealed by challenge to the Employment Court and the employer made further Calderbank offers which were likewise rejected. The *Chen* case may be distinguishable, therefore, on the basis that a Calderbank offer or offers were made specifically in contemplation of the hearing of Mr Chen's challenge in the Employment Court to the Authority's determinations, unlike in the present case where no such second or subsequent Calderbank offers were made. The Court also dismissed Mr Chen's challenge to the Authority's determination, finding that he had not been disadvantaged unjustifiably.[10] A subsequent application for leave to appeal to the Court of Appeal was declined.

[25] Although there is nothing remarkable about the Court taking into account a rejected Calderbank offer made in an attempt to settle the proceedings before the Court, the significance of this series of cases lies in the possibility of the Court's consideration of all Calderbank offers including that made and rejected before the Authority's investigation.

[26] Dealing first with the leave judgment of the Court of Appeal,[11] this does not appear to have dealt with the question now facing this Court. So, although the Court of Appeal determined[12] that an award of indemnity costs was appropriate following the rejection by Mr Chen of Calderbank offers, the judgment cannot be said to be authority for the proposition either that a pre-Authority investigation Calderbank

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[9] *Chen v New Zealand Sugar Company Ltd* AA 177A/09, 20 July 2009.
[10] [2010] NZEmpC 54.
[11] [2010] NZCA 477.
[12] At [23].

offer can be taken into account by the Court or, more importantly, that such an offer alone can be.

[27] Turning to this Court's costs judgment in *Chen*,[13] it is not clear from the judgment whether the pre-Authority investigation Calderbank offer was included in the Court's assessment of multiple Calderbank offers. Whilst it is clear that at least the last Calderbank offer was made in contemplation of the challenge in this Court (because it refers to an offer to waive enforcement of the costs award in the Authority), that is all I am able to assume safely from the Court's costs judgment. In these circumstances, it does not appear that the matter currently before this Court was argued before Judge Perkins in the *Chen* costs case. The judgment cannot therefore be authority for the proposition that a pre-Authority investigation Calderbank offer can be taken into account by the Court in a subsequent costs judgment. The *Chen* cases are, therefore, neutral and not of assistance in determining this issue.

[28] I decline to take account of the defendant's Calderbank offers made before, and for the purpose of settling, the investigation meeting in, and determination of, the Authority. To have done so would have given reg 68(1) of the Regulations a meaning which it does not bear. To have done so, also, would have extended implicitly the terms of the Calderbank offers which the Court of Appeal has confirmed should be expressed and clearly so. Whilst it is one thing to say that, with the benefit of hindsight, Mr Kaipara may have been unwise to have challenged the Authority's determination, he was not put on notice by the defendant that to do so and lose again would sound in more than usual costs or otherwise in accordance with the intention of the Calderbank offers. The defendant's Calderbank offers have already been taken into account on questions of costs by the Authority and there has been no challenge or cross challenge to its determination of costs. If a party to litigation wishes to be able to rely upon a Calderbank or reg 68(1) offer on a challenge, and otherwise in circumstances such as are disposed in this case, that party must do more than the nothing the defendant did after the challenge was served on it.

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[13] [2010] NZEmpC 81.

The defendant's claim for costs

[29] The defendant's actual costs of legal representation in the proceeding before the Court totalled $55,093.05 (GST inclusive). A 66 per cent starting point would be a contribution of $36,361.41. The defendant says that, by analogy, an award of costs pursuant to the High Court Rules would have been in the sum of $31,960 assuming that the proceeding would have been categorised 2B.

[30] The defendant made an unsuccessful application for an order for security for its costs before trial. Although it was unsuccessful, it says, nevertheless, that it should be compensated for its cost of doing so because Mr Kaipara unsuccessfully sought to have declared inadmissible some of the contents of an affidavit filed by the defendant in support of its application for security. That was, however, a minor procedural point that the Judge disposed of in short order at the hearing and could only have occupied minimal time and attendances. In reliance on the rejection of the Calderbank offers, the defendant says that there should be uplift from 66 per cent to 80 per cent of actual and reasonable costs, an award of $44,074.44 (GST inclusive).

Impecuniosity

[31] The defendant is very critical of the plaintiff for now asserting impecuniosity but not doing so in response to CHH's application for an order for security for costs which the Court dismissed pre-trial. At [19] of the Court's interlocutory judgment dismissing the application for security for costs,[14] Judge Travis concluded that he had no clear evidence of Mr Kaipara's impecuniosity as asserted by the defendant. The Judge noted that although Mr Kaipara acknowledged responsibility for the costs awarded by the Authority, he did not say that he would be unable to pay those costs. Next, the Judge noted that any impecuniosity was linked clearly to Mr Kaipara's loss of his job which was the subject of the proceeding. The Judge stated that, "this Court has shown a marked reluctance to make orders for security for costs against grievants whose financial circumstances may have been caused or contributed to significantly by their dismissal."[15] Noting that, in recent cases where security for

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[14] [2011] NZEmpC 132.
[15] At [20].

costs had been allowed, the Court required the establishment of exceptional circumstances, Judge Travis did not find any disclosed by CHH's case.[16]

[32] As I read Judge Travis's judgment, he concluded that the defendant had failed to establish a sufficient case for security to be ordered, proof of such matters resting on the party seeking such an order. In these circumstances, it is inappropriate to revisit the issue, as the defendant effectively invites me to do, on the basis that Mr Kaipara had an obligation to disclose his relevant financial circumstances to the Court at that time. The implications of this are that Mr Kaipara somehow misled the Court and that had he provided the information about his financial circumstances that he now claims, the Court would have required him to give security for costs. I do not agree.

Defendant's own conduct

[33] Next, the defendant submits that its conduct leading to Mr Kaipara's dismissal should be irrelevant in any consideration of its application for costs. This relates to my comments in the primary judgment set out at [3] of this decision. Counsel relies on the judgment of the Court of Appeal in *White v Auckland District Health Board*[17] as authority for this proposition. That was a case in which the Court of Appeal emphasised that the absence of an award of costs should not be a constituent part of the remedies that the Court might otherwise allow a party.

[34] Mr Erickson argued that any breaches of good faith by his client (which the Court found but not to be such as to have affected the justification for suspension or dismissal) could be reflected in a penalty but this had not been sought by Mr Kaipara. In this regard, also, counsel submitted that it would not be appropriate for the Court's equity and good conscience jurisdiction to take account of any breach of good faith by CHH in setting costs. Again, in reliance on *White* in the Court of Appeal, Mr Erickson submitted that equity and good conscience cannot operate inconsistently with the scheme or terms of the Act, including the requirement for separation of issues of costs and remedies exemplified in *White*.

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[16] At [24].
[17] [2008] NZCA 451, [2008] ERNZ 635.

[35] I find against Mr Erickson's submissions in this regard. The judgment of the Court of Appeal in *White* is distinguishable in that it determined that an award of costs, or the absence of it, could not form part of the remedies for an unjustified dismissal. That is not the same thing as an otherwise deserving party's conduct being reflected in a reduction of the costs to which it might otherwise have been entitled. I will, in these circumstances, take into account the aspects of the defendant's conduct referred to at [74] of the primary judgment.

The plaintiff's Calderbank offer

[36] This was made after the Authority's determination and in consideration of his forthcoming challenge. He proposed, "without prejudice except as to costs", that if CHH did not enforce the Authority's costs determination against him, he would withdraw his challenge to the Court.

[37] I do not propose to take into account Mr Kaipara's offer to withdraw his challenge if CHH did not enforce the Authority's costs award against him. The company was entitled to its costs in the Authority and Mr Kaipara's challenge was, in the end, unmeritorious. This is not a factor which should reduce or eliminate an award in favour of CHH in this Court.

Reasonable legal costs

[38] The hearing of the challenge de novo occupied three days in Rotorua. It was an unremarkable personal grievance in the sense, not that it was unimportant to the parties, but that there were neither novel legal issues nor complex facts to be presented and absorbed. The hearing time included a useful half day visit to the saw mill at Kawerau where the events which were the subject of the case took place.

[39] Assessment of the company's reasonable legal costs is not an exercise in second guessing the reasonableness or otherwise of its actual legal costs. Rather, the Court must assess what would have been reasonable legal costs to conduct the case for that party in all the circumstances.

[40] In that regard, the costs associated with having Auckland lawyers for a Rotorua case do not come into the equation. Nor does the presence of junior counsel at the hearing for the defendant. Put another way, the case was such that it could have been handled reasonably by a local practitioner on his or her own, but no doubt with help from a well resourced client such as CHH. So reasonableness of fees is assessed in part on this basis.

[41] Next, not only must no allowance be made for the company's costs of unsuccessfully applying for an order for security for costs, but there should be an appropriate credit for Mr Kaipara in his costs of opposing that application successfully.

[42] The defendant has highlighted the equivalent costs under the scale had this been a proceeding in the High Court. In these circumstances, I propose to take into account that analysis although it is, of course, not determinative or even persuasive. It is one of a number of factors that go into the mix in the exercise of the discretion under cl 19.

[43] I do not accept the defendant's calculation of the equivalent High Court costs award. By my calculations, based on a category 2 recovery (proceedings of average complexity requiring counsel of skill and experience considered average), I would delete any allowance for costs on the defendant's unsuccessful interlocutory application for security. In that regard, a High Court calculation would give a notional credit of $2,068 to the plaintiff. The defendant has also claimed for preparation for the hearing under both cls 7 and 8 of Schedule 3 of the High Court Rules. Clause 7 applies to preparation for hearing following setting down or direction if a trial does not eventuate, which is not applicable in this case. The remainder of the defendant's High Court costs calculations under cl 8 and other clauses are, however, correct. This would have provided for a High Court costs award in favour of the defendant of $20,304 but subject as always to a discretionary reduction of this amount in the particular circumstances of the case.

The plaintiff's financial circumstances

[44] These are a relevant consideration and are, as I alluded to in the primary judgment and has now been confirmed on affidavit, not great. Mr Kaipara is not now currently, and is unlikely to be, able to afford any more than a nominal award of costs against him, taking into account his current substantial degree of unemployment, his work prospects at his age and the area in which he lives, and in view of the fact that he still owes CHH costs from the Authority's investigation, not to mention his advocate's costs of representation.

[45] Mr Kaipara's affidavit discloses that he has no savings or other assets except for his interest in his joint family home and in jointly owned household furniture. He is unable to borrow from his bank, no doubt because of his income position but also because the bank's advances currently secured by a mortgage are for the maximum value of the home and there is no further equity. His home's capital value is $145,000 and a recent market appraisal assesses its current market value as being $135,000. Apart from some casual engagement with a kohanga reo, Mr Kaipara's former short term position at a labour hire company has now ended and his prospects of further employment are not good. Mr Kaipara's wife's part-time employment at a very modest hourly rate disentitles him to receipt of Income Support.

[46] I was surprised to read in Mr Austin's submissions on costs, what appeared to be an invitation to make a substantial award against his client. The advocate wrote at para 36: "I submit that the defendant ... is entitled to costs in this matter as follows ...". There then followed a calculation the bottom line of which amounted to $21,451.44.

[47] Reading that passage in the context of the long submissions made on Mr Kaipara's behalf, the reference to "the defendant" should probably read "the plaintiff"! Indeed, it appears that Mr Austin is not only asking that his client not have costs awarded against him, but that Mr Kaipara be awarded costs against CHH of $21,451.44. That is, with respect, an unduly optimistic, indeed hopeless, claim.

[48] To award CHH any more than nominal costs would be an exercise in futility because of Mr Kaipara's circumstances and might indeed finish him off economically. In all the circumstances, I allow the defendant costs against the plaintiff of $3,000.

GL Colgan
Chief Judge

Judgment signed at 4.45 pm on Wednesday 13 June 2012