

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 396  
5353766

BETWEEN                      LENNARD FREDERICK  
   CLAPHAM  
   Applicant

A N D                              ALEXANDER & CO LIMITED  
   Respondent

Member of Authority:        James Crichton

Representatives:            Kevin Muir, Counsel for Applicant  
   David France, Counsel for Respondent

Submissions received:      27 September 2012 from Applicant  
   10 October 2012 from Respondent

Date of Determination:     14 November 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive decision**

[1]     The Authority dealt with the application made to it by Mr Clapham in its substantive determination issued on 27 August 2012. That determination found exclusively for Mr Clapham.

[2]     Costs were reserved.

**The claim for costs**

[3]     As the successful party, Mr Clapham seeks an award of costs in the sum of \$14,000. In a carefully argued submission, Mr Clapham's counsel justifies that sum by reference to general principles, the particular circumstances of this case, and the existence of a *Calderbank* offer made by Mr Clapham prior to the proceedings in the Authority.

## **The response**

[4] Counsel for the unsuccessful party (Alexander & Co Limited) also assisted the Authority with a carefully analysed submission proposing a lesser award of \$6,000 and placing reliance first on the absence of any particular complexity in the case, the evidence that both parties argued their positions appropriately and without undue complication, and suggesting that the significant reliance placed on the Calderbank offer in the submissions for Mr Clapham rather overstated his entitlement.

## **The law**

[5] Both parties refer to the appropriate legal principles and draw assistance from the leading case in the costs fixing environment in the Authority, *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[6] The principles to be derived from that decision include costs following the event, costs awards in the Authority being modest, costs awards being discretionary, the appropriateness of considering *Calderbank* offers, where made, and the use by the Authority of a notional daily rate.

[7] The parties also referred to a number of other decisions, particularly decisions of the Authority where the notional daily rate was increased because of an effective *Calderbank* offer.

[8] The legal position with *Calderbank* offers is clear enough. A *Calderbank* offer is only effective if it is turned down by the offeree and the offeror is subsequently more successful in the subsequent proceeding than the figure in the offer. Then, and only then, can the tribunal consider an “uplift” in costs awarded to the offeror.

[9] It follows that while there may be debate about the quantum of that “uplift”, the first issue must always be whether the *Calderbank* offer is in fact an effective one. Only when that is established can the quantum of the “uplift” be considered.

## **Discussion**

[10] This is a case where both parties accept that a costs award is the successful party’s entitlement, but there is dispute about the quantum of that award. In essence, Alexander & Co accept that there was an effective *Calderbank* offer made by Mr

Clapham and argue that the cases disclose that the uplift from that effective *Calderbank* offer ought to be at a more modest level than Mr Clapham himself suggests in his submissions.

[11] Conversely, Mr Clapham's argument rests squarely on the equitable principle that a costs award of \$14,000 "would give Mr Clapham's *Calderbank* offer "full weight", but would also be consistent with the decision of the Employment Court in *Watson v. New Zealand Electrical Traders Ltd t/a Bray Switchgear*, Employment Court, Auckland, AC64/06, 24 November 2006.

[12] In that latter case, Mr Watson's *Calderbank* offer was very close indeed to the Authority's eventual determination of the matter. However, the parties would each have been in a much better financial position if Mr Watson's *Calderbank* offer had been accepted prior to the Authority's investigation because of the cost each party incurred in that investigation.

[13] The decision is critical of the Authority's application of the tariff based approach in that particular case, on the footing that it failed to take proper account of the particular circumstances of the facts in the instant case.

[14] In any event, in reliance on that decision and the contention that Mr Clapham ought to get "full weight" from his effective *Calderbank* offer, counsel for Mr Clapham argues that as his *Calderbank* was around 20% lower than the awards made on his behalf by the Authority, the percentage of actual costs recoverable should be increased to approximately 70% of Mr Clapham's actual fees which produces the claimed figure of \$14,000.

[15] Counsel for Alexander & Co argue that all of the decided cases they rely upon show the Authority making a proper allowance for an effective *Calderbank* offer by calculating the uplift that ought to apply from the notional daily rate then applying.

[16] The effect of that calculation, according to Alexander & Co's submissions, is to produce a daily tariff rate (in cases when an effective *Calderbank* letter is in play) of between \$5,000 and \$7,000. The Authority in the present case is urged to adopt that rather more modest quantum than is advanced by Mr Clapham.

[17] It is also contended for Alexander & Co that Mr Clapham indulged in what their submission calls a "Rolls Royce" approach to the litigation and that it is

unreasonable for the unsuccessful party to have to contribute to costs unreasonably incurred.

[18] That argument is well made and in that regard, it is useful in the costs fixing environment to consider the reasonableness of the fees incurred, whether a *Calderbank* offer is in play or not, in determining the fixing of costs. The reasonableness or otherwise of costs actually incurred is, the second of three principles which were enunciated by the Authority in an earlier decision *Graham v. Airways Corporation of New Zealand Ltd* (unreported) Employment Relations Authority, Auckland, AA39/04, 28 January 2004.

[19] The question then remains whether, in all the circumstances of the present case, the costs incurred are reasonable. The Authority is advised that total costs incurred by Mr Clapham amounted to \$19,500 exclusive of GST.

[20] This was a relatively straightforward personal grievance claim dealt with by the Authority in one day. There were no particular complexities in the argument that was advanced by either side. On that basis, the total costs incurred by Mr Clapham might appear to be slightly outside the normal range of costs for a matter of this kind. Having said that, the Authority would not wish to be seen to be critical of either appearing counsel; both performed credibly and were of great assistance to the Authority throughout the investigation.

[21] Given the Authority's conviction that the total costs incurred by Mr Clapham were slightly higher than the normal range for a matter of this kind, the Authority must reflect that conviction in its costs award. However, the Authority must also be mindful of the very clear injunction from the decision in *Health Waikato Ltd v. Elmsley* [2004] 1 ERNZ 172 where the Court of Appeal mandated a "more steely" approach to costs fixing in circumstances where reasonable settlement proposals had been rejected, the Court being satisfied that the approach it was commending was consistent with the wider public interest.

### **Determination**

[22] This was a matter dealt with by the Authority in one day. A starting point then for costs fixing is \$3,500, the current notional daily rate. A single *Calderbank* offer was advanced by Mr Clapham (there were other settlement proposals but only one

*Calderbank* offer) and that *Calderbank* offer was an effective one thus requiring the Authority to apply some “uplift”.

[23] In effect, Alexander & Co suggest that “uplift” should be 100% of the notional daily rate whereas Mr Clapham’s submission proceeds on the different footing that he is entitled to 70% of his actual costs which submission is based first on giving “full weight” to Mr Clapham’s effective *Calderbank* offer, and secondly to the principles enunciated in *Watson*.

[24] But as Alexander & Co point out, the snare in the application of percentages in the costs fixing environment is that the calculation is, of necessity, based on the fees actually charged. In the present circumstance, the Authority is persuaded that the total fees incurred by Mr Clapham fall just outside the usual range for a matter of this kind, and on that footing the Authority must rebate the award appropriately.

[25] The Authority considers that the proper approach is to accept the logic of Mr Clapham’s argument by giving weight to his effective *Calderbank* offer, but on the basis of Alexander & Co’s contention that the percentage ought to be calculated on a more modest figure.

[26] The Authority, taking all of those matters into account, directs that Alexander & Co pay to Mr Clapham the sum of \$11,000 as a contribution to his costs. For the avoidance of doubt, the Authority has applied the 70% multiplier to a lesser total fee of \$15,500 and rounded that amount up slightly to achieve the figure of \$11,000.

**James Crichton**  
**Member of the Employment Relations Authority**