

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 425
5362894

BETWEEN RAEWYN JARVIS-HALL
Applicant

A N D WAIKATO COMMUNITY
HOSPICE TRUST t/a
HOSPICE WAIKATO
Respondent

Member of Authority: James Crichton

Representatives: Carl Blake, Counsel for Applicant
Melanie O'Neill, Counsel for Respondent

Submissions Received: 24 July 2012 and 10 August 2012 from Applicant
23 July 2012 and 10 August 2012 from Respondent

Date of Determination: 28 November 2012

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] By determination dated 5 July 2012, the Authority disposed of the employment relationship problem brought by Ms Jarvis-Hall by determining that she had been unjustifiably dismissed, was entitled to compensation and a contribution to lost wages but that she had also taken annual leave to which she was not entitled. The Authority determined that the value of that annual leave be returned to the respondent (Hospice Waikato).

[2] Costs were reserved.

The application for costs

[3] Both parties seek an award of costs. Dealing first with the application filed by Ms Jarvis-Hall, her application proceeds on the footing that her substantive claim was

wholly successful and while she acknowledges that she had been unsuccessful in her earlier interim reinstatement application and Hospice Waikato had succeeded in its counterclaim in the substantive matter, she seeks to rely on the principle that, in terms of the substantive matter, her own claims were *wholly successful*.

[4] Ms Jarvis-Hall acknowledges the receipt of a *Calderbank* offer but notes that as was for a total of \$19,696.04 it was less than the Authority's award and thus can be ignored as ineffective.

[5] Of particular moment for Ms Jarvis-Hall's purposes is the correct treatment of the counterclaim where Hospice Waikato were completely successful. Ms Jarvis-Hall submits that the counterclaim cannot be set off against the remedies awarded to her, and even if that is not accepted, she points out that the counterclaim was filed and served by Hospice Waikato a long time after the *Calderbank* offer was made. That statement is demonstrably true; the counterclaim was filed in the Authority on 23 April 2012 whereas the *Calderbank* offer was made on 25 October 2011, the day Ms Jarvis-Hall was dismissed. It follows that the *Calderbank* offer pre-dates the counterclaim by fully six months.

[6] Ms Jarvis-Hall contends that the way in which she managed her case did not contribute to the costs incurred by Hospice Waikato and that the application to the Authority for discovery of documents held by Hospice Waikato, and thus the additional costs of that process, ought not to be sheeted home to her because Hospice Waikato ought to have disclosed the documents in the first place without being required to do so by the Authority.

[7] Taken together, a total sum of \$6,157.88 in costs is sought, broken down under three heads:

- (a) Costs - \$3,500
- (b) Disclosure - \$2,597.85
- (c) Photocopying - \$60.03.

The total amount in legal fees incurred by Ms Jarvis-Hall for the services in question amount to over \$35,000.

[8] For its part, Hospice Waikato also seeks an award of costs. They rely first on the *Calderbank* offer. The Authority is not persuaded that the *Calderbank* offer is effective. This is because the counterclaim, where Hospice Waikato were completely successful, must be excluded from the computation because it was plainly not in the party's contemplation when the *Calderbank* offer was presented. It was not filed and served until fully six months after the *Calderbank* offer was presented to Ms Jarvis-Hall. Moreover, the Authority must treat the *Calderbank* as ineffective given that the awards made by the Authority in the substantive determination, even when netted off for tax purposes, amount to significantly more than the *Calderbank* offer made on 25 October 2011 some six months before the counterclaim was on foot.

[9] However, the position is otherwise in relation to the costs incurred by Hospice Waikato in defending Ms Jarvis-Hall's claim for interim reinstatement. Here, Hospice Waikato were completely successful in resisting Ms Jarvis-Hall's application and the Authority accepts that it is appropriate for it to factor in those costs as part of the global costs fixing exercise.

[10] Next, Hospice Waikato reject Ms Jarvis-Hall's contention that she did not contribute adversely to the time taken for the litigation, and thus the costs incurred by Hospice Waikato. In particular, the various applications made on Ms Jarvis-Hall's behalf for further and better particulars are, it is contended, frivolous and/or irrelevant and in any event it is submitted little if any of that material was used in the eventual investigation meeting.

[11] Next, Hospice Waikato claims to have been the victor looking at the matter in the round because they were completely successful in their application to the Authority for counterclaim and were completely successful in resisting Ms Jarvis-Hall's application for interim reinstatement.

[12] Next, Hospice Waikato drew attention to the significant time invested by its Chief Executive, Mrs Bang in investigating the circumstances of the counterclaim and that significant time ought to be reflected in the costs award in respect to the counterclaim.

The responses

[13] Because in the instant case, both parties have sought an award of costs, both have also filed submissions in reply and they are now considered in turn.

[14] Dealing first with the applicant's response, Ms Jarvis-Hall makes further pertinent observations about the efficacy of the *Calderbank* offer. For the reasons the Authority has already enunciated, it is satisfied that the *Calderbank* offer cannot be effective in the present case. Ms Jarvis-Hall notes that, at the point at which the *Calderbank* offer was made, she thought she was still in the employment, had not raised a personal grievance, and had not commenced any proceeding in relation to an employment relationship problem. Given the foregoing, the *Calderbank* offer does not qualify for that description in terms of the High Court Rules because the Rules contemplate that offers are made by parties in relation to an actual proceeding.

[15] The Authority is satisfied that those matters simply add to the grounds on which the *Calderbank* offer ought to be rejected in the present case.

[16] The applicant's submissions to the counterclaim are less attractive. It is true, as Ms Jarvis-Hall submits, that the counterclaim is an entirely separate claim and in the Authority's view must be dealt with as such. But that does not mean that it ought not to attract costs in the normal way. If the counterclaim were a free standing and separate proceeding, where Hospice Waikato had been completely successful (as it was in the present proceeding in relation to the counterclaim) then there would be no question that they were entitled to have Ms Jarvis-Hall contribute to their costs.

[17] It may be that the counterclaim took a reasonably small part of the total hearing time although that submission, true as far as it goes, must be set off against the fact that Mrs Bang for Hospice Waikato spent a significant amount of her time researching the claim for the employer which of course was subsequently entirely successful.

[18] In relation to the interim reinstatement application, Ms Jarvis-Hall maintains that because she withdrew the permanent reinstatement claim the result of the interim reinstatement investigation became irrelevant and was *overridden* by the result in the substantive decision of the Authority.

[19] That submission appears to proceed on the basis that the Authority should effectively ignore the costs incurred by the successful party in defending the interim reinstatement application, because in a subsequent proceeding, which did not involve reinstatement, the parties positions were effectively reversed.

[20] That submission seems to fly in the face of logic. It cannot be that the costs incurred by the parties in the interim reinstatement application just disappear into the ether; they have been incurred and as Hospice Waikato correctly pointed out in its submission, costs were reserved in respect to the interim reinstatement application, as well as the substantive application. In the Authority's judgment, there can be no question of the substantive determination somehow superseding the interim determination on a different matter. Both need to be considered in the overall costs fixing environment.

[21] Dealing with the contention that Hospice Waikato made that Ms Jarvis-Hall was simply pursuing discovery of documents for the sake of it, Ms Jarvis-Hall resists that claim, argues that she was entitled to the documentation sought, points out that the Authority made orders to require Hospice Waikato to produce the documentation and asserts that some of the material obtained went to the heart of her case, in particular the contention that the Chairman of the Board's evidence was important to her contention that the dismissal had been pre-determined.

[22] Finally, Ms Jarvis-Hall makes the submission that the Authority should not allow Hospice Waikato to claim any sum in costs for work done by Mrs Bang in researching the background to the counterclaim because, strictly speaking, that was management effort rather than effort directed at the litigation.

[23] In its response, Hospice Waikato contend that the timing of the counterclaim was not the issue that Ms Jarvis-Hall maintained it was; that Ms Jarvis-Hall and the Authority knew the counterclaim was coming. That may be so but the juxtaposition between the counterclaim and the *Calderbank* offer, fully six months apart, must be in the Authority's consideration in a cost setting environment.

[24] Next, Hospice Waikato maintain that Ms Jarvis-Hall's legal costs may not have been *reasonably incurred* because there is no narration for the fees charged. The Authority's invariable practice is to assess the reasonableness of fees charged in the round. Experienced Authority members have a very good feel for whether the totality of fees rendered are within a reasonable band, or not.

[25] Hospice Waikato maintain, correctly, that the issue of the interim reinstatement application cannot simply be made to *go away*, but costs were incurred

by both parties and that in its determination in the matter, the Authority reserved costs.

[26] Counsel for Hospice Waikato persists with Hospice Waikato's argument in relation to the *Calderbank* offer about which the Authority has said enough already and repeats submissions in relation to the issues around disclosure.

Discussion

[27] The law on costs fixing in the Authority is well settled and the principles that ought to apply have been clearly enunciated by the Full Bench of the Employment Court in the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[28] That decision, amongst other things, approves the Authority's common practice of applying a daily tariff and enunciates various other principles such as the Authority's discretion to grant costs or not, the fact that costs will typically follow the event, the fact that costs in the Authority will typically be modest and the fact that the behaviour of the unsuccessful party may sound in costs. In addition of course, *Da Cruz* makes it clear that *Calderbank* offers *can be taken into account* and there is ample other law on that point as well.

[29] Because in the present case each party is effectively claiming victory and therefore seeking an award of costs from the Authority, it will be useful if the analysis proceeds on a compartmentalised basis.

[30] The first issue that the Authority wishes to deal with for the sake of completeness is the effectiveness of the *Calderbank* offer. The Authority is satisfied that for reasons already enunciated in the body of this determination, the *Calderbank* offer advanced by Hospice Waikato is not effective and therefore is not in play. The principle reason that the Authority reaches that conclusion is the fact that, looked at properly, (that is excluding the counterclaim) the *Calderbank* offer did not produce a figure that would challenge the awards made by the Authority and it is not therefore effective as a *Calderbank* offer. That analysis rests on the footing that the counterclaim must be excluded because it is a separate matter, it was filed and served some six months after the *Calderbank* offer was presented, and there is even doubt as to whether the *Calderbank* offer would ever have been potentially effective because it was made before there was even any litigation in prospect.

[31] However, the Authority is absolutely satisfied that both the counterclaim and the interim reinstatement application fall for a costs determination, as effectively free standing claims, as does the substantive matter itself. Looked at in a practical way, the Authority's considered view is that the best approach to take is to enunciate an award of costs in respect to each of the component parts of the litigation and then summarise the position with an aggregate result.

[32] In each of the three separate exercises that the Authority will undertake in costs fixing in this matter, the inquiry needs to proceed on the basis of the helpful analysis in the earlier Authority decision in *Graham v. Airways Corporation of New Zealand Limited* AA39/04 where the present Chief of the Authority Member Dumbleton postulated three questions that the Authority should consider in costs fixing:

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

[33] Applying those principles first to the interim reinstatement application, this was a matter where Hospice Waikato were completely successful. They advise that costs of \$9,030.00 were incurred in their successful defence of that application. That sum appears to the Authority to be within the appropriate range for fees for that service. The investigation meeting, as is typical of matters of an interim nature, were dealt with in approximately half a day. The current daily tariff is now \$3,500. The Authority's considered judgment is that Ms Jarvis-Hall should contribute the sum of \$2,500 to Hospice Waikato's costs in respect to the interim reinstatement application.

[34] In respect to the substantive matter, shorn of the counterclaim, Ms Jarvis-Hall was herself completely successful and her counsel's fees for dealing with the whole of the substantive matter amounted to around \$35,000 which in the Authority's judgment is at the high end of fees for services of this kind. However, nothing turns on that quantum because the claim made on Ms Jarvis-Hall's behalf for a contribution to her costs is modest indeed at \$6,157.88. The Authority awards Ms Jarvis-Hall that sum as a contribution to her costs in successfully prosecuting her personal grievance.

[35] The third element is the counterclaim where Hospice Waikato were again completely successful. Hospice Waikato do not tell the Authority what percentage of counsel's time was involved in that aspect and to be fair to them, that would be difficult to break out given that it was inevitably dealt with as part of the overall claim.

[36] However, Hospice Waikato do make a claim for Mrs Bang's time in researching the basis of that counterclaim. The sum claimed is \$5,000.

[37] Whether Mrs Bang's time can be claimed depends on whether the Authority is satisfied that the amount sought relates to the litigation or is more properly identified as normal management activities.

[38] In the Authority's judgment, the evidence before the Authority supports Hospice Waikato's claim that Mrs Bang was not involved in ordinary management activity but was effectively assembling evidence and/or assessing counter evidence, in respect to the counterclaim. On that footing, some contribution to those costs is appropriate.

[39] \$5,000 is sought. Counsel quite properly acknowledges that there is no science to that number. The Authority considers that, in all the circumstances, Ms Jarvis-Hall should contribute \$1,500 to the costs incurred by Hospice Waikato in relation to the counterclaim inclusive of legal costs and Mrs Bang's own efforts.

Determination

[40] Because of the particular complexities of this matter, the Authority has analysed the costs claimed in components. The Authority has looked at the three elements of the litigation and apportioned a costs award in respect to each of those three elements. At this point, and for the sake of completeness, the Authority wishes to make clear that there is no basis for Hospice Waikato's contention that they are entitled to a global award of costs, nor for an award of \$25,000 for that matter. Those sorts of figures would rarely be awarded in the Authority and certainly not in favour of a party who, however the matter is dressed up, was less successful than the other party.

[41] The Authority has considered the question of whether the various exchanges between the parties around discovery issues ought to further sound in costs. The

Authority notes that there is an element of that aspect in the claim for costs made by Ms Jarvis-Hall, which the Authority has already agreed to award. The question is whether there should be any further allowance made either for Ms Jarvis-Hall or for Hospice Waikato.

[42] The Authority's considered view is that on balance, Ms Jarvis-Hall is entitled to seek the information that she did seek, ought not to have had to apply to the Authority to get it and therefore, any further costs award in favour of Hospice Waikato would be inappropriate.

[43] On that basis then, Hospice Waikato are to pay to Ms Jarvis-Hall the sum of \$6,157.88 and Ms Jarvis-Hall is to pay to Hospice Waikato the sum of \$4,000, each as a contribution to the others costs.

James Crichton
Member of the Employment Relations Authority