

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 90/10
5274872

BETWEEN AARAN CALLAGHAN
 Applicant

A N D TAEGE MANUFACTURING
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: David Beck, Counsel for Applicant
 Penny Shaw, Counsel for Respondent

Submissions Received: 5 February 2010 from Applicant
 5 March 2010 from Respondent

Determination: 15 April 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] This matter was disposed of in an substantive determination of the Authority dated 18 December 2009. The applicant was successful in his claim and was awarded modest compensation. Costs were reserved.

The claim for costs

[2] The applicant seeks full indemnity costs in the sum of \$3,488.50 on the footing that the respondent employer consistently failed to deal with the applicant's personal grievance, lodged a *Calderbank* offer which was less than the amount awarded to the applicant by the Authority and most particularly that the applicant is an hourly rate worker of modest means and, if he is required to meet the costs of bringing his proceeding from his own resources, then the modest compensation award made in his favour by the Authority will effectively be nugatory.

[3] Conversely, the respondent submits that the matter of costs should be dealt with on general principles, that is to say, there is no particular basis for full solicitor/

client costs to be awarded and the usual rules usefully summarised by the Employment Court in the case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 should apply. In fact, the respondent encourages me to allow costs to lie where they fall.

[4] The respondent draws the Authority's attention to the fact that, in the substantive determination, the applicant's redundancy was held to be genuine but that it was not until the hearing itself that the applicant conceded that fact, thus putting the respondent to proof. Further, the Authority's attention was drawn to the finding in the substantive determination that the respondent had behaved with good faith throughout the process and that the finding of an unjustified disadvantage against the respondent was a function of the delay by the respondent seeking to avoid redundancy at all costs.

[5] On the *Calderbank* offer, the respondent acknowledges that a *Calderbank* offer at \$2,000 was made and, while accepting that that was less than the award made by the Authority in the substantive determination, noted that the original *Calderbank* offer was made in July 2009, some five months before the investigation meeting and certainly well before the costs of the investigation meeting would have been incurred. Further, it is noted by the respondent that the applicant's aspirations with respect to pre-hearing settlement, as disclosed in open correspondence, was for more than twice the offer encapsulated in the respondent's *Calderbank* proposal, with costs on top. It is suggested that the Authority, in fixing costs now, can appropriately take judicial notice of those exchanges between the parties.

Discussion

[6] There can be no question that the costs charged to the applicant by his counsel are reasonable ones. A total fee of \$3,800 in round figures, inclusive of both a mediation and an Authority investigation meeting, together with associated attendances, is a fair fee for the work required. However, it is also relevant to note that a significant proportion of that total fee involved the attendance at mediation and it is the longstanding practice of the Authority not to award costs occasioned by mediation attendances. On that basis alone, perhaps 20% of the total fee charged needs to be reduced to remove the mediation component. Further, it is also the Authority's longstanding practice to consider the fixing of costs exclusive of GST. Applying those two factors to the original figure, produces a net claim of say \$2,800.

[7] The argument that the applicant is an hourly rate wage worker of limited means and is entitled to have those factors taken into account, has merit. The applicant received a modest award from the Authority. That award was, in the Authority's view, commensurate with the level of hurt he suffered by what the Authority considered was the inadvertent breaches of the employer. However, in order for the applicant to win even that modest award he had to expend, in legal fees, a net amount which was in excess of the compensation finally awarded. Of course, the awarding of compensation and the incurring of costs in legal proceedings are neither of them exact sciences and it will be a brave practitioner indeed who confidently predicts a particular outcome from a particular tribunal determining the compensation likely to be awarded against the costs incurred in getting to that result.

[8] The applicant says that he is entitled to full indemnity costs because he has modest means and because the compensatory award made to him was not great. The respondent says that the applicant ought to have known that this would be the outcome and that the fact that the applicant is of modest means is neither here nor there. The applicant, so the argument goes, must make the cost benefit analysis that any litigant must make of assessing the chance of success against the risk of failure and marrying those calculations to the costs in each case. What is more, the respondent points out that months prior to mediation, it made a *Calderbank* offer which, had it been accepted, would have put the applicant in a stronger financial position than any result that can be achieved now. I accept that submission completely. Obviously, at the time that the applicant determined to reject the *Calderbank* proposal, the applicant believed that he had a reasonable chance of doing better by proceeding to mediation and/or to the Authority.

[9] In the end, if the matter were to be dealt with exclusively on the basis of the daily rate tariff which is traditionally applied to Authority hearings and which is specifically mandated in the *PBO Ltd* decision, then an award of perhaps \$1,500 would be the likely outcome, given that the investigation meeting was of short duration encompassing no more than half a day's hearing time. However, the applicant says that he is entitled to full solicitor/client costs for the reasons I have already related and the respondent seeks to have costs lie where they fall on the basis of the various arguments it advanced in support of that proposition.

[10] I conclude that, given the adjustments to the fee charged to the applicant which I referred to above, the maximum amount I could award by way of costs is \$2,800. I have already noted that applying the daily tariff approach, an award of say \$1,500 would be appropriate. The respondent invites me to conclude that costs should lie where they fall because its behaviour was not egregious, its breaches slight and it attempted to reasonably conclude the matter with the applicant but without result. I agree with all of those submissions, but still must conclude that there is no reason in principle why the costs should not follow the event. That is the usual principle and I am not persuaded that, in the present case, that principle ought to be departed from.

[11] However, I am also not satisfied that this is a case where full solicitor/client costs ought to apply. That would be a very unusual case indeed, even at the modest level that the applicant has been charged in the present case. I think the proper course of action is to fix costs on the basis of the daily tariff approach with appropriate allowances for the arguments advanced by both parties.

Determination

[12] I fix costs at \$1,000 and direct that the respondent is to pay to the applicant that sum as a contribution to the applicant's legal costs in bringing this matter. In reaching that conclusion, I conclude that it is not appropriate for the respondent to pay nothing towards the costs of the successful party, but equally I am persuaded that the applicant contributed to the costs incurred by failing to accept a reasonable settlement proposal advanced at a very early stage.

James Crichton
Member of the Employment Relations Authority