

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 177
5442817

BETWEEN

ROBERT FLETT
Applicant

A N D

HIGGINS COATINGS PTY
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Michael Quigg, Counsel for the Respondent

Submissions received: 4 May 2015 from the Applicant
16 April 2015 from the Respondent

Date of Determination: 22 June 2015

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In my substantive determination issued as [2015] NZERA Auckland 57, I found that Mr Flett had no viable personal grievance but recorded concessions properly made by the respondent (Higgins) about wages due and owing by Higgins to Mr Flett.

[2] I reserved costs noting that Higgins could make an application for Mr Flett to contribute to its costs given it had been substantially successfully but I recorded the evidence before the Authority concerning Mr Flett's personal financial circumstances.

[3] In concluding the final section on costs in the substantive determination, I observed that:

... it may be that Higgins takes the view that this is not a matter that requires it to seek any contribution to its costs from Mr Flett.

The claim for costs

[4] A contribution to its costs of \$7,000 is sought by Higgins having incurred total costs in excess of \$20,000 in the matter.

[5] Higgins acknowledges that the investigation meeting took only one day and therefore in principle application of the notional daily rate would only attract a figure of \$3,500. The uplift in the putative daily rate is justified on the footing that Mr Flett failed to respond positively to an earlier operative *Calderbank* offer, acceptance of which would have placed him in a materially better position than he is in now as a consequence of having failed to establish his case.

The response

[6] Mr Flett has filed a submission on his own behalf which proceeds on the footing that he will pay whatever the Authority considers just, but will need time to pay.

[7] In addition, Mr Flett provides extensive evidence of his current reduced financial circumstances.

[8] Mr Flett's submission is also critical of Higgins' *Calderbank* offer, maintaining that the offer was not made until 29 weeks into the dispute and that that did not properly value him. Mr Flett misunderstands the purpose of a *Calderbank* offer; its purpose is essentially to seek to bring to an end the costs each party to a piece of litigation are expending by (hopefully) creating an environment where the recipient of the offer will be moved to accept the offer rather than to continue with the litigation and therefore continue to incur cost to both parties.

[9] *Calderbank* offers are seldom if ever presented unless and until disputes are well advanced and the whole point of making a *Calderbank* offer is to bring the costs of the continuing dispute to an end on the footing that that is a more attractive prospect than continuing to incur cost and continuing to incur risk of the litigation failing to achieve the outcome that the recipient of the *Calderbank* offer desires.

[10] That is precisely the situation that Mr Flett was in when the offer from Higgins was received; the dispute between the parties was well advanced and Higgins sought to bring its costs to an end, and take out the risk of the Employment Relations Authority making a finding adverse to Higgins, while giving Mr Flett an offer which Higgins would have hoped was sufficiently attractive to Mr Flett to encourage him to bring his claim to an end and conclude all matters on the basis of a payment from Higgins to Mr Flett.

[11] As is now painfully clear, if Mr Flett had accepted the *Calderbank* offer made by Higgins at the time it was made, the costs incurred by Higgins from that point onward would have ceased, Higgins would no longer have been at risk of an adverse finding from the Authority, Mr Flett would have had a payment into his account which on any analysis was a better outcome than what he subsequently got, and Mr Flett would have had the certainty of knowing that the litigation had come to an end without further risk to him and that it had ended in him receiving a payment from his former employer.

[12] Mr Flett also observes in his submissions on costs that he was entitled to act for himself in the matter and that comments by Higgins in its submissions to the effect that Mr Flett would have been better advised to seek some advice on the matter are misplaced and unfair.

[13] Again, I observe that Mr Flett misunderstands the position. All that Higgins is doing is commenting adversely on the fact that Mr Flett had no dispassionate adviser assisting him to assess his litigation risk. All claims or responses to claims benefit from dispassionate advice. Higgins is saying that if Mr Flett had had the benefit of that dispassionate advice from a competent legal practitioner, he might well not have invested energy in claims that had no legal merit and moreover, might well have accepted the operative *Calderbank* offer which would have materially advantaged him.

Determination

[14] The law on costs fixing in the Authority is well settled and need not be recited again here. The fundamental principle is the one that I referred to in my substantive

determination, namely that costs follow the event or to express the same idea in non-legal language, the successful party can normally look to the loser to obtain from the losing party money to assist the winning party pay its legal costs.

[15] Here, Higgins was substantially successful and Mr Flett appears to be accepting of the fact that he needs to make some contribution to its costs. That is particularly the case when, as I am bound to do by law, I factor into the equation Mr Flett's failure to accept the proffered *Calderbank* offer.

[16] While the law is clear that the failure to accept an operative *Calderbank* offer in the Authority is just one of the factors that the Authority must take into account and is not, for example, as determinative as the same circumstance would be in the Employment Court, it is nonetheless a fact that the whole point of making *Calderbank* offers is to reduce the need for unnecessary litigation, make it attractive for disputing parties to bring their disputes to an end and critically, where an operative *Calderbank* offer is proffered and not accepted, putting the facts around the *Calderbank* proposal before the Authority when it comes to the question of fixing costs. That particular consequence was clearly signalled to Mr Flett in Higgins' correspondence making the *Calderbank* offer.

[17] So Higgins is the successful party and its success is magnified by the failure of Mr Flett to accept the proffered *Calderbank* offer because that failure is required to be considered by the Authority when costs are set.

[18] Looking at the matter in the usual way that the Authority approaches these matters, the starting point would be the daily tariff approach. That approach requires the Authority to commence its consideration of a costs application by applying a factor of \$3,500 to each day of hearing and then considering whether there are factors which entitle the Authority to increase that amount or decrease it. Here, the fact of an operative *Calderbank* offer not accepted by the unsuccessful party ought to result in an increase in the costs that would otherwise apply.

[19] Conversely, Mr Flett signalled his financial circumstances in the Authority's substantive investigation such that the matter was referred to specifically by me in the substantive determination.

[20] Those observations Mr Flett made are augmented by subsequent material in his submission on costs where he sets out in considerable detail his reduced financial

circumstances. That fact is a circumstance which seems to me to entitle me to reduce the figure that would otherwise apply.

[21] I accept without reservation the thrust of the submissions made for Higgins that the effect of a losing party's financial stress is not a slam-dunk misiere, to vigorously mix metaphors.

[22] In the recent decision of the Employment Court of *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, Judge Inglis made clear that the financial hardship that might be suffered by the unsuccessful party in contributing to a costs award is "*not decisive*" in deciding the amount of that award. The decision of the Court in *Stevens* was an appeal from a costs determination of mine where I had awarded an entirely nominal amount to the successful employer party because of the clear evidence from the unsuccessful employee of financial stress.

[23] Having reviewed all of the material before me and reflected on the situation, I think the proper course of action is to require Mr Flett to make a contribution to Higgins' costs in the sum of \$2,500 and that the parties discuss with each other how that payment might be able to be made over time.

[24] This sum is a dramatically reduced amount from that claimed by Higgins but it reflects my conviction that any more than that amount would constitute a degree of hardship which is "*excessive or disproportionate*" to Mr Flett: *Gates v. Air New Zealand Ltd* [2010] NZEmpC 26 applied.

[25] While I have just made the point that the sum I have ordered Mr Flett to contribute to Higgins is dramatically less than Higgins sought, it is also appropriate for me to observe that Mr Flett must make a proper attempt to meet some of the obligations that every unsuccessful litigant has of contributing to the costs of the other side. I reject Mr Flett's continued belief that Higgins has behaved unfairly or badly in the way it has engaged with him during the Authority's investigation. In my opinion, both parties behaved respectfully to each other and I am satisfied that Higgins did everything it reasonably could to try to get Mr Flett to settle his dispute with it, even after all the evidence was in.

[26] It is most unusual for me to comment about the honourable way that a particular practitioner dealt with the party on the other side, but on this occasion I feel

obliged to draw attention to the decent behaviour of Michael Quigg who acted for Higgins in engaging with Mr Flett during the Authority's investigation.

[27] It only remains for me to remind the parties that Higgins owes Mr Flett some unpaid wages which it properly conceded during the investigation meeting; presumably the parties can agree that that sum, once calculated, can be deducted from the outstanding amount owed by Mr Flett to Higgins.

James Crichton
Member of the Employment Relations Authority