

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 460
5328688

BETWEEN ELAINE MANDER
 Applicant

A N D IHC NEW ZEALAND
 INCORPORATED
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in Person
 Paul McBride, Counsel for Respondent

Submissions Received: 3 December 2012 from Applicant
 30 October 2012 from Respondent
 and

Date of Determination: 17 December 2012

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] The Authority issued a determination on the substantive matter on 11 September 2012 wherein it decided that Ms Mander’s claims “*failed in their entirety*”.

[2] Costs were reserved.

The application for costs

[3] The respondent (IHC) as the successful party seeks an award of indemnity costs in the sum of \$8,700 post-a *Calderbank* offer (about which more shortly) together with a contribution of half the pre-*Calderbank* offer costs being \$900 and an additional award of \$500 as a contribution to the costs of the costs application itself.

[4] Not surprisingly, IHC relies on the *Calderbank* offer it made in this case which was in the sum of \$3,000. As Ms Mander was completely unsuccessful in her application before the Authority, the *Calderbank* offer becomes effective because, as counsel for IHC carefully explained in the letter of 15 February 2012 offering the *Calderbank*, *Calderbank* offers become effective (and are thus able to be considered by the Authority in fixing costs) when the recipient of the *Calderbank* offer (in this case Ms Mander) would have been better off to take the *Calderbank* offer than to persevere with her hearing.

[5] Not only did IHC's counsel carefully explain the effect of the *Calderbank* offer to Ms Mander but he also urged her to seek legal advice in relation to it. That is proper professional practice given that Ms Mander was unrepresented.

[6] In the result, Ms Mander did not accept the *Calderbank* offer and because it is effective (as explained above), it falls for consideration in a costs fixing environment. The effect of allowing the *Calderbank* to form part of the decision-making matrix for the Authority is generally to make it easier for the successful party to obtain a larger award of costs.

[7] This is because the Courts have long held the view that, to quote the judgment in *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385 at para.[20] (as relied upon by IHC):

... the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered.

[8] Counsel for IHC also urges on the Authority that because Ms Mander was unrepresented, the Authority should not, as it were, feel sorry for her and seek to write down the quantum of costs that IHC would normally have been entitled to.

[9] IHC advises that it incurred costs of \$1,800 exclusive of GST up to the date of the *Calderbank* offer and a further \$8,700 after the *Calderbank* offer.

The response

[10] Ms Mander objects to much of IHC's submission in respect of costs. Contrary to the submission made by IHC, Ms Mander says that she did not ignore IHC when it wrote to her to seek an agreement on costs; she understood (erroneously as it turns

out) that because she had applied for a rehearing of the substantive matter, costs would effectively be deferred until that rehearing had been attended to.

[11] Dealing with the *Calderbank* offer, Ms Mander's description of how she approached the *Calderbank* offer effectively proceeds on the footing that as she felt wronged by what IHC had done in declaring her position surplus to requirements, she had no alternative but to proceed and that financial compensation was not the goal. Of course, the difficulty with that thesis is that in determining to proceed, Ms Mander effectively imposed additional costs on IHC, which it would not otherwise have had to bear and it is for precisely that reason that the Courts have traditionally made costs awards against unsuccessful parties. One of the oldest rules in litigation is the rule that costs usually follow the event (that is, the unsuccessful party contributes to the costs of the successful party), because the Courts have long held that litigants cannot expect to bring legal proceedings against another party unless they accept the risk that if they are unsuccessful, they will have to assist the successful party to bear the costs of the whole enterprise.

[12] Ms Mander also alleges that the *Calderbank* offer principle "*favours IHC*" because if she had been successful, there would have been no costs award in her favour because she acted for herself. That would only be true if there were no costs incurred by her in successfully prosecuting her claim. The law is quite clear that costs of litigation include a far wider ambit than simply the fees charged by an advocate or lawyer. And of course, the converse is also true that it is not fair that IHC be penalised in a reduced costs award because Ms Mander was not represented.

[13] That is the point that Mr McBride was making when he urged on the Authority the view that the Authority should not write down IHC's entitlement just because Ms Mander is not represented by counsel.

[14] The tariff-based approach which IHC comments on in its submissions and Ms Mander refers to without understanding exactly what is meant, is simply a way in which the Authority has traditionally sought to fix costs. The Authority has often adopted a daily tariff approach, presently at \$3,500 per day's hearing, as a starting point for considering costs awards. What the Authority does is use that figure as a base to either add to or subtract from depending on the arguments made by the representatives in favour of higher or lower costs as the case may be.

[15] Finally, Ms Mander makes a number of observations about the quantum sought by IHC and in particular the additional award of \$500 for preparing the costs submission.

The law

[16] The leading case in costs fixing in the Authority is the decision of the Full Bench of the Employment Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[17] That decision admirably summarises the jurisprudence around costs fixing in the Authority including the precepts that costs in the Authority will typically be modest, that costs will usually follow the event, that it is appropriate for the Authority to apply a daily tariff to cost fixing and that the Authority ought to consider *Calderbank* offers where they are made.

[18] In that latter regard, as Mr McBride has made clear in submissions for the IHC, the law has strengthened since *PBO* with a number of observations by the Court of Appeal to the effect that a “steely” approach is to be taken to costs fixing where *Calderbank* offers are effective (as in this case). Exactly such an observation was made in the *Blue Star* case referred to earlier.

Determination

[19] The Authority is used to assessing the reasonableness of fees charged by counsel and lay advocates in matters of this kind. The Authority has no hesitation in concluding that the fees charged by counsel for IHC in the present case are reasonable. The only question is what percentage of those reasonable costs ought to be met by Ms Mander given the existence of an effective *Calderbank* offer.

[20] IHC claims costs in three discrete heads, namely the post-*Calderbank* offer costs, pre-*Calderbank* offer costs and an additional contribution to the costs of filing the costs submissions.

[21] Dealing with the two smaller claims first, as to the amount of \$500 sought as a contribution to the costs of filing the submissions on point, the Authority is not minded to make an award. Ms Mander makes a series of submissions in relation to this aspect, the thrust of which is that she was not simply ignoring Mr McBride’s

correspondence; she thought (erroneously) that costs fixing would be deferred given she had sought a rehearing.

[22] As to the pre-*Calderbank* costs, 50% of the actual costs is sought. That percentage is higher than the Authority thinks reasonable.

[23] Looked at in the round, an order for indemnity costs of \$8,700 is sought for the post-*Calderbank* costs. The effect of such an award would, in the Authority's opinion, penalise Ms Mander more than it would compensate IHC. While the Authority accepts that IHC is a voluntary organisation operating with scarce funds which it can ill afford to use on activities such as defending claims of this sort, the Authority's view is that Ms Mander ought to be asked to contribute a figure of \$6,000 in total to IHC's costs. That represents roughly two thirds of the costs incurred since the *Calderbank* together with a small allowance of \$300 for costs incurred prior to that and no allowance at all for the costs incurred in preparing the costs submission.

[24] If Ms Mander needs time to pay that amount, that should be allowed.

James Crichton
Member of the Employment Relations Authority