IN THE EMPLOYMENT COURT
AUCKLAND

AC 28/09
ARC 74/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	FILTA VACUUM PRODUCTS LIMITED Plaintiff
AND	HUNTER DOLAN Defendant

Hearing: By submissions filed on 14 April and 12 May 2009

Judgment: 9 July 2009

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff, the former employer of the defendant, has challenged a costs determination of the Authority issued on 1 September 2008. The defendant was ordered to make a contribution of $11,633, being 66 percent of the defendant's costs in the Authority. Counsel were agreed that the challenge, which was by way of a hearing de novo, would be dealt with by an exchange of written submissions.

[2] The unchallenged substantive determination was issued on 19 June 2008 following an investigation meeting that took place over 3 days in March, with written submissions filed in April and May 2008.

The Authority's findings

[3] On 29 March 2007 the defendant was dismissed from his position as general manager, having formerly been the company accountant, for serious misconduct. At the time his remuneration package included provision for bonus payments. The

principal reason for his dismissal was making unauthorised bonus payments to himself and another employee and fraudulently concealing these overpayments for two years.

[4] The plaintiff's managing director, Mr Black, had concluded the defendant had also mislead the plaintiff over stock ordering errors, been guilty of the unauthorised removal and destruction of business records and of having an imprudent and irresponsible approach to budgeting.

[5] The plaintiff commenced proceedings for unjustifiable dismissal in the Authority seeking lost wages from the date of dismissal until he was able to obtain suitable alternative employment, payment of unpaid bonuses, compensation of $30,000 and costs. His claim for holiday pay had initially been referred to a Labour Inspector but it was agreed that this matter would be dealt with at the investigation meeting.

[6] The plaintiff's statement in reply denied that the dismissal was unjustified, sought an enquiry into and the repayment of the bonuses overpaid by the defendant to himself and to the other employee, a penalty of $5,000 for breach of good faith and costs. The plaintiff accepted that the defendant had an outstanding entitlement to holiday pay of $8,303.90 but claimed to be contractually entitled to withhold that payment.

[7] After some initial difficulties the parties attended mediation on 26 November 2007 but the matter did not settle. The plaintiff made a Calderbank offer to the defendant on 1 February 2008 stating it would accept $62,000.00 from the defendant in repayment of the overpaid bonuses in full and final settlement of the litigation. Mr Campbell, counsel for the plaintiff, has complained that the defendant disclosed this Calderbank letter to the Authority in relation to costs, even though it was made without prejudice and was therefore a privileged communication.

[8] The Authority found that the evidence did not substantiate the last three grounds advanced to justify the dismissal. The issue became whether the defendant had overpaid himself, whether the overpayments were deliberate and whether he had

sought to mislead Mr Black about them. After closely examining the evidence, the Authority found that there was insufficient evidence to warrant the conclusion that the plaintiff had sought to cover up deliberate overpayments of the bonuses, that Mr Black had investigated his suspicions inadequately and did not have reasonable grounds for his conclusions. The Authority found that Mr Black had not acted as a fair and reasonable employer and the decision to dismiss was not one an employer, acting fairly and reasonably, would have made. It therefore found that the dismissal was unjustified.

[9] Turning to the defendant's claim for reimbursement of $13,750 for the loss of two months employment, the Authority found that the defendant had not assisted matters by failing to acknowledge the possibility of having made a mistake when he should have. It found that the level of transparency associated with the bonus calculations was less than could be expected of someone of the defendant's experience, holding the position of trust that he did. The Authority concluded that the defendant had contributed to the situation giving rise to the grievance to the extent that his remedies should be reduced. The order for lost remuneration was therefore reduced to one month in the amount of $6,875.

[10] Distress compensation of $30,000 was sought. The Authority found that little effort was made to support this substantial claim by way of evidence. The Authority accepted that Mr Black's very serious allegations were inherently likely to, and did in fact, cause injury to the defendant's feelings and that he should be compensated. The amount that would have otherwise been awarded was reduced, for contributing conduct, to $10,000.

[11] The Authority then turned to the repayment of the overpaid bonuses. The Authority closely examined both the methodology and the figures upon which the bonuses were calculated. It found that from October 2003 there was not an agreed methodology of the kind for which the defendant had contended. The Authority accepted the calculations of an independent accountant and found that the defendant had been overpaid. He was ordered to repay a total of $36,383.94 for the two years. It declined to order the defendant to refund the bonuses overpaid to the other employee.

[12] The Authority also dismissed the plaintiff's claim for a penalty for breach of good faith, having found that any failure by the defendant was not deliberate, serious or sustained, in terms of s4A(a) of the Employment Relations Act 2000, and in any event the penalty claim had been brought outside the 12 month time limit in s135(5).

[13] Over the plaintiff's objections the Authority's ordered the plaintiff to pay to the defendant $25,395.37 for the unpaid bonus for his final year of employment. It also found that $8,303.90 of holiday pay, quantum not being in issue, should have been paid and was owed to the defendant.

[14] Interest was not sought by the defendant for his personal grievance remedies. Interest was awarded to the plaintiff at the rate of 8.7 percent per annum on the overpaid bonus payments and to the defendant on the holiday pay. The Authority reserved costs.

Submissions on costs in the Authority

[15] In submissions to the Authority, Mr Harrison for the defendant sought a contribution of 75 percent of actual costs of $17,626.79, which amounted to approximately $13,000. He referred to difficulties experienced with the plaintiff in arranging a date for mediation, other delays on the part of the plaintiff and laid the blame for the failure of the mediation meeting on the plaintiff. The Authority accepted the plaintiff's reasons for the delays and did not find the plaintiff was responsible for the failure of the mediation.

[16] Mr Harrison relied on the plaintiff's Calderbank offer as establishing that the offer to settle for a payment of $62,000 to the plaintiff was unrealistic and *"aggravated"* any remaining chance of settlement. Mr Harrison finally submitted that the length of the investigation meeting itself was unnecessary because it had to deal with the three grounds for dismissal for which there was no evidentiary basis.

[17] Mr Campbell, on behalf of the plaintiff, proposed to the Authority that each party bear its own costs on the basis that neither had challenged the substantive

determination and both had been successful. He relied on *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808.

[18] Mr Campbell referred at some length to the Authority's findings which were adverse to the defendant and alleged that the raising of the claim for holiday pay in both the Labour Inspectorate and the Authority had put the plaintiff to additional expenditure. He referred to the need for the plaintiff to incur professional accountancy fees in relation to both the investigation of the overpayments and in preparation for the investigation meeting. He took no issue with the reasonableness of the defendant's costs, observing that the plaintiff's legal fees had been in excess of those incurred by the defendant.

[19] The Authority found:

> *Overall both parties achieved success in parts of their respective claims, but equally there were serious flaws in the unsuccessful parts. Taking into account all matters associated with the conduct of the investigation, and the outcome, I would have concluded that relevant considerations were in such balance as to warrant an order that costs lie where they fall.*

[20] Having regard to the Calderbank letter the Authority found that the offer was not realistic or reasonable and did not address the personal grievance. That had impeded the possibility of settlement, as had the stance the defendant had taken in refusing to acknowledge that his methodology of calculating the bonuses could be flawed. The offer also differed substantially from the result in the determination, which was an outstanding balance of $14,290.33, not counting interest, in favour of the defendant. It found that this factor should be reflected in an order for costs against the plaintiff.

[21] While finding that the defendant's costs were actually and reasonably incurred, the Authority found that a contribution of 75 percent was too high and set it at 66 percent. It found:

> *At the same time a tariff based approach is not suitable for a matter having a degree of factual complexity, and requiring significant preparation by counsel for both parties.*

Submissions to the Court

[22] Mr Campbell expanded on his submissions to the Authority, repeating his contention that costs should lie where they fall. In the alternative he submitted the plaintiff should pay $2,000 to $3,000 to the defendant being the tariff for a 1 day meeting in the Authority. He submitted that the bonus issue should be treated as a draw or win, for the plaintiff, which had succeeded in its claim to recover overpaid bonuses for 2 years, whereas the defendant succeeded in his claim for a bonus of 1 year. Mr Campbell submitted that the bonus issue was complex and had taken up two thirds of the time in both preparation and at the investigation meting. He acknowledged that the defendant had achieved success on his unjustified dismissal and his holiday pay claim, the quantum of which was admitted by the plaintiff.

[23] Mr Campbell observed that, as this was a de novo challenge, it was not necessary to establish that the Authority had made errors in its determination. He submitted, however, that the initial view of the Authority was correct that costs should lie where they fall, and that it had fallen into error in taking into account the Calderbank offer. He submitted that the costs awarded were wholly excessive having regard to the plaintiff's substantial success.

[24] Mr Campbell analysed the defendant's actual legal fees of $14,740 exclusive of disbursements and GST and accepted that they were reasonable for a 3 day investigation. He submitted that the administration charges totalling $443.25 should not be allowed as they were not particularised and a charge out rate of $300 an hour was sufficient to cover reasonable overheads. He also submitted that it was not usual for GST to be included in the actual and reasonable costs. He submitted that the starting point should therefore be $15,225 for actual and reasonable costs, including the filing fees and typing service.

[25] Turning to the Calderbank offer Mr Campbell accepted it was not unusual for claimants to make a without prejudice proposal, giving as an example *Watson v New Zealand Electrical Traders Ltd t/a Bray Switchgear* AC 64/06, 24 November 2006, but observed that in this case the defendant had made no such offer. He submitted that the plaintiff's offer was irrelevant in considering costs as the plaintiff did not

recover more than the offer it made and that the offer had not increased the defendant's costs. Costs themselves were not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct, unless it increased the costs of the proceedings. He observed that Calderbank offers were considered by the Court of Appeal in *White v Auckland District Health Board* (2009) 9 NZELC 93,029 (CA) at paragraphs [49] and [50]. There the Court of Appeal noted that the relief sought by the appellant in his second letter significantly exceeded the outcome he achieved in the substantive judgment. Thus the Calderbank offer had no particular bearing on the issue of costs. He submitted the same principle applied in this case.

[26] Mr Harrison, expanding on his submissions to the Authority, submitted the determination was correct in its approach. The net result, after allowing for interest, was $9,642.78 in favour of the defendant, who was therefore the successful party. Mr Harrison submitted that as this was a de novo challenge it was open to the Court to assess the award in light of relevant factors and to determine whether the amount of $11,633 fell within a range open to the Authority.

[27] In addition to the financial outcome, Mr Harrison stressed the effects of the determination on the defendant's reputation. He observed that the Authority dismissed three of the four grounds for the dismissal as not substantiated on the evidence. This was, he contended, not a finding of procedural flaws but a finding of substance in relation to three extremely damaging allegations.

[28] Mr Harrison relied on the Authority's rejection of the plaintiff's allegation that the defendant had been fraudulent and had attempted to cover up the earlier payments. He submitted that these findings were very important to the defendant. It was necessary for the defendant to clear his name as he continues to work in the financial industry, having previously been the plaintiff's company accountant. He submitted that it was not difficult to appreciate the damage to the defendant's career and reputation if those allegations had remained unchallenged. He submitted that because the defendant had to proceed with an Authority investigation in order to clear his name, as there was no retraction by the plaintiff, this should be expected to result in a reasonable contribution towards his legal costs.

[29] Mr Harrison analysed the length of time the investigation took, including the preparation of substantial submissions. He cited, as an example, *Graeme v Crestline Proprietary Limited* AA 23/06, 7 February 2006, where the Authority member awarded $15,000 on the basis of $5,000 per hearing day to the successful respondent as a reasonable contribution towards legal costs of $32,800 for 6 days preparation, 3 days hearing time, plus an extra day for consideration of financial information. He observed that the tariffs applied by the Authority on a daily basis, range anywhere between $2,000 and $5,000 per day, with additional time allocated for submissions. This would therefore give a range, on a tariff approach, of between $8,000 and $20,000.

[30] Mr Harrison analysed the progress of the case and alleged the plaintiff had intentionally set out to increase costs for the defendant. He relied on the Authority's findings concerning the view Mr Black formed as to the defendant being guilty of fraud and pursuing this conclusion without giving proper attention to the defendant's responses. He submitted this was recognised by the Authority's substantial award of compensation to the defendant, reduced through contributory conduct. He submitted the plaintiff had doggedly maintained these serious allegations and used valuable hearing time unsuccessfully to try and prove them. All of these matters and the need for the defendant to repair his reputation were, Mr Harrison submitted, proper factors to be taken into account in awarding the defendant a substantial contribution towards his legal costs.

Discussion

[31] The Court's role in a de novo hearing is to make its own decision on the matter and any relevant issues: s183(1) of the Employment Relations Act 2000. I accept, however, that the role of the Court, in a challenge to a costs determination of the Authority as determined in *Da Cruz*, is to stand in the Authority's shoes and assess, de novo, the evidence relating to the costs award in that forum in order to determine what was an appropriate award in light of all the considerations which were relevant to the Authority.

[32] On first blush one can sympathise with the initial view of the Authority, as contended for by Mr Campbell, that relevant considerations were in such a balance

as to warrant an order that costs should lie where they fall. When, however, the matter is looked at in more detail, then a different view emerges.

[33] The Authority was entitled to have regard to the Calderbank letter which was relied upon by Mr Harrison. The Calderbank offer was expressed to be without prejudice except as to costs and was relied upon by the defendant solely for this purpose. The offer contained in the Calderbank letter showed that the plaintiff was prepared to settle upon payment to it by the defendant of $62,000. This represented the amount the plaintiff considered the defendant had overpaid himself and the other employee. The Authority found that this offer made no reference to the defendant's personal grievance in which he succeeded and did not take into account his claim for an unpaid bonus for the year ending 2007. I agree. Although the plaintiff was successful in finding that the defendant had been overpaid it was for a total of $36,283.34, almost $26,000 less than the plaintiff had claimed in its Calderbank letter.

[34] The matter was complicated because the plaintiff had sought a refund from the defendant of $35,000 allegedly paid to the other employee but failed to recover any part of that from the defendant. The defendant was also successful in recovering a bonus of $33,919.40 for the year ending 2007. Such a deduction was not contemplated in the Calderbank offer. In addition the plaintiff failed in its penalty claim against the defendant.

[35] On the other hand the defendant was also successful in establishing that he was unjustifiably dismissed and in recovering reimbursement of lost income, and substantial compensation for distress and humiliation.

[36] Viewing the Authority's outcome on this basis would lead to the view that the defendant was successful in the outcome he achieved and therefore entitled to seek a contribution towards the costs he incurred. I therefore reject the plaintiff's submission that, as it succeeded in relation to its bonus claims, and because two thirds of the time was taken up in both preparation and in the investigation and subsequent submissions in relation to bonuses, costs should therefore lie where they fall.

[37] Further, the Calderbank offer did not expressly address the defendant's unjustifiable dismissal grievance but contemplated the full and final settlement of the litigation. Had the plaintiff's offer been accepted this would have left the defendant's dismissal, on the grounds of fraud, in place. The Calderbank offer and the case advanced by the plaintiff at the investigation meeting clearly demonstrated that the plaintiff had maintained its claim that the defendant's actions were both fraudulent, in the sense that the defendant had deliberately overpaid himself and the other employee and had misled the plaintiff over the bonuses, stock losses and the destruction of documentation. These were very serious allegations to make against an employee who had been the company's accountant and was then the general manager. Much of the time taken up in the investigation in dealing with the bonuses also therefore bore on the justification for the dismissal in which the plaintiff was entirely unsuccessful in establishing fraud or any deliberate misleading on the part of the defendant.

[38] As Mr Harrison contended, the defendant therefore was successful not only in the economic outcome, but also in preserving his reputation against the plaintiff's continued maintenance of the serious allegations against him.

[39] Although the full Court in *Da Cruz* found the principles applying to costs decisions in the three leading Court of Appeal cases[1] were not applicable to the Authority, and therefore did not impel it to apply the 66 percent guideline, the *Binnie* case referred to a factor which the Authority could have taken into account in the present circumstances. In *Binnie* the Court of Appeal at para [31] held that justified public vindication of reputation is a material factor in litigation. In such circumstances, although costs payable by a defendant should not lightly be fixed at a level which is disproportionate to the sum recovered by the plaintiff, there will be cases where disproportion is justified by the Court's overall discretion (See para [11]). The Court of Appeal stressed that Dr Binnie had been forced to litigate in order to mitigate the damage to his reputation which his employer's conduct must have caused. This had been insufficiently taken into account by the Employment Court in setting the level of costs. The Court of Appeal referred at para [31] to "the

[1] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305; *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172.

simple fact" that if Dr Binnie had accepted a Calderbank offer he would have recovered $50,000, but the defendant insisted that the settlement be kept confidential. By going to hearing he recovered over $71,000, or at least $58,000, and achieved the public vindication to which he was entitled. The Court of Appeal increased the costs award from $80,000, plus disbursements of nearly $13,000, to $162,577 plus disbursements.

[40] Applying this approach to the present case, the defendant could have settled by paying the plaintiff $62,000 and his dismissal for fraud and misleading financial accounting would have remained in place. By going to an investigation he recovered over $9,600, after interest, and, more importantly, was found not to have been guilty of fraud or misleading conduct. The finding that he was unjustifiably dismissed achieved the public vindication to which he was entitled.

[41] I accept Mr Harrison's submissions that on a tariff based approach, the award for costs for the 3 days' hearing could have been anywhere between $8,000 to $20,000. Taking into account preparation and the complexity of the bonus issue, the tariff based approach resulting in an award of $5,000 per day to a total of $15,000 might also have been appropriate. This, however, would have been considerably more than the starting point, even for the Court, of two-thirds of actual and reasonable costs totalling $17,626.79, including GST and the administration fee to which Mr Campbell took objection. A two-thirds award of net costs and disbursements of $15,225 would be $10,150. Balancing this against what I had considered might be an appropriate tariff based approach of $15,000 suggests to me that the award made in the Authority of $11,633 should stand. This award was as a result of a principled exercise of the Authority's discretion and a decision not to approach the matter on a tariff based approach, having regard to the degree of factual complexity. Although s183 requires me to make my own decision on the matter, I am nevertheless content to adopt the Authority's figure as my own. I direct the plaintiff to pay to the defendant, as contribution to the costs he incurred in the Authority, the sum of $11,633.

[42] This effectively means the challenge is dismissed. The defendant is entitled to costs on the challenge. If they cannot be agreed, the defendant should file and

serve a memorandum as to costs within 30 days of the date of this judgment with the plaintiff having a further 21 days within which to respond.

BS Travis
Judge

Judgment signed at 4 pm on Thursday 9 July 2009