

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 54
3014251

BETWEEN VICTOR CHEN
 Applicant

A N D SOUTHERN DISTRICT HEALTH
 BOARD
 Respondent

Member of Authority: Peter van Keulen

Representatives: Victor Chen
 Cassandra Kenworthy, Counsel for Respondent

Submissions Received: Written submissions for Applicant on 27 March 2018
 Written submissions for Respondent on 12 March 2018

Date of Determination: 30 April 2018

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 22 February 2018¹, I determined that the Health Board had not breached the record of settlement between it and Dr Chen and there was no basis to award penalties against it or grant the compliance orders requested by Dr Chen.

¹ [2018] NZERA 20

Costs application

[2] In my determination, I reserved costs. The Health Board now seeks costs. Counsel for the Health Board, Ms Kenworthy, seeks indemnity costs for the Health Board on the basis of a Calderbank offer made to Dr Chen on 6 October 2017 and because of Dr Chen's conduct of his claim.

[3] Dr Chen says it is not correct or just to reimburse the Health Board for any or all of its costs in this matter. He says the Health Board failed to provide information regarding the alleged breach of the non-disparagement obligation in the record of settlement and this extended the need for the formal investigation process of the Authority. He also says there were facts established in the investigation, which supported the alleged breaches and created the need for him to protect his position, and the decision on compliance was not a clear-cut decision, evidenced by concessions made in submissions by Ms Kenworthy and my suggestion that the parties discuss possible terms of compliance. Dr Chen submits that there should be no order for costs.

Discussion

[4] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*².

[5] Based on clause 15 and *Da Cruz*, and other relevant Employment Court and Court of Appeal decisions³, the approach to be adopted by the Authority includes:

- (a) An award of costs is discretionary and the exercise of that discretion should be made in accordance with principle and not arbitrarily;

² [2005] 1 ERNZ 808

³ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135

- (b) The decision to award costs is consistent with equity and good conscience jurisdiction of the Authority but equity and good conscience should be considered on a case-by-case basis in terms of the award of costs;
- (c) Costs will generally follow the event but in some instances this will not be the case where, for example, the nature of the case is such that costs should lie where they fall or alternatively where an applicant has not bettered the terms of a Calderbank offer which he or she unreasonably rejected prior to the investigation meeting;
- (d) Once a decision has been made by the Authority to award costs in favour of one party then the starting point for quantum is the daily tariff. It is open to the Authority to depart from applying the daily tariff in appropriate circumstances where, for example, indemnity costs may be appropriate or actual costs incurred since the rejection of a Calderbank offer are more appropriate.
- (e) However, the standard approach is to start with the daily tariff and then consider whether that tariff should be increased or decreased. The factors relevant to the consideration of the increase or decrease of the daily tariff include:
 - (i) Costs awards in the Authority will be modest;
 - (ii) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
 - (iii) Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;
 - (iv) Without prejudice offers can be considered;

[6] So, the first thing I must consider is whether I will award costs in favour of one party, in this case the Health Board. This is an exercise of discretion, which must be based on principle and not be exercised arbitrarily. My decision must also be consistent with equity and good conscience as that applies to this case.

[7] The first applicable principle is that costs will normally follow the event unless there is some accepted circumstance that would justify departure from this. On this point, Dr Chen says, essentially, that the nature of the case is such that costs should lie where they fall.

[8] I do accept there is some value to Dr Chen's submission regarding the merit of his claim based on the evidence and his view that he should progress his claim to protect his position (particularly relating to the alleged disparagement), but this is insufficient to displace the fundamental principle that costs should follow the event.

[9] Applying equity and good conscience, I am satisfied that it is appropriate to award costs to the Health Board as it was completely successful in defending all of Dr Chen's claims.

Daily tariff

[10] The next decision is whether I should depart from the normal practice of applying the daily tariff as Ms Kenworthy seeks indemnity costs for the Health Board. This is based on the rejection of a Calderbank offer, which Dr Chen did not better in my determination and Dr Chen's conduct in: pursuing compliance orders in terms, which she submits, I could not make; providing a large amount of irrelevant background material; and pursuing compliance in respect of the SAC-1 report.

The relevance of the Calderbank offer

[11] It appears to me that there are two preliminary matters relating to the application of Calderbank offers pertaining to Ms Kenworthy's submissions:

- a. First, is a Calderbank offer relevant when an applicant has been wholly unsuccessful?
- b. Second, does a Calderbank offer mean indemnity costs should be imposed?

[12] As the primary purpose of a Calderbank offer is to shift the risk of costs to an applicant when he/she is successful, there has been suggestion that a Calderbank offer becomes irrelevant if an applicant does not succeed⁴. However, given the principles in *Da Cruz* a Calderbank offer does remain relevant if an applicant loses, when considering either to depart from applying the daily tariff or increasing the tariff, if it is applied⁵.

Indemnity costs

[13] Therefore, the Calderbank offer will be relevant to Ms Kenworthy's request for indemnity costs. But, there is no presumption that indemnity costs will be imposed following the rejection of a Calderbank offer which is not bettered in a hearing⁶. In fact, in most cases where there is an applicable Calderbank offer, the Authority will use it as a basis to uplift the daily tariff.

[14] Indemnity costs normally only follow a Calderbank offer where there is some additional factor making that appropriate, such as the conduct of the case by the applicant⁷.

[15] In this case, Ms Kenworthy submits that Dr Chen's conduct of his case was such that I should award the Health Board indemnity costs.

⁴ *Shanks v Agar (t/a Rod Agar & Co)* [1996] 2 ERNZ 578

⁵ *Walker v Delta Community Support Trust* [2013] NZERA Christchurch 204.

⁶ *Diver v Geo Boyes and Co Ltd* HC Hamilton CP58/93.

⁷ See for example, *Prins v Tirohanga Group Limited (formally Tirohanga Rural Estates Ltd)* EmpC Auckland AC 27/07



[16] In order to award indemnity costs I must be satisfied that there was exceptionally bad behaviour by Dr Chen⁸.

[17] I have reviewed Dr Chen's conduct of his claim. I have already commented that I believe there is some value to Dr Chen's submission regarding the merit of his claim based on the evidence and his view that he should progress his claim to protect his position (particularly relating to the alleged disparagement). I do accept that some of the orders he sought were outside my jurisdiction but this did not render his claim frivolous or vexatious. I simply put this down to Dr Chen being overzealous in pursuit of protecting his reputation. The short point is he thought he had been harmed in two ways by the Health Board's actions, which he saw as breaches of the record of settlement and he felt sufficiently aggrieved to seek compliance to remedy the situation.

[18] Further, the fact that he sought two compliance orders (of five in total) that I could not make even if he had been successful in proving there had been a breach of the record of settlement, was of no consequence. These two orders related to non-disparagement and Dr Chen sought orders requiring the Health Board to retract any prior statement and to assist Dr Chen in identifying all incidences of disparagement. Neither of these two orders required additional evidence to be led nor did they take up much time, if any, in terms of submissions made.

[19] The additional background material provided by Dr Chen was of limited impact. I did not find that it created an onerous amount of additional work or increased the length on my investigation.

[20] Finally, in terms of Dr Chen's conduct, pursuing compliance in respect of the SAC-1 report was not frivolous or vexatious, there was a basis for this aspect of the claim and it was not misconceived. I accept that a larger proportion of the cost for the Health Board may have been expended in dealing with this aspect of the claim, but in the usual course of dealing with

⁸ *Bradbury v Westpac Banking Corporation* [2009] NZCA 234

costs that follow the event in any claim, the daily tariff covers this cost. If this aspect of the claim was unmeritorious, misconceived or even frivolous or vexatious then there may be a basis to consider the impact of the behaviour but that is not the case in respect of the SAC-1 report.

[21] Overall, having reviewed Dr Chen's conduct of his claim, I conclude that there is no basis to award indemnity costs. The behaviour complained of does not meet the standard set out by the Court of Appeal in *Bradbury v Westpac Banking Corp*⁹. Nor is there a basis on which I should award actual costs from the date of rejection of the Calderbank offer or even a percentage of those costs.

[22] I am satisfied that the daily tariff is the correct approach.

Uplift to the daily tariff

[23] However, I will consider if an uplift is appropriate given the Calderbank offer and Dr Chen's conduct.

[24] In this case the factors relevant to the consideration of the increase or decrease of the daily tariff include:

- a. Costs awards in the Authority will be modest.
- b. Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account.
- c. Without prejudice offers can be considered.

⁹ [2009] NZCA 234

[25] Turning first to the Calderbank offer I must be satisfied that the offer meets the criteria for Calderbank offers as set out in *Ogilvie & Mather (NZ) Ltd v. Darroch*¹⁰; in particular is a “walk away” offer a Calderbank offer – as this was the nature of the offer made.

[26] The Health Board made a Calderbank offer to Dr Chen on 6 October 2017. The terms of the offer were simply that the Health Board invited Dr Chen to withdraw his claim and it would not seek costs against him. This was on the basis that the Health Board was satisfied, after investigation and an analysis of the claim, that Dr Chen’s claim lacked any merit and would not succeed.

[27] This offer was rejected by Dr Chen on 8 October 2017.

[28] A Calderbank offer based on a walk away scenario has been held to have no effect on costs if there is no element of compromise¹¹. The Employment Court has indicated that there may be situations where a walk away Calderbank offer could amount to a genuine compromise¹². And in *O’Hagan v Waitomo Adventures Ltd*¹³ the Court considered a walk away Calderbank offer to be relevant because there was a monetary value attached to the offer – in that case the offer included not enforcing part of the award made in the Authority against the applicant.

[29] I am not satisfied that this offer had an element of compromise or monetary value. The offer contained nothing of value to Dr Chen in terms of what he was seeking. In the circumstances, Dr Chen’s rejection of the Calderbank was reasonable.

[30] I have already indicated that I consider Dr Chen’s conduct of his claim to have been largely reasonable and his pursuit of the additional compliance orders was of no consequence.

[31] Given these two conclusions, it follows that the daily tariff should not be increased.

¹⁰ [1993] 2 ERNZ 943

¹¹ *Hira Bhana & Co Ltd v PGG Wrightson Ltd* [2007] NZCA 342

¹² *Foai v Air New Zealand Ltd* [2013] NZEmpC 50

¹³ [2013] NZEmpC 58

Application of daily tariff

[32] The investigation meeting in this matter took one and a half days. So applying the daily tariff without any uplift gives a sum of \$6,250.00.

Disbursements

[33] Ms Kenworthy has also submitted that the Health Board should be paid disbursements in this matter relating to travel costs for counsel. I decline to make any award for the disbursements sought. Whilst a party can choose to instruct the counsel of its choice, if it chooses to instruct counsel outside of the town where the investigation meeting is held and there are capable and experienced counsel in that town who could have attended to the matter then it must bear the cost of travel¹⁴.

Determination

[34] Dr Chen must pay the Health Board \$6,250.00 as a contribution to the costs it incurred in this matter.

Peter van Keulen
Member of the Employment Relations Authority

¹⁴ See *Banks v Hockey Manawatu Inc* [2016] NZEmpC 97