IN THE EMPLOYMENT COURT
WELLINGTON

WC 13/09
WRC 5/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	IDEA SERVICES LTD Plaintiff
AND	WARREN DAVID COLLINS Defendant

Hearing: Heard on the papers

Judgment: 14 May 2009

JUDGMENT OF JUDGE C M SHAW

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[1] The plaintiff has brought a non de novo challenge against a costs determination of the Employment Relations Authority (the Authority) following the dismissal of Mr Collins' claims against Idea Services Ltd and IHC New Zealand Inc for being brought out of time and against the wrong legal entity.

[2] Idea Services applied to the Authority for costs of $8,850 which it had incurred since making a Calderbank offer to Mr Collins. The Authority made an order that costs lie where they fall. The plaintiff challenges that finding.

[3] Mr Collins has declined to take any part in the challenge. It was therefore unopposed.

Background

[4] Until 14 February 2008 the plaintiff had incurred legal costs of $1,150 plus GST in dealing with the defendant's personal grievance.

[5] On 14 February 2008, the plaintiff made a Calderbank offer of $1,500 to the defendant to settle his claim. He rejected this offer.

[6] From 14 February 2008, the plaintiff incurred legal costs of $8,850 plus GST in defending the defendant's claim.

[7] When the defendant's claim was dismissed in their entirety by the Authority the plaintiff sought costs, relying in part on the Calderbank offer it had made.

Authority's costs determination

[8] The Authority accepted that the Calderbank offer had been properly made. It noted that Mr Collins had been unsuccessful in his application because he had mis-described his former employer and had failed to commence his action in the Authority within 3 years after the date on which his personal grievance had been raised. It also observed that the merits of Mr Collins' claim slightly favoured IHC; that he had delayed for almost 3 years; and that his prospects of success on the claim were less than 50 percent.

[9] As opposed to those matters, the Authority noted that, with the effective concurrence of Idea Services Ltd and Mr Collins, the Authority support staff had changed the employer's name and had this not occurred Mr Collins may have been able to pursue this claim. Thus he was seriously affected by the failure to grant an extension of time. The Authority found that Mr Collins had not been able to have his day in court and one of the reasons for this had not been entirely through his own fault in that there were misunderstandings that were shared by the Authority staff and Idea Services Ltd itself. Were it not for the Calderbank offer, it would have let costs lie where they fall. It noted:

> *[9] If Idea Services Limited had discovered before the day of the investigation meeting, as Mr Collins and the Authority should also have, then it (and Mr Collins) would not have had to incur the substantial preparation costs it did.*

[10] In relation to the Calderbank offer the Authority said:

> *[10] Any applicant must assume, however, that in the normal course of events, if they are unsuccessful they are liable to pay costs and a* Calderbank *offer makes no difference in this regard (*Shanks v Agar *[1996] 2 ERNZ*

> *578). The issuing of the* Calderbank *offer, although having been properly made in this case, should not significantly affect the result accordingly, particularly as it was set at a relatively low level. It therefore follows, in equity and good conscience and the interests of justice, that costs should lie where they fall. I order accordingly.*

The challenge

[11] Mr McBride set out the following summary of the principles which apply to the making and enforcement of Calderbank offers:

> *a.* Calderbank *offers provide necessary protection to a Defendant which, reasonably, seeks to limit its litigation risk by offering to settle all of or some of the claim made;*
>
> *b.* Calderbank *offers are therefore sensible litigation strategy to be actively encouraged by the Courts;*
>
> *c. The Authority has a discretion to award costs which must be exercised in accordance with principle. That includes consideration of conduct that unnecessarily increases costs, and of (*Calderbank*) offers of settlement;*
>
> *d. The Authority is properly required to take a "steely" approach to the rejection of reasonable* Calderbank *offers;*
>
> *e. A reasonable* Calderbank *offer is one close to the sum ultimately awarded, or in excess of that sum. It follows that where a claim is dismissed in its entirety any financial offer is highly relevant; the quantum of such offer is not a substantial factor;*
>
> *f. The rejection of such offers ought then to usually result in, if not solicitor-client costs for the period following the expiry of the offer, a substantial contribution to those costs.*

[12] The plaintiff alleges that in this case the Authority failed to determine costs in a principled manner by erroneously relying on the Employment Court decision of *Shanks v Agar (t/a Rod Agar & Co)*[1]. It is also alleged that the Authority was not correct in its finding that the Calderbank offer should not significantly affect the result particularly as it was set at a relatively low level.

Discussion

[13] In *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz*[2] the full Court found that the role of the Court on a challenge as to costs is to stand in the shoes of the Authority and to assess the evidence relating to the costs award in that forum. It is

[1] [1996] 2 ERNZ 578
[2] [2005] ERNZ 808

the role of the Court to judge what is an appropriate award in light of all the considerations which were relevant to the Authority.

[14] The full Court held that the Authority is a practical and pragmatic body that exercises its jurisdiction without regard to technicalities although it is limited by statute. For these reasons the Court should not apply the same criteria on a challenge as those which apply to proceedings before the Court.

[15] When considering costs, the Authority has a wide discretion as conferred by clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act):

> ***15 Power to award costs***
>
> *(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*
>
> *(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[16] The full Court in *PBO Ltd* found that without prejudice offers can be taken into account by the Authority in the exercise of its discretion as well as other matters such as the nature of the case.

[17] In *Shanks v Agar*, Chief Judge Goddard made the following comments about Calderbank offers: [3]

> *… it will not ordinarily be appropriate to have regard to such an offer when the plaintiff loses. The purpose of the offer is to shift the risk of future costs from the respondent/defendant to the applicant/plaintiff. When the applicant/plaintiff loses, she or he will at all times have been at risk of an award of costs in the event of losing and the Calderbank offer makes no difference to that situation.*

[18] As the Calderbank offer in that case was too late and unclear, it was not taken into account. Therefore, the Chief Judge did not have to decide whether a pre-trial offer is only relevant when a plaintiff is partially successful and receives less than the offer. However, he was inclined to the view that a Calderbank offer is of little weight when a party is completely unsuccessful. The Chief Judge's comments are therefore obiter.

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[3] at p581

[19] The Authority has a wide discretion in awarding costs but will be guided by generally accepted principles. The wording of clause 15 of Schedule 2 of the Act is wide enough to include a situation where the plaintiff has been completely unsuccessful and the defendant has sought to have a Calderbank offer taken into account.

[20] Where a Calderbank offer is made it is appropriate first to consider whether it was properly made and whether it was made in a timely fashion sufficient to give the offeree a reasonable time to consider it before the offeror incurs further costs of preparation for the trail.

[21] If such an offer is made then that is a compelling factor to be considered by the Authority in the exercise of its discretion and an award of costs would ordinarily be made. The amount of the offer made is only relevant to the question of whether it would have been more beneficial to the offeree.

[22] In this case the Authority had dealt with the original application by Mr Collins to bring his grievance out of time and had an in-depth knowledge of the circumstances concerning his and other parties' contribution to Mr Collins's delay. When the Authority was considering the question of costs it was exercising its discretion in the full knowledge of all of those circumstances.

[23] The Authority had regard to the fact that Idea Services should have been aware of the misdescription of itself much earlier than the day before the hearing and that the reasons for Mr Collins losing his opportunity to have his day in court was not entirely his fault. These are valid reasons for the Authority to have taken into account.

[24] Notwithstanding the existence of a Calderbank offer, in the end the question of an award of costs is always within the discretion of the Authority which has heard the substantive proceedings. Unless there has been a fundamental error of law which has led to the decision, the exercise of the discretion should be left with the Authority.

[25] In spite of its apparent reliance on the obiter remarks in *Shanks v Agar*, in its costs determination the Authority set out other proper reasons for its decision to allow costs to lie where they fall and none of those can be regarded as an error of principle or law.

[26] For these reasons and, in spite of the lack of opposition to the challenge, the challenge is dismissed. There will be no order for costs on the challenge.

C M SHAW
JUDGE

Judgment signed at 2.00pm on 14 May 2009