IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 182
5463786

	BETWEEN	ANDRENE SUE FRENCH Applicant
	A N D	WAIKATO BUSINESS PUBLICATIONS LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Prue Dawson, Counsel for the Applicant Glenys Steele, Advocate for the Respondent
Submissions received:	1 May 2015 from the Applicant 16 February 2015 from the Respondent
Date of Determination:	23 June 2015

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] The Authority's determination in the substantive matter issued as [2015] NZERA Auckland 22 on 29 January 2015.

[2] In that determination, I rejected Ms French's claims in their entirety and found exclusively for the respondent.

[3] Costs were reserved.

The claim for costs

[4] The respondent employer seeks full indemnity costs of $20,757.50 together with disbursements of $1,462.50.

[5] The argument for full indemnity costs is supported by the way in which Ms French ran her unsuccessful case, the conviction that Ms French had mounted a claim which was *"frivolous"* and a reliance on various precedents which justify the

increase in the traditional daily tariff approach used by the Authority in a costs setting environment.

[6] The respondent also seeks an allowance for preparation time because of the factual challenges required to deal with the way in which Ms French's claim was argued.

[7] Finally, the respondent contends that I should ignore submissions from Ms French on costs because they took so long to be filed.

[8] As the Authority did not specify a timeline in which costs submissions were to be filed, I cannot take that last contention any further.

The response

[9] Ms French argues that costs should lie where they fall. She claims that any challenges in the way the matter was presented to the Authority were a consequence of decisions made by the respondent rather than by her and refers particularly to the respondent calling a large number of witnesses, many of whom were not required to be heard.

[10] Moreover, Ms French maintains that she *"took constructive steps to avoid or limit the parties' costs …"*.

[11] Ms French also maintains that she was *"entitled to challenge the respondent's actions towards her and that an award of costs against her would undermine this"*.

[12] Moreover, Ms French maintains that the respondent *"must be accountable for its decision to incur the costs it did in excess of the cost estimate given by its representative on 10 July 2014 …"*.

[13] Furthermore, Ms French maintains that she is impecunious and not in a position to make any realistic contribution to the respondent's costs. A budget of outgoings is supplied together with the intelligence that Ms French is reliant on the charity of friends and family and that her mortgage and personal loan commitments are both in arrears and are of significant magnitude for a person in reduced circumstances.

***Calderbank* offers**

[14] Both parties have proposed settlement to the other in the course of the lead up to the investigation meeting although it is difficult to understand why Ms French, who was completely unsuccessful, should imagine that the Authority should take account of the *Calderbank* offers that she made to settle matters, given that her claim was unsuccessful.

[15] The position, of course, is otherwise with the *Calderbank* offer made by the successful respondent where the Authority's invariable practice is to take that fact of an operative *Calderbank* offer being made by the successful party into consideration in the overall mix of fixing costs.

Discussion

[16] The law around fixing costs in the Authority is now well settled . Both parties refer to the leading decision, *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[17] Principles derived from that decision include the self-evident proposition that costs usually follow the event, that the Authority ought to take into account *Calderbank* offers made by the successful party, and that the Authority's usual practice of commencing its evaluation with the daily tariff is appropriate.

[18] That being the position, the starting point for any determination of costs is the prevailing daily tariff rate of $3,500. This matter was dealt with in the Authority in two hearing days and accordingly the start point must be the sum of $7,000.

[19] Against that is to be set Ms French's contention that costs should lie where they fall. The usual rule that costs should follow the event is not in my judgement displaced by any of Ms French's submissions. The fact is that parties take a risk when they enter into litigation, whatever the forum, and it will be an unusual case where the usual rule of costs following the event ought not to apply.

[20] The question whether Ms French is in a position to pay a reasonable contribution to the successful respondent's costs is a quite different question and one that I will address shortly.

[21] The proper approach in determining costs in the Authority is to start with the daily tariff for the appropriate number of days and then consider whether there should be any uplift in that figure or a reduction of it.

[22] In the present case, the successful respondent seeks an uplift and Ms French seeks a reduction. Dealing with the submissions for an uplift first, it is apparent on the submissions of the respondent that a total cost of over $25,000 was incurred. Moreover, the respondent seeks an uplift based on an operative *Calderbank* offer made immediately after the unsuccessful mediation, and an uplift essentially because of the way in which Ms French chose to present her claim. In particular, it is suggested for the respondent that Ms French's claim was presented in an *"inefficient"* manner, that that increased the respondent's costs, that *"elements of the applicant's claim were so obviously without merit she would have been aware of that from the outset"* and that the scope of the allegations made by Ms French effectively broadened out the scope of the claim that the respondent had to meet.

[23] Some of these points are met by Ms French's complaint that the respondent produced a number of witnesses who were not required to be heard by the Authority and that that evidenced a similar lack of specificity on the part of the respondent.

[24] I accept that the respondent did seek to bring evidence to the Authority from a large number of people, much of which I decided was unnecessary. But I also accept that the reason the respondent did that was because of the way in which Ms French had chosen to present her claim.

[25] It is difficult for Ms French to escape the reality that she chose a complex and expensive way of making her claim by, for instance, presenting the case as a series of personal grievances.

[26] Of necessity, this approach is an expensive one in terms of preparation time for both parties and it is inevitable that when that approach is initiated by an unsuccessful applicant, such a device will sound in costs.

[27] Ms French's submissions that she diligently sought to settle the matter with the respondent in the run up to the investigation meeting is difficult to square with her rigid refusal to ever meet the respondent face-to-face and engage with it in an effort to resolve the employment relationship problem. In the end, parties have to bear the cost of the decisions they make in the way they run the litigation.

Determination

[28] Given my conviction that this is not a case where there is any basis for departing from the usual that costs should follow the event, in principle Ms French needs to accept that having commenced a piece of litigation without being in any way successful in it, a contribution to the costs of the successful party is now expected of her.

[29] This is particularly so given that the successful party initiated an operative *Calderbank* offer immediately after the unsuccessful mediation which Ms French did not accept. Had she done so, she would have been dramatically better off than she will be now. I would be failing in my duty if I did not take that operative *Calderbank* letter into account. I think that that *Calderbank* letter entitles the respondent to an uplift in the daily tariff.

[30] Moreover, I think there is an argument for the view that the expensive way in which Ms French chose to mount her claim ought also to sound in costs. However, because I think there is some merit in Ms French's contention that the respondent rather overdid the number of witnesses that needed to be called, I discount this factor a little.

[31] It seems to me that, taking both the *Calderbank* letter and the manner in which the case was argued into consideration but allowing something of a discount for the number of witnesses that the respondent sought to have the Authority hear, an uplift in the starting figure of $7,000 can be justified and I fix the increase at $2,000 leaving the subtotal to amount to $9,000.

[32] I need to now consider whether Ms French's impecunious circumstances entitle her to a diminution in the totality of what she should be asked to contribute to. First, I accept counsel's submission that Ms French is impecunious, is living in reduced circumstances, is reliant on the charity of friends and family, and on the face of it does not have income sufficient to meet outgoings before there is any consideration of a contribution to costs.

[33] In *Gates v. Air New Zealand Ltd* [2010] NZEmpC 26, the Employment Court said:

> *A factor which must be considered in the overall exercise of my discretion to award costs is the ability of the plaintiff to pay. The established principle is that a party ought not to be ordered to pay costs to the extent that doing so would cause undue hardship. What this principle allows for is that payment of any substantial sum will cause a measure of hardship to some litigants, particularly individuals. That is to be expected and is considered to be an acceptable consequence of unsuccessfully engaging in litigation. It also recognises that the primary focus of an award of costs should be on compensation of the successful party. It is only when payment of an award which achieves the purpose of justly compensating a successful party would cause a degree of hardship which is excessive or disproportionate that the interests of the unsuccessful party must be recognised by reducing the award which would otherwise be appropriate.*

[34] While the principles enunciated in the above passage relate to the law and practice in the Employment Court, in the later judgment of the Court in *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, the Court accepted that the principles enunciated in *Gates* applied in the Authority as well. The Court in *Stevens* said:

> *… the successful party's interest in being compensated for its costs is an important consideration to be weighed in the Authority's broad discretion … In my view the fact that an order for costs will impose financial hardship is to be considered when making an order for costs in the Authority but is not decisive and must be weighed among other factors relevant to the costs exercise.*

[35] The Authority is required to balance the entitlement of the successful party to have the fruits of its victory undiminished by its need to fund its legal costs on the one hand, against the requirement for the unsuccessful party to have its financial circumstances weighed to establish whether, in making a proper contribution to the successful party's costs, the unsuccessful party suffers such a degree of hardship as to be *"excessive"* or *"disproportionate"* so as to justify the Authority reducing the award that would otherwise be made.

[36] I am satisfied on the basis of the material before me that this is a case where the award that I might otherwise have made, were it not for the impecuniosity of the unsuccessful applicant, needs to be reduced to some extent because an award of the magnitude I would have contemplated otherwise would cause excessive or disproportionate hardship to Ms French.

[37] Put in numerical terms, were it not for her financial difficulties, I should have been persuaded that an award of $9,000 was appropriate. I note for the sake of completeness that that figure itself is some considerable distance from the full

indemnity costs sought by the successful respondent whose figure is more like $21,000.

[38] Given Ms French's financial difficulties, I am persuaded that the amount she should be asked to contribute to the costs of the successful party is in the sum of $5,000 and I now order that Ms French is to arrange to pay that sum to Waikato Business Publications Limited.

James Crichton
Member of the Employment Relations Authority