

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 171A/10
5286758

BETWEEN SANDRA JAMIESON
 Applicant

A N D ROBIN McCARTHY t/a
 CHRISTCHURCH TOURS
 Respondent

Member of Authority: James Crichton

Representatives: David Beck, Counsel for Applicant
 Peter Anderson, Counsel for Respondent

Submissions Received: 28 September 2010 from Applicant
 12 October 2010 from Respondent

Date of Determination: 26 October 2010

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 1 September 2010 the Authority resolved the employment relationship problem between these two parties by determining that Ms Jamieson had a personal grievance by reason of having been unjustifiably dismissed from her employment.

[2] Costs were reserved.

The claim for costs

[3] Counsel for Ms Jamieson seeks indemnity costs totalling \$4,282.50. Conversely, Mr McCarthy proposes that an award of \$1,000 would be more appropriate.

[4] In essence, Mr McCarthy maintains that there is no reason in principle to depart from the Authority's usual process of applying the *daily tariff* approach while

Ms Jamieson claims indemnity costs on the basis of the allegedly poor behaviour of Mr McCarthy in dealing with the matter, Ms Jamieson's tendering of a *Calderbank* offer in a timely fashion, and Ms Jamieson's limited means.

[5] Mr McCarthy seeks to meet each of those submissions with like submissions of his own. First, he emphasises that there is no particular reason to depart from the daily tariff approach, there is no reason in principle to identify his behaviour in dealing with the matter as anything other than the behaviour of an employer seeking to defend itself against a claim, and Mr McCarthy himself submits that he also is in financial difficulty and an award of the magnitude sought by Ms Jamieson might be sufficient to cause him to cease trading. Further and finally, Mr McCarthy submits that the *Calderbank* offer, coming as it does from the successful applicant, ought not to be relied upon by the Authority in a costs setting environment.

The legal principles

[6] The Full Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 identifies the guiding principles traditionally referred to by the Authority in a costs setting and confirms the appropriateness of those principles. Specifically, the Full Bench of the Employment Court approved the tariff based approach often adopted by the Authority in a costs environment, as long as the particular circumstances of the individual case are taken into account.

[7] In essence, the Authority's task in determining a costs matter is, as Member Dumbleton observed in *Graham v. Airways Corporation of New Zealand Ltd* (unreported, AA39/04, 28 January 2004) is to consider three questions:

- (a) What were the actual costs of the successful party;
- (b) Were those actual costs reasonable in all the circumstances; and
- (c) What proportion of those actual costs ought to be met by the unsuccessful party?

Discussion

[8] The Authority's default position in a cost-fixing environment is to look at the matter using the daily tariff approach. That approach can be departed from, if the

circumstances of the case warrant it, but in the ordinary course, it will often be found to be the most useful underpinning for a costs decision.

[9] The particular circumstances of this case are not, in my opinion, extraordinary. I do not accept that Mr McCarthy ought to be punished in costs simply because his handling of Ms Jamieson's employment relationship problem was less than ideal. Certainly, it would be quite improper to penalise an employer simply for defending a personal grievance claim. However, in the particular circumstances of this case, it is alleged that because the Authority made findings of bad faith against Mr McCarthy, that grounds a claim for costs over and above the norm. I do not agree. It is the case that, in the Authority's view, Mr McCarthy did not deal with Ms Jamieson's claim appropriately. But the reality is that the Authority is supposed to be a reasonably informal and low cost environment in which parties can, if they wish, act for themselves. Certainly, I think it would be quite inappropriate to penalise Mr McCarthy because he chose to deal with the matter himself (without counsel). It may be that had he taken legal advice earlier, the course of the dispute may have been different, but the Authority must preserve its status as an institution which parties can approach without counsel if they choose.

[10] Nor am I much attracted by Ms Jamieson's argument that her *Calderbank* offer is somehow definitive. It is the case that the law requires the Authority to have regard to attempts by the parties to resolve matters prior to formal hearings and arguably, if Mr McCarthy had accepted Ms Jamieson's *Calderbank* offer, the matter would have been concluded earlier, and definitively without appeal, and at less cost to him. However, a *Calderbank* offer for the successful applicant can never have the game changing effect of a *Calderbank* offer from a successful respondent. It is, however, appropriate that the Authority consider the *Calderbank* offer as part of the overall set of considerations in reaching a decision.

[11] Both parties claim to be financially stressed and I accept those claims at face value. Given that the only possible outcome of a costs fixing is that Mr McCarthy will owe Ms Jamieson money, the only relevant issue is Mr McCarthy's ability to pay. It is a matter that the Authority is entitled to consider.

[12] The short point is that there is nothing in the present matter which ought to distract the Authority from considering the matter on the basis of a daily tariff approach. This was a very straightforward grievance dealt with quickly in the

Authority in around half a day and while I accept without reservation that Ms Jamieson's legal costs are absolutely reasonable, in a case of this kind, it would be an unusual departure for the Authority to exercise its discretion and apply full indemnity costs.

Determination

[13] In all the circumstances, this was a simple, straightforward grievance dealt with by the Authority in under half a day. The unsuccessful respondent is financially stressed. Any significant award on top of the awards already made by the Authority would have a further deleterious effect. Conversely, costs ought to follow the event in accordance with the usual principle and an award should be made.

[14] I agree with counsel for the respondent that an appropriate award in the circumstances is \$1,000 and I direct that Mr McCarthy is to pay that sum to Ms Jamieson as a contribution to her costs.

James Crichton
Member of the Employment Relations Authority