IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA125A/08
5112032

	BETWEEN	WARREN DAVID COLLINS Applicant
	AND	IDEA SERVICES LIMITED First Respondent
	AND	IHC NEW ZEALAND INCORPORATED Second Respondent

Member of Authority: G J Wood

Submissions Received: 9 December 2008

Determination: 12 December 2008

COSTS DETERMINATION OF THE AUTHORITY

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[1] In my substantive determination I dismissed Mr Collins' claims against Idea Services Limited, and his application to pursue a claim against IHC New Zealand Incorporated (IHC). I determined that his statement of problem did not identify IHC as his employer, that IHC could not be joined as a party under s.221 of the Employment Relations Act 2000 and declined to extend the time within which Mr Collins could properly bring a personal grievance against IHC under s.219 of the Act.

[2] On behalf of Idea Services Limited, Mr McBride seeks solicitor costs of $8,850 incurred following its *Calderbank* letter, plus a substantial contribution to its other costs of $1,900, because Mr Collins was entirely unsuccessful in his application and Idea Services Limited had made a valid *Calderbank* offer of $1,500 in respect of that application.

[3] In response, Mr Collins stated that his application had been dismissed on a technical point only, there were good reasons for any delays and that Mr McBride

without any forewarning whatsoever sprung a surprise on the day of the investigation meeting concerning the naming of the wrong party in the statement of problem. He stated that Idea Services Limited had already accepted the statement of problem, instructed a solicitor to act on its behalf, attended three telephone conferences, made a *Calderbank* offer and prepared statements of evidence. Its witnesses had also stated that they and he were employed by Idea Services Limited at the time, even though they were not. Mr Collins stated that he had no opportunity to avoid the costs involved in preparation accordingly. Mr Collins also noted that the Authority stated that the merits of the case only *slightly favour* IHC.

[4] Mr Collins submitted that as the matter was dismissed on a technical point that was unknown to either party at the time the *Calderbank* offer was made, costs should lie where they fall but if not, they should take the form of a modest order taking into account the costs he has already incurred.

[5] In response, Mr McBride stated that the Authority concluded that Mr Collins' case was weak, that Mr Collins had made no proposal to resolve costs and that Idea Services Limited was entirely successful. He also noted that the respondent is a registered charity.

[6] Mr Collins was unsuccessful in his application because he had misdescribed his former employer. This meant that he had failed to commence his action in the Authority within three years after the date on which his personal grievance had been raised. I gave consideration to whether I could allow Mr Collins to pursue his grievance pursuant to s.219 – validation of informal proceedings etc. I took into account the reason for the omission to bring a grievance within time, the length of delay, any prejudice or hardship to any other person, the effects on the rights and liabilities of the parties, subsequent events and the merits of the claim. I noted that Mr Collins must take responsibility for the misdescription of his former employer and the delay until the very end of the relevant three year period. I noted that IHC would be prejudiced by granting an extension of time, but that Mr Collins would suffer greatly by being unable to pursue his grievance. I also noted the involvement of the Authority's support staff in changing the employer's name, with the effective concurrence of Idea Services Limited and Mr Collins. Had this not occurred, Mr Collins may have been able to pursue his claim and thus he was seriously affected by the failure to grant an extension of time.

[7] My conclusion on the merits of the claim was not that Mr Collins' case was weak, as was asserted by McBride, but that *the merits slightly favour IHC*. I noted that:

> *In terms of the overall interests of justice, the key issues are that Mr Collins would lose his day in Court and that his mis-description of his employer have been complicated by the intervention of the Authority staff and the acquiescence by Idea Services Limited.*

[8] Against that had to be balanced the delay for almost three years, the prejudice that followed and Mr Collins' prospects of success being less than 50%.

[9] Mr Collins has not been able to have his day in Court. One of the reasons for this has not entirely been through his own fault in that there were misunderstandings that were shared by the Authority's staff and Idea Services Limited itself. 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. Were it not for the *Calderbank* offer, this is clearly a case where costs should lie where they fall as a result of the mutual misunderstanding as to who Mr Collins' former employer was.

[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.

G J Wood
Member of the Employment Relations Authority