

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 122
5275176

BETWEEN BRIAN MULDOON
 Applicant

AND NELSON MARLBOROUGH
 DISTRICT HEALTH BOARD
 Respondent

Member of Authority: M B Loftus

Representatives: Angela Sharma, Counsel for the Applicant
 Paul McBride, Counsel for the Respondent

Submissions received: 28 February and 6 April 2011 from the Respondent
 30 March 2011 from the Applicant

Determination: 10 August 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 28 January 2011 I rejected Mr Muldoon's claim that he had a personal grievance.

[2] The issue of costs was reserved with the successful respondent, Nelson Marlborough District Health Board (NMDHB), being advised that if it wished to seek a contribution toward its costs, it should do so via a written application. It does.

[3] NMDHB incurred costs of \$12,000 plus GST and disbursements of \$673.70. Toward that, it seeks a contribution of \$11,550 plus disbursements of \$277.20.

[4] In support of the application it is submitted:

- i. The matter was complicated, with the difficulties being accentuated by the applicant's decision to change his representative more than once;
- ii. The Respondent put the applicant on early notice that the claim was without basis;

iii. That, and given the submission tendered most significantly, the Respondent tendered a Calderbank offer letter dated 16 February 2010. The offer was subsequently rejected; and

iv. The result turned, to some extent, on the applicants' own evidence *that established that he did not believe in the claims being advanced on his behalf.*

[5] By way of response, Ms Sharma asserts:

- i. That the application was not the *unmeritorious try-on* NMDHB portrays it as;
- ii. The determination has been challenged;
- iii. That Mr Muldoon suffered financially as a result of his loss of employment with NMDHB and his situation has not improved with various commitments imposing a heavy burden upon him;
- iv. NMDHB's Calderbank is deficient in that it fails to specifically propose how costs to date be dealt with;
- v. NMDHB's submissions fail to record all interactions between the parties and the fact they came relatively close to resolving the dispute (though it should be noted that NMDHB disputes Mr Muldoon's recollections in this respect);
- vi. NMDHB's claim is manifestly excessive when considered vis-à-vis average Authority awards.

[6] 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. From that point adjustment may be made depending on the circumstances.

[7] This was a one day hearing. Applying *Da Cruz* and *Tawhiwhirangi (No 2)* the award would be \$3,000.

[8] Two exceptions aside, I am not convinced by the arguments of either party that I should depart from this approach with the points made being of the type I would

normally expect. That said, comment should be made on the point of whether or not the parties came close to resolving the matter. It does not matter whose recollection is correct as Mr Muldoon was unsuccessful and received no award. As Mr McBride submitted:

... the Employment Court (Judge Shaw) held in Idea Services Ltd v Collins (2009) 9 NZELC 93,337; (2009) NELF 495 at [21];
“The amount of the offer made is only relevant to the question of whether it would have been more beneficial to the offeree”
Once the figure is more than that awarded by the Authority, that is sufficient.

[9] The exceptions referred to in 8 above are the Calderbank and Mr Muldoon’s alleged pecuniary disadvantage.

[10] There can not, in my view, be any suggestion that NMDHB did not issue a legitimate Calderbank offer. The letter in question refers to the term, clearly states it is *Without prejudice except as to costs* and that if rejected would be used to pursue full solicitor client costs in the event Mr Muldoon attained a lesser award and was proffered well before the matter went to hearing.

[11] The principles pertaining to Calderbanks are also well known and accepted. In essence they are a vehicle by which respondents can reduce their exposure to risk and gain some protection from potential costs by making a reasonable offer to settle a claim without the need for costly litigation. The reasonableness or otherwise is established by comparing the offer to the award achieved through litigation.

[12] The offer clearly exceeded Mr Muldoon’s award, given that he was unsuccessful. Indeed it was, assuming Ms Sharma is correct about the counter offer, some 75% of Mr Muldoon’s counter suggesting it could not be considered unreasonable.

[13] While the Calderbank’s existence should, on the face of it, be recognised, it does not entitle NMDHB to solicitor client costs as claimed. The existence of a Calderbank simply becomes a matter to be considered in assessing the amount of the Mr Muldoon’s contribution (*Diver v Goe Boyes and Co Ltd* HC Hamilton CP58/93, 20 May 1991).

[14] The other pertinent matter is Mr Muldoon’s financial situation.

[15] Whilst he was able to fund this litigation, it is apparent from the fact that he has subsequently obtained legal aid for mounting a challenge to the decision that his situation is now far more parlous. That is a factor that should be taken into account but some liability remains as Mr Muldoon, as the unsuccessful party and having rejected the Calderbank, should contribute toward the costs incurred by NMDHB as the successful party.

[16] Having considered the issues, and the arguments tendered by Counsel, I consider a contribution of \$5,000 to be appropriate.

[17] NMDHB seeks a contribution toward disbursements in the amount of \$277.20, being the travel costs incurred by its Counsel to attend the investigation meeting. Mr Muldoon responds by suggesting that the issues were not overly complex and did not justify the use of out of town Counsel. NMDHB's reply is simple – Mr Muldoon also had Wellington based Counsel at one stage and must therefore have considered any resulting costs to have been reasonably incurred. I agree.

Conclusion

[18] Mr Muldoon is to pay the NMDHB the sum of \$5000 (five thousand) as a contribution toward costs, along with a further \$277.20 (two hundred and seventy seven dollars and twenty cents) as a contribution toward disbursements.

Mike Loftus
Member of the Employment Relations Authority