IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 20
5350930

	BETWEEN	SUSAN McLEOD Applicant
	A N D	NATIONAL HEARING CARE (NEW ZEALAND) LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Dave McLeod, Advocate for the Applicant Richard Harrison, Counsel for the Respondent
Submissions Received:	17 February 2012 from the Applicant 3 February 2012 from the Respondent
Date of Determination:	27 February 2012

COSTS DETERMINATION OF THE AUTHORITY

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[1] On 21 December 2011 I issued a determination concluding that Ms McLeod did not have a personal grievance and dismissing the claims of unjustified dismissal and unjustified disadvantage she had brought against her previous employer, National Hearing Care (New Zealand) Limited (National Hearing).

[2] The issue of costs was reserved with the successful respondent, National Hearing, being advised that if it wished to seek a contribution toward its costs, it should do so via a written application. It does.

[3] National Hearing incurred costs of $15,387.76 though this includes the cost of advice as to how to respond to Ms McLeod at the time of the events about which she subsequently complained. The above total includes disbursements of $670.46 and GST of $2007.10.

[4] Normally the Authority will assess costs on a daily tariff basis: refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. In assessing that tariff a

common starting point is $3,000 per day: refer *Chief Executive of the Department of Corrections v Tawhiwhirangi (No 2)* [2008] ERNZ 73, though in recent times a number of costs determinations have referred to $3,500 as now being appropriate. From that point adjustment may be made depending on the circumstances.

[5] This matter took a day so applying the above approach, an award of $3,500 would appear appropriate.

[6] National Hearing seeks a greater contribution and suggests $10,000 as being appropriate. In support of that suggestion Mr Harrison refers to the principles enunciated in *PBO Ltd v Da Cruz* before noting that:

a. Ms McLeod's focus on reinstatement greatly increased costs as it meant National Hearing had no choice but to actively defend the matter as such an outcome would lead to both a commercial and, from National Hearing's point of view, legal nonsense;

b. It was Ms McLeod who rejected cheaper alternatives such as mediation with a weak rationale and despite encouragement to do so from the ERA member then dealing with the matter (Mr Denis Asher);

c. A Calderbank offer was made by National Hearing on 30 August. It was rejected with a much larger counter proposal being tabled which, it is submitted, was an unrealistic approach meaning costly litigation became unavoidable.

[7] By way of response, Mr McLeod, contends that costs should lie where they fall. In support of that argument he contends that:

a. Ms McLeod should not penalised for a claim brought in good faith. There was a legitimate dispute about the effect of a statutory notice and National Hearing should have resolved that before acting unilaterally. In essence, the prime thrust of the submission is that the substantive determination is wrong and the dismissal remains unjustified;

b. Ms McLeod was, in fact, partly successful. This refers to paragraph 63 of the substantive determination and my comment that if Ms McLeod had not been paid two months notice in lieu of notice, she should have been;

c. That it was National Hearing who initially refused to mediate; and

d. Ms McLeod is now of limited means and can not afford a significant award.

[8] I can not say that the arguments of either party convince me to depart from the normal formula approach.

[9] Mr Harrison's most compelling argument is the existence of the Calderbank and in this respect he urges me to note *Health Waikato Limited v Elmsley* [2004] 1 ERNZ 172 and the Court of Appeal's counsel that the Authority be "steely" in respect to such offers. Undermining the submission is the fact that one of the purposes of a Calderbank is to support an argument that the party making the offer be recompensed for costs unreasonably incurred – ie: those incurred after rejection of the offer. In this instance the offer was made relatively late in proceedings and the bulk of the costs had already been incurred.

[10] Similarly, both parties rejected mediation at various stages and here I note Mr McLeod's comments about my refusal to criticise National Hearing for not mediating in the substantive decision. Notwithstanding a legislative scheme that promotes mediation, the Act also recognises that there are some matters that require judicial intervention (s.143(e)).

[11] Similarly there is little merit to Mr McLeod's suggestion that the substantive decision is wrong (7(a) above); the issue canvassed in paragraph 63 was, in the scheme of things, de-minimis with National Hearing immediately conceding that if the amount sought had not been paid it would be (and subsequently has) and there is no evidence to support the assertion of impecuniousness (7(d) above).

[12] Having considered the issues and arguments, I conclude it appropriate to remain with the normal tariff approach and order Ms McLeod is to pay National Hearing the sum of $3,500 (three thousand, five hundred dollars) as a contribution toward costs.

M B Loftus
Member of the Employment Relations Authority