IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 50
WRC 36/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CLINT FOAI Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

Hearing: (on the papers by submissions filed 20 December 2012 and 28 January 2013)

Counsel: Johanne Greally, counsel for the plaintiff
Tim Cleary, counsel for the defendant

Judgment: 8 April 2013

COSTS JUDGMENT OF JUDGE A D FORD

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[1] In my substantive judgment[1] dated 4 April 2012, I found in favour of the plaintiff and rejected a claim by the defendant for recovery of $42,635.40, being the net amount of an overpayment in wages during the course of a 16-month period in 2007/2008. I awarded the plaintiff costs and ordered Ms Greally, counsel for the plaintiff, to file submissions within 28 days if costs could not be agreed upon. I then heard nothing further until 6 November 2012 when Ms Greally filed an application for leave to file her submissions out of time. She explained that the reason for the delay initially was the fact that the defendant had sought leave to appeal my judgment to the Court of Appeal (leave was declined by the Court of Appeal on 1 August 2012). Ms Greally accepted responsibility for the delay thereafter which appeared principally to have been the result of a medical condition she had

[1] [2012] NZEmpC 57.

experienced. Responsibly, counsel for the defendant, Mr Cleary, did not oppose the application.

[2] On 11 December 2012, I issued a minute allowing Ms Greally seven days in which to file her submissions on costs. That time limit was not complied with and so a further application for leave to file her submissions out of time was filed on 25 January 2013. Again, Mr Cleary took a responsible approach and did not oppose the application for leave. I propose to make some allowance in this costs award for the defendant's responsible approach to the two applications I have described. It clearly saved the plaintiff incurring additional legal expenses.

[3] The guiding principles for costs award in this jurisdiction are now well established. The starting point is cl 19(1) of sch 3 of the Employment Relations Act 2000 which allows the Court to order such costs and expenses as it thinks reasonable. That broad discretion must, however, be exercised judicially according to principle. The established principles in this regard are those confirmed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*,[2] *Binnie v Pacific Health Ltd*[3] and *Health Waikato Ltd v Elmsly*.[4] The usual approach is to determine whether the costs actually incurred by the successful party were reasonably incurred and once that step has been taken the Court must then decide, after an appraisal of all relevant factors, at what level it is reasonable for the unsuccessful party to contribute towards those costs. The figure of 66 per cent of the reasonably incurred costs is generally regarded as an appropriate starting point and that figure may then be adjusted upward or downward, if necessary, depending upon relevant considerations.

[4] The present case also involves the consideration of two settlement offers made without prejudice except as to costs, more commonly referred to as Calderbank offers. The principles applicable to Calderbank offers were referred to in the recent judgment of this Court in *Gini v Literacy Training Ltd*[5] and I will not repeat them save to confirm that the Court of Appeal in *Health Waikato Ltd v Elmsly*[6] and

[2] [2001] ERNZ 305 (CA).
[3] [2002] 1 ERNZ 438 (CA).
[4] [2004] 1 ERNZ 172 (CA).
[5] [2013] NZEmpC 25.
[6] At [53].

Bluestar Print Group (NZ) Ltd v Mitchell[7] has emphasised the need for the Courts to take a "steely" approach where a party does not beat a Calderbank offer.

[5] The plaintiff claims in a "Schedule of Costs" a total of $30,774.63 for costs and disbursements in connection with the hearing in this Court. In her written submissions, Ms Greally states that the plaintiff's reasonably incurred actual costs through her firm amounted to $29,100 which represents 97 hours of attendances at $300 per hour. An accompanying breakdown shows that 30.8 hours ($9,240) were incurred from the date of receipt of instructions until the commencement of preparation for the hearing; 52.7 hours ($15,810) were incurred on "Research and Case preparation and submissions for hearing" and a further 15 hours ($4,500) were incurred in respect of the hearing itself which occupied approximately two and a half days. The breakdown in question records hours totalling 98.5 compared with the figure of 97 hours mentioned in counsel's memorandum.

[6] In his submissions, Mr Cleary stated that:

> 8. ... several case management conferences were necessary because the plaintiff was initially self-represented and then amended his pleadings once he obtained representation, that there was a high level of co-operation from the defendant, and that the issues involved were straightforward, the notional rate should not be more than, say, $6,000 per day of hearing. A two day hearing gives a total of $12,000.

[7] With reference to the 66 per cent starting point figure referred to in [3] above, Ms Greally submitted that the defendant's contribution in this case should be increased to 85 per cent having regard to ten "relevant factors" which she itemised in her submissions and the two Calderbank offers. On that basis the plaintiff's costs claim would amount to $24,735. For his part, Mr Cleary submitted that no adjustment was required to the accepted 66 per cent starting figure and he contended that an appropriate award was two thirds of $12,000, namely, $8,000. Clearly the parties were a long way apart.

[8] The supporting breakdown of costs is brief and provides few particulars. Mr Cleary states that he sought time records from the plaintiff's counsel but none had been provided. It is up to claimants to make out their claims for costs and the Court should not be left to speculate or to try and fill in the gaps when insufficient

[7] [2010] NZCA 385 at [20].

particulars are provided. No issue is taken with Ms Greally's charge out rate of $300 but, in the absence of a more detailed explanation, the amount claimed on account of research and preparation for the hearing of 52.7 hours ($15,810) appears to be excessive. The Court of Appeal noted in *Binnie*[8] that a broad approach of two days preparation for every day of hearing is a useful rough and ready guide. I accept that the issues in this case were relatively complex and somewhat out of the ordinary. In all the circumstances, I consider that an appropriate costs figure for preparation would be $12,000.

[9] The breakdown provided for attendances in respect of the initial period prior to the commencement of preparation for the hearing is absolutely minimal. I consider that the figure of 30.8 hours ($9,240) claimed in respect of this period is excessive. The breakdown includes six hours for reading documents from the Employment Relations Authority (the Authority), 5.2 hours for "Initial Research" and 4.5 hours for "Calculations", without any indication of what the calculations refer to.

[10] One of the points made by Ms Greally in her submissions was:

> 10.8 that counsel had no secretarial support and performed all required tasks herself, (such as preparing the bundle of documents and research).

The implication, which is not clarified in submissions, is that counsel may have charged out secretarial work at her hourly rate of $300 which would clearly be excessive. That may be one explanation for the high figures presented.

[11] I consider that a more appropriate figure for costs in respect of this initial period, which included work on the pleadings, would be $3,000. The amount claimed in respect of the two-day hearing itself ($4,500) appears to be reasonable.

[12] Having regard to the various matters I have identified, I consider that in all the circumstances a reasonable figure for actual costs incurred would be something in the order of $19,500. The next step involves identifying, in all the circumstances, the reasonable level for the defendant to contribute towards those costs. I have considered the ten factors listed by Ms Greally which she contends warrants an

[8] At [16].

increase in the 66 per cent starting figure to 85 per cent but, with respect, I consider that they have been amply provided for in the $19,500 figure I am prepared to accept for actual costs incurred. That leaves the issue of the two Calderbank offers.

[13] I deal first with the second Calderbank offer. This was an offer apparently made by the plaintiff's former counsel. It is mentioned only briefly in one sentence of the submissions on costs in rather vague terms and it is not supported by any documentary or other evidence. Mr Cleary highlighted the fact that there was no evidence before the Court in relation to that offer and he opposed any reliance upon it. I agree and I disregard the second Calderbank offer.

[14] The first Calderbank offer was made on the plaintiff's behalf by his union's general counsel, Mr Greg Lloyd, on 21 December 2010. At that stage, the parties had received a determination[9] from the Authority dated 8 November 2010 in which the Authority had concluded that Mr Foai was required to repay Air New Zealand the net amount of the overpayment, namely $42,635.40, and Air New Zealand was required to pay Mr Foai the sum of $9,363.04 which it had withheld from his final pay and purported to offset against the overpayment. Essentially the Calderbank offer, made "without prejudice save as to costs", was that neither party would pursue their claim in the Employment Court and all matters would be at an end.

[15] It is not clear from the documentation before the Court whether that first Calderbank offer was ever responded to. Apart from referring to the offer as one of the grounds for increasing the percentage figure from 66 per cent to 85 per cent, there were no submissions made or authorities cited by plaintiff's counsel in relation to the Calderbank offer in question. For his part, Mr Cleary submitted:

> 11. ... The offer is of little weight because of the size of the relative claims at that time: Air New Zealand's claim was in excess of four times Mr Foai's claim.

[16] In *Health Waikato Ltd v Van der Sluis*,[10] the Court of Appeal confirmed that Calderbank offers are merely a discretionary factor for the Court in determining an

[9] WA 120A/10.
[10] [1997] ERNZ 236 (CA) at 240.

appropriate costs award. It approved the following statement by Chief Judge Goddard in *Ogilvy & Mather (New Zealand) Ltd v Darroch*:[11]

> Once the Court has received evidence of the *Calderbank* offer, it can take into account the fact of its making and non-acceptance in the course of the exercise of its discretion on costs. Obviously, the Court will give greater weight to the making of such an offer if the plaintiff has in the Court's view unreasonably proceeded with the claim that could have readily settled and has then recovered less or not significantly more.

[17] In this case, it was the plaintiff who made the Calderbank offer but, regardless of whether the offeror is the plaintiff or the defendant, the making of such an offer does not in itself automatically result in a more favourable costs award. It is merely a discretionary factor. An offeror still has the burden of persuading the Court to exercise its costs discretion in his/her favour. Such an onus is difficult to satisfy, however, when, as in this case, no submissions or authorities were presented on the issue.

[18] There are Australian authorities to the effect that what is referred to as a "walk-away" Calderbank offer, whereby there is a discontinuance with each party left to pay their own legal costs, will not in itself be sufficient to result in a variation of the usual costs order. The rationale for that approach appears to be that such an offer involves "no real element of compromise but merely invites capitulation ..." - see *Herning v GWS Machinery Pty Ltd (No 2)*[12] and *Townsend v Townsend (No 2)*.[13]

[19] Without hearing argument on the issue, it is difficult to determine whether that same approach should be followed in this jurisdiction. I suspect that there may well be situations where a "walk-away" Calderbank offer could amount to a genuine compromise but I have not been persuaded that the case before me can be said to come into that category. While I accept that the union's proposal was a genuine attempt to settle, as Mr Cleary observed the offer was one-sided and the reality was that the plaintiff was offering very little. Given all the circumstances at the time the offer was presented, I do not consider it can be said that the defendant acted unreasonably in not accepting the first Calderbank offer. I note in passing that in its judgment dismissing the defendants' application for leave to appeal, the Court of

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[11] [1993] 2 ERNZ 943 at 953.
[12] [2005] NSWCA 375 at [5].
[13] [2001] NSWCA 145.

Appeal made no reference to the Calderbank offers and fixed costs on a standard basis.

[20] For the foregoing reasons, I do not propose to make any adjustment to the standard 66 per cent contribution level which means that the amount I am prepared to allow for costs is 66 per cent of the $19,500 figure referred to in [12] above, namely, $12,870. In addition, I allow the disbursement claim of $435.55 for Court costs and I am prepared to allow $50 towards the photocopying costs (claimed to total $150) of the agreed bundle of documents. I disallow the remaining disbursements claimed on account of travel between Wellington and Petone and mobile telephone calls. The plaintiff also seeks costs in connection with the preparation of his submissions on costs. I would normally allow a reasonable contribution towards this expense but for the reasons mentioned in [2] above I make no such order in this case. The total award, therefore, made in favour of the plaintiff on account of costs and disbursements is fixed in the sum of $13,355.55.

A D Ford
Judge

Judgment signed at 2.45 pm on 8 April 2013