IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 1
5416443

	BETWEEN	ANGELIQUE MERLE STEVENS Applicant
	A N D	HAPAG-LLOYD (NZ) LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Eska Hartdegen, Counsel for Applicant Peter Kiely, Counsel for Respondent
Submissions Received:	2 December 2013 from Applicant 22 November 2013 from Respondent
Date of Determination:	7 January 2014

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] By determination [2013] NZERA Auckland 461 issued on 9 October 2013, the Authority disposed of this matter by finding Ms Stevens had no personal grievance against the respondent (Hapag-Lloyd).

[2] Costs were reserved.

The claim for costs

[3] As the successful party, Hapag-Lloyd seeks a contribution to its reasonably incurred costs in the sum of $20,000.

[4] The Authority is told that that figure represents 58% of the total amount expended by Hapag-Lloyd in successfully defending the matter, those total costs amounting to $34,490.90 inclusive of GST and disbursements.

[5] The claim for costs is supported by reference to a *Calderbank* offer made on 15 April 2013 and the contribution allegedly made to the expense of the proceedings by the applicant's conduct in the matter.

The response

[6] Submissions for Ms Stevens accept the principle that costs usually follow the event but deny the contention that Ms Stevens' conduct of the matter increased the costs of the proceeding.

[7] Ms Stevens maintains that Hapag-Lloyd's costs in the matter were not reasonable and contends that that level of investment makes the risks for an employee too great in contemplating employment litigation in the Authority.

[8] Ms Stevens advises that she has been unable to find employment at a similar level of remuneration to that which she enjoyed at Hapag-Lloyd and that as a consequence, her family circumstances are much reduced.

[9] Ms Stevens has very sensibly provided an affidavit to support her submissions in that regard.

The law

[10] Both parties refer to the leading case on costs setting in the Authority: *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. That judgment of the Full Bench of the Employment Court sets out the principles that should guide the Authority in setting costs.

[11] Amongst other things, those principles include the fact that costs will generally follow the event, that costs in the Authority will be modest, that factors such as the existence or otherwise of a *Calderbank* offer and the ability of a party to pay will be taken into account and that the Authority's common practice of applying a daily tariff as a starting point is appropriate.

Discussion

[12] The appropriate starting point is the application of the daily tariff. That daily tariff is currently set at $3,500. This was a two day hearing. On that basis then, the starting figure must be $7,000.

[13] The Authority must add to or take away from that base figure amounts which recognise the particular circumstances pertaining in the individual case. Here, the successful party seeks an uplift and the unsuccessful party seeks a reduction from the daily tariff.

[14] The uplift is based first on a *Calderbank* offer and secondly on the allegation that Ms Stevens' conduct of the matter materially increased the costs.

[15] Dealing first with the *Calderbank* offer, it is common ground that a *Calderbank* offer dated 15 April 2013 was made and was rejected. It is also clear from the terms of that offer, which are now before the Authority, that Ms Stevens would have been materially better off to have accepted the *Calderbank* offer than to have proceeded with the Authority's investigation of her alleged personal grievance.

[16] Of course, as the Authority has frequently remarked, the whole purpose of a *Calderbank* offer is to seek to bring to an end expensive litigation. By advancing a *Calderbank* offer and having that offer rejected, a successful party is entitled to put the terms of that offer before the Court or Tribunal in a costs setting environment and ask that the failure of the unsuccessful party to accept an operative *Calderbank* offer be taken into account when costs are fixed.

[17] As the Court of Appeal observed in *Health Waikato Ltd v. Elmsly* [2004] 1 ERNZ 172, the whole point of a *Calderbank* offer was to encourage reasonable settlement proposals to be accepted. The corollary was that where those reasonable settlement proposals were not accepted, the obligation on the Court or Tribunal was to adopt a *"more steely"* approach to costs fixing, so as to give effect to the underlying legal principle that parties ought to be encouraged to settle rather than proceed to hearing of their disputes.

[18] It follows from the foregoing observations that, without more, Ms Stevens ought to expect to bear a greater share of the costs burden than would have been the case if there had not been an operative *Calderbank* offer which she had rejected.

[19] Moreover, Hapag-Lloyd relies on submissions the broad thrust of which is to claim that the way in which Ms Stevens conducted her case was to put it to additional cost.

[20] Given that some of that argument is supported by observations the Authority made during the lead up to the investigation meeting, it is difficult for the Authority to now distance itself from that conclusion.

[21] Of most importance in that regard is the submission made by Hapag-Lloyd on the various changes of representative, and the structure of the applicant's proceedings.

[22] The Authority went to unusual lengths to try to encourage Ms Stevens to retain proper professional advice throughout the proceeding and in particular to encourage her to seek advice on both the extent of her claim (particularly concerning compensation) and the evidence that she would need to put before the Authority in order to have an arguable case.

[23] As Hapag-Lloyd points out, Ms Stevens' representation changed five times during the proceeding and while her current counsel was involved at the very commencement of the claim, that counsel was not reinstructed until the eleventh hour with periods of self-representation and another quite unrelated person acting in between.

[24] Again, for that complex of reasons alone, in the normal course of events the Authority would be persuaded that the factor just described ought to result in an uplift in the costs to be awarded against Ms Stevens.

[25] However, Ms Stevens, in her submissions, makes two points of substance which the Authority needs to deal with. The first is the allegation that Hapag-Lloyd's costs are unreasonable. The Authority rejects that suggestion; given the way in which the proceedings were undertaken by Ms Stevens, it was inevitable that the costs incurred by the successful employer in resisting the claim would have been greater than necessary, if the matter had been tidily pleaded from the outset on Ms Stevens' behalf.

[26] That said, the Authority would also observe that this factual matrix was never a straightforward matter to argue which was one of the many reasons the Authority tried really hard to get Ms Stevens to get proper advice. The argument that the

applicant party had to run was based on factual matters which were neither straightforward nor, as it turned out, easy to provide evidence of and the commensurate response from the employer was always going to be more complex, and therefore expensive, than a more straightforward case.

[27] The second point made by Ms Stevens in her submissions, and supported by her affidavit as to her means, have more force. It is a truism that the Authority must take into account a party's ability to pay when setting costs. Costs are not supposed to be a punishment for wrongdoing and in circumstances where a party is legitimately unable to make the sort of provision for costs that would normally be expected, the Authority can appropriately exercise its judgment in favour of a lesser sum.

[28] This is particularly the case where a higher award of costs would negatively impact on innocent third parties, especially young children. Here, the effect on Ms Stevens' children of her reduced circumstances is apparent from her affidavit and it is as plain as can be that the sort of costs award that might otherwise be considered appropriate, were it not for her reduced financial circumstances, would have an even greater negative effect on her children.

Determination

[29] Were there no issue about the ability to pay reasonable costs, the Authority would have no hesitation in relying on the operative *Calderbank* offer which was not accepted and on the way in which Ms Stevens pleaded her case to increase the daily tariff to a figure of or near the figure suggested in submissions for Hapag-Lloyd. At the very least, an uplift doubling the daily tariff would be in accordance with principle.

[30] In the alternative, a higher figure than the normal daily tariff rate could be supported by an assessment of the costs incurred by the successful party after the *Calderbank* offer was rejected.

[31] Either of those approaches could be supported by an allowance for the extra costs incurred by the successful party because of the confused way in which the proceedings were advanced in the Authority.

[32] But in the particular circumstances of this case, the Authority is persuaded that the most important factor that it must rest on is Ms Stevens' inability to meet more

than a token contribution to Hapag-Lloyd's costs. The Authority is persuaded that this is a case where its discretion ought to be exercised in favour of reducing the daily tariff rather than increasing it and because the Authority is satisfied that Ms Stevens' present financial circumstances do not allow anything more than a token contribution to costs, the Authority directs that Ms Stevens is to pay the sum of $2,000 as a contribution to Hapag-Lloyd's costs to be paid at the rate of $100 per month for 20 months, the first such payment to be made within 30 days of the date of this determination. Arrangements for the receipt of these progress payments are to be agreed between counsel.

James Crichton
Member of the Employment Relations Authority