IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 50/09
5085452

BETWEEN	IAIN ALLAN Applicant	
AND	OGILVY WELLINGTON LIMITED Respondent	

Member of Authority:	James Crichton
Representatives:	Barbara Buckett, Counsel for Applicant Chris Patterson, Counsel for Respondent
Submissions received:	9 December 2008 and 21 January 2009 from Applicant 22 December 2008 from Respondent
Determination:	24 April 2009

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 8 October 2008, the Authority resolved the employment relationship problem between these parties by determining that Mr Allan had personal grievances for unjustified dismissal and unjustified action causing disadvantage.

[2] Costs were reserved.

The claim for costs

[3] Counsel for Mr Allan, the successful party seeks a substantial costs award, comprising $35,948.50 (plus GST) by way of special damages, disbursements of $1,737.61 inclusive of GST, and the costs of the application for costs itself. Evidence is provided to the Authority to confirm that the actual costs incurred by Mr Allan amount to over $48,000 in fees to date, plus GST.

[4] Counsel for Ogilvy Wellington Limited (Ogilvy), while acknowledging that costs typically follow the event, contends that the costs levied by counsel for Mr Allan are simply *exorbitant*, and thus not reasonably incurred.

[5] Furthermore, Ogilvy contends that the effect of an award of the magnitude sought by Mr Allan would, in effect, be punitive rather than reimbursing in nature.

[6] Counsel for Ogilvy also contends that, while there are circumstances where special damages can be awarded for costs, where costs are incurred in deciding contractual entitlements for instance, this is not a case where special damages ought to apply and further, it is impossible to identify just what the cut off point should be between costs proper and special damages.

[7] Ogilvy refers to the notional daily rate for costs principle and suggest that on that basis, the claim for costs from Mr Allan is grossly overstated.

The legal principles

[8] The full Court in *PBO Ltd v. Da Cruz* AC2A/5 identifies the salient principles traditionally referred to by the Authority in a costs setting and confirms the appropriateness of those principles. The Full Bench of the Employment Court also specifically approved the *tariff based approach* often adopted by the Authority in a costs environment as long as the particular circumstances of the individual case are taken into account as well.

[9] In addition, I have often found it helpful to adopt the approach suggested by Member Dumbleton in an unreported decision of the Authority, *Graham v. Airways Corporation of New Zealand Ltd* (ERA Auckland AA39/04, 28 January 2004). In that decision, the Authority postulated three steps in evaluating applications for costs. These are, first, a consideration of the actual legal costs and expenses of the successful party; second, a decision about whether those costs are reasonable; and finally, a determination of what proportion of those costs ought to be met by the other side.

The issue of special damages

[10] Mr Allan, in his application for costs, seeks an award of special damages on the footing that he was put to trouble and expense in seeking to have his employer

Ogilvy address his employment relationship problem short of the issue of any proceedings. In those circumstances, as the decision of the Court of Appeal in *Binnie v. Pacific Health Ltd* [2002] 1 ERNZ 438 makes clear, special damages may be awarded.

[11] As Mr Allan's counsel correctly observes in her submissions on her client's behalf, the Authority has traditionally been reluctant to award special damages at least in part because of the conviction that the Authority's proceedings, not being strictly adversarial, are not particularly amenable to legal rules coming from an adversarial environment. Indeed, that very point was clearly enunciated by Travis J in *Harwood v. Next Homes Ltd*, 19 December, 2003 AC 70/03.

[12] Notwithstanding that, there are decisions of the Authority where special damages have been awarded.

[13] For the purposes of the present application though, it seems to me the short point is that the issue of whether special damages apply or not is really just one of classification. Indeed the judgment in *Binnie* makes that point very clear. Whether the label is costs proper or special damages is in a sense less the issue than the question of how much the award is to be.

[14] On that basis then, I am not persuaded that this is a case that requires the classification of special damages rather than simply of costs proper and it seems to me that the real issue is one of quantum.

Discussion

[15] Mr Allan seeks a significant award of costs against a background of a submission from Ogilvy that the costs charged to Mr Allan are simply *exorbitant*.

[16] It will be helpful to apply the principles I have already referred to from the case of *Graham v. Airways Corporation of New Zealand Ltd*. The first issue, then, is the actual quantum of the costs and expenses levied against the successful party. In the present case, Mr Allan has expended somewhere in the realm of $50,000. On the face of it, that is a significant expenditure on legal fees in this tribunal. It is true that the matter was dealt with over a significant period of time with the first part of the investigation meeting taking place on 4 September 2007 and the matter not concluding until fully six months later on 16 April 2008.

[17] However, despite the passage of time between those two dates, the actual hearing time was quite modest with the 4 September 2007 fixture taking approximately half a day and the second day on 16 April 2008 occupying a full hearing day.

[18] In addition to that, Mr Allan draws attention (quite properly) to the difficulties that he encountered in making his claim by reason of the corporate restructuring in which Ogilvy was involved and the associated confusion that that occasioned.

[19] In particular, Mr Allan reminds me that it was necessary to deal, on an interlocutory basis, with the issue of just who the employer actually was and that this was the subject of an interim determination from the Authority.

[20] Further, Mr Allan points out that, by reason of Ogilvy changing its counsel at the last minute, there was further delay which put him to additional expense.

[21] Finally, Mr Allan argues that his costs were greater because Ogilvy did not engage with him expeditiously in respect to either of his grievances and that that fact materially increased the costs that he incurred.

[22] I accept the thrust of Mr Allan's argument on these points. It is fair to say that the behaviour of Ogilvy materially contributed to the costs that Mr Allan incurred and I hold that it is proper for me to take into account as a factor that behaviour of the respondent employer. In essence, my conclusion is that had Ogilvy behaved differently, and in particular dealt more expeditiously with the grievances raised by Mr Allan, both with him face-to-face and on a counsel-to-counsel basis, then his costs would have been less than they presently are.

[23] However, Ogilvy is right to remind me that the informal and inquisitorial nature of the Authority's proceedings militate against significant costs awards and that, in a sense, the whole point of the Authority as a decision-making body is to reduce unnecessary legalism and with it the occasionally prohibitive costs of trial in the traditional adversarial system.

[24] The Authority has traditionally carefully watched the movement of costs in matters before it and members of the Authority are familiar with the range of costs charged to parties by reason of the decision-making required from the Authority in respect of costs awards. It is not appropriate for the Authority to evaluate costs

applications by reference to comparators in the traditional trial system, but it is appropriate for the Authority to make comparisons within its own jurisdiction.

[25] Costs in the Authority have moved upwards over time, as one might expect. In *Harwood* (supra), Judge Travis made the point that average awards of costs for a one day investigation meeting might be in the range of $1,000-1,500. *Harwood* was a decision issued in 2003. Conversely, in *PBO Ltd* (supra), a 2005 decision, Judge Shaw noted that costs awards for a one day meeting were then in the range of $2,000-2,500. I think it reasonable to say that there has been further movement of average awards since *PBO* was decided and that the average daily award is probably closer to between $3,000-3,500 now.

[26] Looking next at the question whether the costs charged to the successful party are reasonable or not, I have already made some observations about the relationship between the figure charged in the present case and comparisons within the Authority's own jurisprudence and within the more traditional trial context. It is clear that the figure charged to Mr Allan and on which the claim for costs by him is now based is at the highest end of costs charged in the Authority.

[27] Looking at the notional daily rate tariff which is frequently used by the Authority to make decisions about costs matters, and making a generous allowance for the deficits of Ogilvy to which I have already referred, it is difficult to see how an award of much more than $10,000 is realistic. Anything more than that, in my opinion, would be out of step with other awards made by the Authority in similar circumstances.

[28] However, Mr Allan draws my attention to a *Calderbank* letter which he presented to Ogilvy dated 19 December 2007 in the sum of $50,000. The effect of a *Calderbank* letter is, of course, to entitle the author of the letter to ask that it be considered in an application for costs where the recipient of the letter rejects the offer and the sender of the letter is successful in the proceeding. If, as in this case, Mr Allan does better in the decision of the Authority than he would have by force of his *Calderbank* letter, then that is a material factor in the decision the Authority has to make in relation to costs.

[29] Interestingly, Ogilvy did not comment on the *Calderbank* letter in its initial submissions, although it is plainly a relevant consideration in the costs setting.

Further submissions were sought on this issue and have been considered by the Authority.

[30] Ogilvy, in its subsidiary submissions, allege that there was, in truth, no *Calderbank* letter at all because it was phrased as an *offer to treat*. It is said that Mr Allan was saying that if an offer of $50,000 was made, it might be adequate.

[31] I do not accept that submission. Looked at in its totality, the purpose of the relevant provisions is to settle the matter short of further litigation and I consider it should be read in that light.

[32] Next, Ogilvy says that the *Calderbank* offer does not fall for consideration because it exceeds the amount that Mr Allan was awarded. Mr Allan was awarded $18,000 compensation and $48,000 gross in lost wages, a rough total of $66,000. Mr Allan's *Calderbank* offer was for $50,000 compensation, to cover lost earnings and legal fees (and presumably compensation for hurt, humiliation and injury to feelings). Ogilvy says that the *Calderbank* offer amounts to $70,000 (allowing for grossing up the effect of the tax free status of the payment).

[33] However, the *Calderbank* offer covers compensation (by implication) and wages and costs explicitly. On that basis, to compare the *Calderbank* letter with the remedies awarded is not to compare apples with apples because the remedies awarded exclude costs, whereas the *Calderbank* explicitly includes them. It follows that the only proper way to compare quantum is to reduce the *Calderbank* figure by a factor commensurate with the amount of the *Calderbank* offer that relates to costs. A reduction to take account of this notional calculation would bring the *Calderbank* figure down to a sum less than the amount Mr Allan was awarded.

[34] Furthermore, if the same *grossing up* process is applied to the awards made by the Authority to Mr Allan, the actual comparative figure from the Authority's award is more like $75,000 which is more than the *grossed up* figure of the *Calderbank* offer as stipulated by Ogilvy.

[35] Ogilvy also submits that, in a number of respects, the *Calderbank* offer is defective in respect of labelling, finality and timing. I agree that the *Calderbank* offer is not as artfully worded as it might be, but I continue to view it as a legitimate attempt by Mr Allen to bring matters to an appropriate conclusion without further

hearing time. In dealing with this matter in my final decision, I have adopted a conservative approach but determined that I should consider the *Calderbank* offer.

Conclusion

[36] Having already referred to the actual quantum of costs charged to Mr Allan as the successful party and referred to the reasonableness of those costs by reference to the Authority's practice and procedure and other awards in the Authority's jurisdiction, the final question to be answered is what percentage of the costs actually incurred by Mr Allan ought to be reimbursed to him by Ogilvy.

[37] As I have already noted, looked at exclusively on the basis of the notional daily rate approach including an allowance for the unhelpful behaviour of Ogilvy, a figure of no more than $10,000 as a contribution to costs would be derived. However, on top of that, disbursements need to be treated separately and the *Calderbank* offer needs to be considered as well. It is clear there was no response to the *Calderbank* offer so it can be said that it was rejected by Ogilvy. The offer was made some four months before the final day of the investigation meeting and some three months after the first day of the investigation meeting. The costs incurred by Mr Allan since the *Calderbank* offer was made amount to $17,000 odd in additional costs.

[38] It seems to me to follow that had Ogilvy accepted Mr Allan's *Calderbank* offer of $50,000 inclusive of a contribution to costs, at the very least Mr Allan would have saved himself the $17,000 odd in additional costs, as well as the intangible emotional costs of having to proceed with the uncertainty of a decision of the Authority.

[39] On the basis of a very conservative approach to costs fixing, if one were to deduct the $17,000 in *unnecessary* costs from the total amount that Mr Allan incurred, that reduces the total figure to a more realistic level of around $31,000.

[40] Factoring in the rejected *Calderbank* offer to the equation, I consider an appropriate contribution to costs from that source to be $15,000 and I think there should be a contribution to disbursements of $1,000.

Determination

[41] The usual rule is that costs should follow the event and there is no reason to depart from that principle in this case. Mr Allan was completely successful in his claim and he is entitled to a contribution to his costs insofar as those costs have been reasonably incurred.

[42] In this particular case, there is a *Calderbank* offer to be considered. The offer was made by Mr Allan and rejected by Ogilvy so it is relevant in a costs setting.

[43] I have decided that Ogilvy should pay to Mr Allan the sum of $25,000 as a contribution to costs together with a further $1,000 as a contribution to disbursements incurred. The primary figure of $25,000 is arrived at by totalling the "base" sum of $10,000 which I calculated by reference to the "daily rate" adjusted by the various deficits Mr Allan pointed to from Ogilvy's behaviour, together with a further sum of $15,000 derived from a consideration of the *Calderbank* offer.

James Crichton
Member of the Employment Relations Authority