IN THE EMPLOYMENT COURT
WELLINGTON

[2014] NZEmpC 138
WRC 27/13

IN THE MATTER OF	a challenge to a costs determination of the Employment Relations Authority
BETWEEN	BRENDAN KELLERMAN Plaintiff
AND	STONEWARE 91 LIMITED trading as SWITCHED ON GARDENER Defendant

Hearing: (on the papers by way of submissions filed on 26 June, 1 and 9 July 2014)

Judgment: 31 July 2014

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The plaintiff was granted leave by this Court[1] to bring a challenge in respect of a costs determination of the Employment Relations Authority (the Authority) dated 29 October 2013.[2]

[2] The Authority's costs determination followed a substantive determination where it found that the applicant did not have a personal grievance and that his dismissal from employment with the respondent was justified. That determination has not been challenged.

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[1] *Kellerman v Stoneware 91 Ltd t/a Switched on Gardner* [2014] NZEmpC 81.
[2] *Kellerman v Stoneware 91 Ltd t/a Switched on Gardener* [2013] NZERA Wellington 136. [Authority costs determination]

[3] In the costs determination the defendant, Stoneware 91 Limited (Stoneware), sought indemnity costs in excess of $11,000. The Authority determined that taking into account the costs reasonably incurred by the defendant, a rejected Calderbank offer, the nature of the plaintiff's claim, and the principle that an unsuccessful party should contribute to the costs of the successful party, an increase of a notional daily tariff was appropriate. Accordingly, the Authority Member determined that the applicant should pay the respondent $6,000 as a contribution towards the defendant's costs.[3]

[4] Each party has filed documentation to support their position, aside from the pleadings. Much of the material filed by Mr Kellerman is irrelevant and/or cannot be considered by the Court in that it effectively seeks to challenge factual conclusions reached by the Authority in respect of evidence that is not before the Court.

[5] The aspects of Mr Kellerman's challenge which it is appropriate to consider can be summarised as follows:

a) Costs were used as a punishment or as an expression of disapproval.

b) Mr Kellerman was unaware of a Calderbank offer until the investigation meeting, contrary to the conclusion reached by the Authority that it was more likely than not he was aware of it.

c) There was no exceptionally bad behaviour by him, such as would justify an order of indemnity costs.

d) Mr Kellerman has been unemployed since his dismissal from the defendant, and so has been under financial stress.

e) Costs should be ordered in the $1,000 to $3,500 range.

[6] The essence of Stoneware's position as to costs is:

[3] At [23]-[24].

a) The case became unnecessarily complicated by Mr Kellerman's unsubstantiated claims and his refusal to elaborate on them at the investigation meeting.

b) The Authority disallowed three invoices from the sum claimed, which reduced the sum effectively then sought by Stoneware to $6,928.75.

c) Costs were not used as a punishment. The final figure awarded was less than 54 per cent of Stoneware's total claim so that it could not be said costs were imposed as a punishment.

d) The investigation meeting became unduly prolonged because of the way in which Mr Kellerman conducted himself at the hearing.

e) At the investigation meeting Mr Kellerman either refused to answer questions or alternatively gave vague answers.

f) The company should have been awarded a costs order equal to its actual costs.

Principles

[7] Clause 15(1) of Sch 2 to the Employment Relations Act 2000 (the Act) provides that the Authority may make any order "as the Authority thinks reasonable".

[8] The principles for awarding costs in the Authority are well established. They were extensively discussed by a full Bench in *PBO Ltd (formerly Rush Security Ltd) v da Cruz*.[4] In that decision the Court approved the following factors which the Authority may consider when considering costs:

- There is a discretion as to whether costs may be awarded and in what amount.

- The discretion is to be exercised in accordance with principle and not arbitrarily.

[4] *PBO Ltd (formerly Rush Security Ltd v da Cruz* [2005] ERNZ 808 (EmpC) at [44].

- 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 unnecessary or unreasonable.

- Costs generally follow the event.

- Without prejudice offers can be taken into account.

- Awards will be modest.

- Frequently costs are judged against a notional daily rate.

- The nature of the case can also influence costs.

[9] Also relevant is the dicta of Judge Couch in *Metallic Sweeping (1998) Ltd v Ford*:[5]

> [12] That raises the question of how the Court can and should conduct a de novo hearing of an application for costs. As in this case, most claims for costs are determined by the Authority on the basis of written submissions by the parties or their representatives. All concerned have been directly involved in the investigation and, as the Authority did in this case, may make only brief and general references to the events which are relevant to the outcome. Evidence is rarely if ever given in relation to costs. Rather, the Authority relies on its own knowledge of events, particularly in relation to interlocutory matters and the manner in which the parties have conducted their cases.
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> [13] When conducting a de novo hearing of substantive issues, the Court effectively puts the Authority's determination to one side and decides the matter on the basis of the evidence adduced before it. Given the nature of the process by which costs determinations are made, however, that is simply impractical when the Court is asked to decide what costs ought to have been

[5] *Metallic Sweeping (1998) Ltd v Ford* (2010) ERNZ 433 [2010] NZEmpC 129, [2010] ERNZ 433.

> awarded by the Authority. The Court receives nothing from the Authority. There is no record of the investigation meeting. While it would be possible for oral evidence to be given by the parties about every aspect of the Authority's investigation and each other's conduct on which they seek to rely, that could easily lead to a hearing out of all proportion to what is at stake.
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> [14] It seems to me that the only practical way of deciding a challenge to a costs determination is for the Court to be primarily informed through the submissions of the parties, with the possibility that this may be supported by affidavit evidence about contentious issues. In most cases, there will not be a hearing at which the parties or their agents appear in person. Thus, resolving differences between the parties or their representatives will be problematic. Inevitably, a Judge of the Court deciding a challenge can never be as well informed about events as the member of the Authority who conducted the investigation but I can see no realistic means to bridge that gap. In areas of uncertainty, the Court will need to have regard to the Authority's assessment of matters in a manner it would not do when deciding a substantive challenge by way of a hearing de novo. It may also be helpful and appropriate for the Court to have regard to the Authority's substantive determination.

[10] The notional daily tariff which is generally applied by the Authority currently stands at $3,500.[6]

Discussion

[11] In considering Mr Kellerman's challenge, I am obliged to proceed by having regard to the Authority's assessment of matters, particularly because there is no other reliable evidence before the Court. There are numerous contested statements which the Court cannot resolve in the present context. I also have regard to the Authority's substantive determination.

[12] The Authority costs determination stated:[7]

> [17] The applicant made extensive and various claims which were frequently amended in the lead up to the investigation meeting and which were not particularised clearly despite repeated requests by the respondent. The applicant placed a large quantity of information before the Authority although the vast majority of the documentation was irrelevant to his claims against the respondent and were related to matters with a previous employer and other organisations.
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> [18] The uncertainty as to what exactly was being claimed undoubtedly required the respondent to defend its actions over a wide number of matters.

[6] *Pathways Health Ltd v Moxon* [2013] NZEmpC 18 at [36].
[7] Authority costs determination, above n 2.

> I conclude that the applicant's vast range of claims led to an increase to the respondent's costs as regards preparation.
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> [19] During the Authority's telephone conference on 16 October 2012 the applicant acknowledged the possibility of liability for costs if he was unsuccessful with his claims.

[13] In my view, the conclusion reached by the Authority Member as to the way in which the hearing proceeded is confirmed by reference to the substantive decision.[8] In the determination, the Authority was required to consider a pattern of difficult behaviour which was replicated by the way in which Mr Kellerman conducted his case. It is plain that elements of the relationship problem were not clarified until the investigation meeting itself, and that the hearing became unnecessarily prolonged by this process. A serious allegation of forgery was made, which the Authority Member concluded was not established. These factors relating to the conduct of the hearing are matters which it was proper to consider at the costs stage.

[14] Mr Kellerman contests the finding that it was more likely than not that he was aware of a Calderbank offer which was made, and that this is a factor that the Authority is entitled to consider. The Authority was well placed to make this credibility assessment, having regard to the extensive evidence which was considered at the investigation meeting.

[15] The Calderbank offer was not produced to the Authority or to the Court, but the Authority's costs determination states that it "reflects a modest offer by the respondent to resolve the issues".[9] It may be considered on that basis.

[16] I note that the Authority was not persuaded to award indemnity costs. Nor is there any evidence to support the proposition that he was "punished" by any of the findings in the costs determination.

[17] The starting point must be the sum of $3,500, which figure is at the upper end of the range which Mr Kellerman accepts would be an appropriate order. There is very clear evidence that the hearing became unnecessarily protracted, and this will have increased Stoneware's costs to some extent. Also relevant is the evidence that a

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[8] *Kellerman v Stoneware 91 Ltd t/a Switched on Gardener* [2013] NZERA Wellington 74.
[9] Authority costs determination, above n 2, at [12].

Calderbank offer was made, proposing resolution on the basis of an outcome which was better than that achieved by Mr Kellerman at the investigation meeting. These factors justify an uplift from the notional daily rate.

[18] The Court's main concern relates to Mr Kellerman's financial circumstances. The Authority Member concluded on this point that she was not satisfied he is impecunious; and that there is evidence he has alternative financial resources and property that he owns. Accepting that this may be so, the further evidence which has been placed before the Court is that Mr Kellerman has not had employment since his dismissal by Stoneware and that he is financially stressed. I consider that the absence of income is a factor which the Court should properly take into account when considering this matter.

Conclusion

[19] Having regard to all the factors which the Court has been required to consider, I conclude that the appropriate sum to be paid by Mr Kellerman to Stoneware is $4,500.

[20] Stoneware sought an order that it be paid its costs in full. However, Stoneware did not advance a cross-challenge in respect of the Authority's decision. In any event, for the reasons given, the appropriate award of costs is as above.

[21] If either party has any costs with regard to the applications in this Court, they are to lie where they fall.

B A Corkill
Judge

Judgment signed at 2.30 pm on 31 July 2014