Employment Court of New Zealand

Te One A Mara Limited v Olsen [2012] NZEmpC 176 (12 October 2012)

Last Updated: 19 October 2012

IN THE EMPLOYMENT COURT WELLINGTON

[2012] NZEmpC 176

WRC 10/12

IN THE MATTER OF a point of law challenge to a determination of the Employment Relations Authority

BETWEEN TE ONE A MARA LIMITED Plaintiff

AND CHAD OLSEN Defendant

Hearing: (by memoranda of submissions filed on 16, 29 and 31 August 2012) Counsel: Michael Quigg and Simon Martin, counsel for the plaintiff

Jills Angus Burney, counsel for the defendant

Judgment: 12 October 2012

COSTS JUDGMENT OF JUDGE A D FORD

Introduction

[1] The plaintiff has challenged on a non-de novo basis that part of a costs determination1 of the Employment Relations Authority (the Authority) dated

12 April 2012, which held that costs in the Authority should lie where they fall. There are other issues but, in essence, the plaintiff claims that the Authority failed to give sufficient weight to a Calderbank offer it made at an early stage of the proceedings. It was agreed that the challenge would proceed in this Court on the basis of an exchange of written submissions but leave was also granted to the

defendant to file an affidavit as to means.

1 [2012] NZERA Wellington 41.

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Background

[2] By way of brief background taken from the Authority's substantive determination2 dated 3 November 2011, the defendant, Mr Chad Olsen, was employed as a dairy farm manager on the plaintiff's farm property near Waiouru. The majority shareholder in the plaintiff company was Mr Charlie Pedersen who ran the company's farms with assistance from his wife, son and son-in-law. Mr Olsen lived on the farm with his domestic partner Ms Jackson and their one-year-old child. Ms Jackson assisted Mr Olsen with his work on the farm. The employment relationship commenced in May 2009 but the Authority found that from the outset it

did not run smoothly. Mr Olsen received three warnings between June and September 2009 and he was dismissed on 5 October 2009 for alleged misconduct. The final two warnings related to "milk quality/animal welfare".

[3] After reviewing the evidence in some detail, the Authority concluded that Mr Olsen had a personal grievance for unjustified disadvantage actions in regard to the three warnings and unjustified dismissal. He was awarded $8,653.86 on account of loss of wages and $8,000 compensation for humiliation, loss of dignity and injury to feelings. Both sums were

reduced by 15 per cent on account of Mr Olsen's contribution to the personal grievance in not meeting "the Fonterra requirements that

were part of his job".3 In addition, he was awarded a payment of $495 for "farm

report communications".4 The net amount of his remedies totalled $14,650.78. The

Authority reserved the question of costs.

[4] The employment relationship problem had been filed in the names of both Mr Olsen and Ms Jackson but the Authority concluded that Ms Jackson was never employed on the farm. Although her name had appeared on one copy of the employment agreement, the Authority concluded that it had been added by Mrs Gina Pedersen as "a memory-jogger"5 only. Another complication was that in the statement of problem both the company and Mr and Mrs Pedersen personally had

been cited as respondents. The Authority stated at the outset of its determination that

2 [2011] NZERA Wellington 170.

3 At [52].

there had been no necessity to include Mr and Mrs Pedersen because no claims had been alleged against them personally.

[5] From the pleadings it appears that the statement of problem was filed with the Authority on 1 December 2010 and a statement in reply comprising of approximately 300 pages was filed on 24 January 2011. The parties were then directed to attend mediation in Palmerston North in February 2011 but the matter was not resolved.

[6] On 29 March 2011, Mr Quigg, counsel for the plaintiff, wrote to Ms Angus Burney, counsel for the defendant, on a "without prejudice save as to costs" basis and made an offer in full and final settlement in the amount of $15,000 (the Calderbank offer). Relevantly, the letter stated:

... we are instructed to offer $15,000 in full and final settlement of all the claims and remedies sought by your clients in respect of the current proceedings and any future proceedings that could be issued arising from the employment relationship, including the cessation of that relationship. This offer is made without prejudice and without any admission of liability, and is inclusive of costs.

...

This offer will remain open for acceptance until 5 pm on Wednesday 6 April

2011 after which time it will lapse. If your clients consider they require further time to consider the offer please advise us accordingly and we will take instructions as to a possible extension of time.

[7] The plaintiff's response was not included in the agreed bundle of documents produced to the Court but in his statement of defence, Mr Olsen confirmed that the Calderbank offer was rejected on 7 April 2011.

[8] After the release of the Authority's substantive determination on

3 November 2011 in which costs were reserved, the parties entered into correspondence in an effort to reach agreement on the issue but agreement was far off. Ms Angus Burney sought costs totalling $18,564.81 made up of $1,000 for Mr Olsen's "first advocate at Tararua Advocacy Service" together with costs of

$17,564.81 which included GST and disbursements for the two-day hearing in the Authority. In response, Mr Quigg rejected that proposal and indicated that his client sought recovery of its own costs on an indemnity basis. They were said to total

$15,345.64 including GST and disbursements. In addition, an amount of $7,500 was

sought for the "executive time" of Ms Pedersen in responding to Mr Olsen's claim.

[9] The plaintiff's claim for indemnity costs was based on the Calderbank offer and the actions of Mr Olsen and Ms Jackson before the Authority in allegedly unnecessarily prolonging the hearing by joining Mr and Mrs Pedersen personally as second respondents and in pursuing Ms Jackson's unsuccessful claim.

The costs determination

[10] In the absence of an agreement on costs the issue was referred back to the Authority and after considering memoranda filed by both parties, the Authority issued its costs determination dated 12 April 2012 which is the subject of the present challenge. In its determination, the Authority confirmed that the investigation meeting had lasted for two days. It also recorded that the commonly adopted approach to costs in the Authority is to take as a starting point a notional daily tariff of $3,500. The Authority then purported to apply the principles relating to costs set out in the judgment of the full Court in *PBO*

Ltd (formerly Rush Security Ltd) v

Da Cruz.6

[11] The Authority held that the claim by the applicants (Mr Olsen and Ms Jackson) for recovery of full costs was "entirely unrealistic" because Ms Jackson had been "entirely unsuccessful" in her claim and because of the Calderbank offer.7

In response to the respondents' (the present plaintiff along with Mr and

Mrs Pedersen) request for recovery of full costs, the Authority stated:8

... This seems to be based on the existence of a Calderbank letter. On that basis there was some reason for the respondent to approach the matter like this. However, the respondents must have known that the costs regime in the Authority is based on a tariff arrangement and to apply for full costs would be outside that approach. I accept that there is a question about the level of costs appropriate for the matter given the respondents' partial success in defending the claims involving Ms Jackson compared to Mr Olsen's successful outcome.

6 [2005] NZEmpC 144; [2005] ERNZ 808.

[12] The Authority proceeded to confirm that an appropriate award for the two-day investigation based on the notional daily tariff would amount to $7,000 but went on to say that costs needed "to be proportioned between the parties because of the mixed outcome."9 In that regard it concluded that the respondent had been better placed to claim costs than the applicants because of the Calderbank offer and because of its successful defence of Ms Jackson's claim. In relation to the

Calderbank offer, the Authority noted that it was made to the applicants "before more costs were expended"10 and that the applicants' failure to accept the offer to settle "was wholly risky".11

[13] The Authority dealt with Ms Jackson's position recording that her continued involvement in the matter added to the length of the investigation. In relation to the second respondents (the Pedersens), the Authority noted that "fortunately for the applicants", Te One Mara Ltd and Mr and Mrs Pedersen were represented by the same counsel and "therefore there should not be much in the way of separate costs for Te One Mara Limited and Mr and Mrs Pedersen as there were no remedies

against them personally."12

[14] In reference to Mr Olsen, the Authority stated:

[17] Mr Olsen was successful, but must have gone into the investigation knowing that an outcome could be less than the settlement offer and with the risk of Ms Jackson's claims, and as such, he has put his own position at risk because of the existence of the Calderbank offer. His success would normally mean that costs follow the event for him. Save for the offer and outcome being so close he cannot expect any costs and he must count himself lucky not to have to pay a sum himself, given the Calderbank letter. I have limited his exposure because he had a genuine claim, and the case was brought by both parties jointly where one was unsuccessful. For this reason the tariff has remained at the level used for a two day investigation. Given the number of witnesses and the parties' agreement for a two-day investigation meeting there is no question that the two days were unnecessary. The respondents at least tried to minimise any further costs by having submissions made orally at the hearing and they did accept that they may not have got the process right for Mr Olsen. This may explain the significant offer of money made at the time and recognising the risk.

9 At [10].

The challenge

[15] In this Court counsel for each party filed extensive submissions citing extracts from relevant authorities. The parties were in agreement that the general principle is that costs in the Authority and the Court usually follow the event. In other words, as the successful party in the Authority, Mr Olsen would normally be entitled to an award of costs. The parties also recognised and accepted the other principles governing the Authority's approach to costs as set out in the judgment of the full Court in *Da Cruz*.

[16] In *Da Cruz* the Court concluded that when considering a challenge as to costs in the Authority, the Court should not apply the same costs principles applicable to proceedings before the Court.13 The Court then went on to list and approve certain basic tenets which the Authority had held to since its inception which, relevantly, included the principle that the Authority had a discretion as to whether costs should be awarded in any given case and in what amount but the discretion was to be exercised in accordance with principle and not arbitrarily. The Court also confirmed that awards in the Authority would generally be modest and without prejudice save as to costs offers could be taken into account.14

[17] In reference to the Authority's recognised frequent practice of judging costs against a notional daily rate, the full Court stated, in a passage emphasised by counsel for the plaintiff in the present case, the following:15

We find there is nothing wrong in principle with the Authority's tariff based approach so long as it is not applied in a rigid manner without regard to the particular characteristics of the case. ... The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs.

Calderbank offer

[18] The reference to "without prejudice save as to costs offers" in *Da Cruz* is recognition by the Court that a Calderbank offer is one of the matters that the Authority can properly take into account in the exercise of its discretion in

determining costs. The general principles concerning Calderbank offers are reasonably well established and were considered by the Court of Appeal relatively recently in *Binnie v Pacific Health Ltd*;16 *Health Waikato Ltd v Elmsly*17 and *Bluestar Print Group (NZ) Ltd v Mitchell*.18 In *Elmsly*, the Court stated:19

... we think that a more sensible approach by the defendants to the making of *Calderbank* offers and steely responses by the Courts where plaintiffs do not beat *Calderbank* offers would be in the broader public interest.

In *Bluestar* the Court re-emphasised that a "steely" approach was required,20

stating:21

... The normal effect of a Calderbank offer is that the costs position is reversed. In this case, the appellant did not seek costs, but rather contended that the costs order against the appellant should be reversed. We agree. Bearing in mind the offer, the timing of the offer and other factors relevant to the outcome of the claim, we are satisfied that there should have been no award of costs against the appellant in the Employment Court.

[19] One of the significant issues raised in submissions in the present case related to the Authority's conclusion that its "award for Mr Olsen's success was slightly less than the settlement offer".22 Ms Angus Burney challenged that conclusion pointing out that when the defendant rejected the Calderbank offer on 7 April 2011 (which was stated to be "inclusive of costs") one of the stated reasons for the rejection was:

b. *That the offer did not cover the costs that the defendant and his partner had already accumulated by 29 March 2011.*

[20] This issue raises a query about the adequacy of the Calderbank offer because as Judge Travis stated in *Tourism Holdings Ltd(t/a C I Munro) v Charlesworth*:23

... A litigant making a Calderbank offer must endeavour to make an accurate assessment of what the court or tribunal is likely to do, because, if the offer does not exceed the result the other side obtains at trial, the offer will have been ineffective.

16 [2003] NZCA 69; [2002] 1 ERNZ 438 (CA).

17 [2004] NZCA 35; [2004] 1 ERNZ 172.

18 [2010] NZCA 385, [2010] ERNZ 446.

19 At [53].

20 At [20].

[21] The requirement for clarity and transparency in the making of Calderbank offers has long been recognised. In *Health Waikato Ltd v Van der Sluis*,24 the Court of Appeal stated:25

... Calderbank letters should be governed, at least primarily, by whatever the authors of such letters actually say; bearing in mind the proper need, in a discretionary area, for clarity ("transparency"). In the absence of specific rules, other should not be artificially imported.

[22] In the present case, the Calderbank offer of $15,000 was said to be "inclusive of costs". Nothing was said in the Authority's determination about the defendant's pre-offer costs. In her submissions, Ms Angus Burney pointed out that the defendant had submitted to the Authority that at the time he received the Calderbank offer:

a. His own preparations were well underway for the substantive hearing and had been at considerable cost to respond to the exhaustive counter-allegations in the SIR (statement in reply) ...

[23] As noted above, the statement in reply was said to have amounted to approximately 300 pages. In the absence of any evidence to the contrary, the defendant had no doubt also incurred additional pre-offer costs in attending the mediation at Palmerston North on 21 February 2011 which is referred to in the pleadings.

[24] In response to Ms Angus Burney's submission that the Calderbank offer did not cover the costs that the defendant and his partner had already accumulated by

29 March 2011, counsel for the plaintiff submitted:

... This is surprising in light of Ms Angus Burney's invoice for her services from the commencement of these proceedings provided to the Authority in advance of its costs determination. This invoice was for $18,405.74 (including GST). If the *Calderbank* offer did not [meet] the costs already incurred by the Defendant and his partner at the time it was made, this would mean that Ms Angus Burney's costs as at 29 March 2011 already exceeded

$15,000, and that her costs for the remainder of these proceedings (including the drafting and filing of briefs of evidence, preparation for and appearance at the Authority meeting, drafting of substantive submissions and costs submissions), were less than $4,000.

[25] In itself, that proposition is a most unlikely scenario but it would appear to be the logical conclusion of a literal interpretation of Ms Angus Burney's submission.

24 [1997] ERNZ 236 (CA).

Conceivably, Ms Angus Burney intended to submit that the Calderbank offer did not exceed the total amount awarded to the defendant plus his pre-offer costs but her submission was not expressed in those terms. Counsel did, however, refer to the principles in *Tourism Holdings* including the statement that,26 "if the offer does not exceed the result the other side obtains at trial, the offer will have been ineffective." Although her submission on the issue was equivocal, I am prepared to accept that

consistently with the principles in *Tourism Holdings*, Ms Angus Burney was referring to pre-offer costs together with the Authority's awards.

Pre-offer costs

[26] The significance of pre-offer costs in relation to Calderbank offers has been highlighted in a number of cases. In *Van der Sluis*, the Court of Appeal stated:27

Calderbank letters can readily spell out whether or not pre-offer costs are included and, if so, whether on a specified or "reasonable" basis. *Cutts v Head*,28 and *Andrews v Parceline Express Ltd*,29 exemplify. In both, the offers were stated specifically to be without costs. That is the proper "transparent" approach which should be encouraged. We do not, of course, altogether rule out the possibility of implication one way or the other, as a matter of interpretation on ordinary principles. We do not agree, however, that there should be an implication that costs down to date of offer are to be paid in addition to amounts offered, simply because nothing else is said. Where nothing is said, the authors fairly bear the burden.

[27] In *Tourism Holdings*, Judge Travis said in relation to pre-offer costs:30

It is often necessary for the offeror to consider what costs have been incurred by the other side to that point in time and to determine whether such costs should be included in the amount of the offer.

[28] As noted above, the Calderbank offer in the present case was expressed to be "inclusive of costs". In other words, at the time it was made the defendant would need to assess, inter alia, his prospects of success before the Authority, making allowance for his own pre-offer legal costs, in the knowledge that the offer did not

include any additional payment to cover such costs.

26 At [35].

27 At 244.

28 [1983] EWCA Civ 8; [1984] 1 All ER 597 (EWCA).

29 [1994] NZCA 254; [1994] 2 ERNZ 385 (CA).

30 At [35].

[29] In Australia there is a line of authority to the effect that a Calderbank letter which is expressed to be "inclusive of costs", is ineffective because it presents practical difficulties when it comes to determining whether the offeree acted reasonably in rejecting it. Those authorities were considered in some depth in a recent decision of Ward J in the New South Wales Supreme Court: *In the matter of*

Cheal Industries Pty Ltd - Fitzpatrick v Cheal.31 Her Honour noted that in

Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd (Formally GIO Insurance Ltd),32 Einstein J had stated: 33

It has been held that a *Calderbank* letter which is expressed to be "inclusive of costs", is insufficiently precise to qualify as a Calderbank offer, for the reason that the offeree is placed in a position of not being able to determine the appropriate amount to attribute to the substantive claim and the costs incurred in advancing it: *Smallacombe v Lockyer Investments Co Pty Ltd* (1993) 42 FCR 97 at 102; *Hanave Pty Ltd v LFOT Pty Ltd (formerly Jagar Pty Ltd)* [1998] 1429 FCA 11, BC9805993.

[30] Another of the authorities referred to by Ward J was the decision of the Court of Appeal of the Supreme Court of New South Wales in *Elite Protective Personnel Pty Ltd v Salmon*34 which appears to set out the current position in that jurisdiction in relation to "inclusive of costs" Calderbank offers. That case made it clear that there was no "definitive rule" that a Calderbank offer which purports to be inclusive of costs can never be considered by the courts but the practical difficulties demonstrated by the authorities indicate that there are sound reasons to discourage Calderbank offers from being framed in such a way. Basten JA stated:

[144] The suggestion that a *Calderbank* letter which is expressed to be inclusive of costs is "insufficiently precise to qualify as a *Calderbank* offer" requires to be addressed in particular circumstances. A defendant who fears that even if successful it will be unable to recover costs awarded against the plaintiff, may wish to make an offer in full and final settlement, without further disputation over costs. It may wish to place pressure on the plaintiff to consider the offer favourably by reserving an entitlement to use the offer in relation to costs if the matter proceeds to trial. There is no reason based on policy or principle which would preclude a defendant relying on such an offer only when it is said to be exclusive of costs. Such an inclusive offer will not cause the plaintiff embarrassment: its value will be that amount remaining to him or her after deducting costs already incurred, which the plaintiff's lawyer should be readily able to quantify. The disadvantage of an

31 [2012] NSWSC 932.

32 [2006] NSWSC 583.

33 At [40].

34 [2007] NSWCA 322.

inclusive offer lies with the defendant if the matter proceeds to judgment. Where the judgment is equal to or above the inclusive figure, the defendant will have failed to better its own offer. However, if the judgment is below the offer there may be uncertainty because the offer included an unquantified element for costs incurred up to the time when it lapsed or was rejected. No doubt the figure for costs incurred to that time by the plaintiff could be resolved by some form of assessment, but if the calculation of the damages component is not clearly seen to provide a figure above the judgment, then the interests of justice will usually not be served by incurring further expense in assessing the costs element of an offer and the plaintiff would be entitled to his or her costs: see *Smallacombe* above at [140].

[31] In New Zealand it is probably fair to say that "inclusive of costs" Calderbank offers have not had the same focus of judicial attention as they have in Australia. As noted in [26] above, the Court of Appeal in *Van der Sluis* made the observation in relation to Calderbank offers stated to be without costs: "That is the proper

'transparent' approach which should be encouraged."

[32] In *Binnie* it was held that a Calderbank offer was deficient in that the offer

was for "$50,000 plus costs to that point". The Court of Appeal stated:35

The lack of a precise offer for costs made the overall offer more difficult for Dr Binnie to assess and accept. ... Calderbank offers which are not inclusive of costs ought sensibly to propose a specific figure for costs to avoid the sort of problem which faced Dr Binnie.

Discussion

[33] In the present case, the Calderbank offer was for $15,000 and the net amount awarded by the Authority was $14,650.78 leaving a difference of $349.22. It would have been open to the Authority, conceivably, to have concluded that as the "costs inclusive" offer had necessarily included an unquantified element for pre-offer costs, the Calderbank offer would, in the words of Judge Travis in *Tourism Holdings*, "have

been ineffective" or, in the words of Ward J in *Cheal*,36 "not enlivened" unless the

plaintiff had been able to establish that the defendant's pre-offer costs came to something less than $350. As noted above, there was no finding by the Authority as to the actual amount of the defendant's pre-offer costs but the evidence before the Court would indicate a figure considerably in excess of that sum. In those

circumstances, the Authority could have taken the approach that it was not

35 At [30].

36 At [155].

unreasonable for the defendant to reject the Calderbank offer and on that basis the defendant ought to have been entitled to his costs. The "steely" approach emphasised by the Court of Appeal in *Elmsly* and *Bluestar* was specifically confined to cases, "where plaintiffs do not beat Calderbank offers". It is not necessary for me to take this point any further, however, because there was no cross challenge to the Authority's determination on this particular issue.

[34] Accepting therefore, the correctness of the Authority's decision to take the Calderbank offer into account, the issue then becomes, in terms of the plaintiff's pleadings, whether the Authority erred in law by approaching the issue of costs "in a rigid manner without regard to the particular characteristics of the case". In this regard, the thrust of the plaintiff's allegations were that the Authority gave too much weight to the tariff-based approach to costs and to the genuineness of the defendant's claim and failed to give sufficient weight to the Calderbank offer.

[35] With respect, I am not satisfied that the Authority did in fact fail to exercise its discretion appropriately in the respects alleged. The outcome of the costs determination is not dissimilar to other decided cases involving Calderbank offers. Thus, in *Bluestar* the appellant had prior to the Authority's investigation made a Calderbank offer for $10,000 compensation plus the sum of $3,000 towards past legal costs. The Employment Court later awarded a total of $11,000 under those heads, made up of $10,000 compensation and $1,000 for Authority costs. The appellant did not seek costs but rather contended that the costs order made against it by the Employment Court should be reversed. The Court of Appeal agreed: "bearing in mind the offer, the timing of the offer and other factors relevant to the outcome of the claim". In that case, unlike the present, the Calderbank offer very clearly exceeded the amount recovered. The Court of Appeal stated it was satisfied that there should have been no award of costs against the appellant in the Employment Court.

[36] In the present case the Authority declined to make a costs order against the defendant. After noting that as the successful party, the defendant would normally be entitled to costs on a tariff basis totalling $7,000, the Authority, in recognition of the Calderbank offer, declined to make any award in the defendant's favour and ordered costs to lie where they fell. That, in my view, does not indicate an unduly

"rigid" approach nor does it support the submission that the Authority failed to give

adequate weight to the Calderbank offer.

[37] Another not dissimilar case before this Court was *Panovski v Marine Trimmers and All Awnings 2004 Ltd*.37 In *Panovski* the Court had increased the Authority's awards by $3,815 and awarded interest on that sum. Less than one month prior to the Court hearing the defendant had made a Calderbank offer in the sum of $4,000. Both parties made a claim for costs. The plaintiff relied on the fact that the interest factor took the total amount of the award to $4,086.85 which

exceeded the Calderbank offer. The defendant's claim for costs was based on the submission that the inclusion of interest, "only just, and in the most nominal way, permitted the plaintiff to claim the total judgment at trial exceeded the amount referred to in the Calderbank offer."38 Judge Travis concluded:39

[20] The defendant cannot rely upon its Calderbank offer to obtain a costs order against the plaintiff. The offer *did not include costs to that point in time,* nor the interest factor. Either of these, had they been included, would have meant that the offer was insufficient to cover the amount the plaintiff successfully obtained in the challenge.

Judge Travis, nevertheless, went on to hold that the defendant was entitled to credit "for making a substantial and realistic offer which exceeded the Court's awards, if interest and costs are excluded."40 His Honour concluded that it was a case where costs should lie where they fall and he ordered accordingly.

Other issues

[38] My conclusions in relation to the correctness of the Authority's approach to the issue of costs are sufficient to dispose of this challenge but, for completeness, there are certain other matters to which I refer briefly. First, Ms Angus Burney submitted that the Calderbank offer was a joint offer to pay $15,000 in total and, "the obvious division is that the offer amounted to a total of $7,500 to each applicant." On that basis, counsel claimed that the Calderbank offer did not exceed the amount recovered by the defendant. In response, counsel for the plaintiff submitted that the

approach suggested was incorrect with regard to the specific circumstances of this

37 AC 24A/08, 16 December 2008.

38 At [4].

39 Emphasis added.

40 At [27].

case including the fact that “there was only one statement of problem filed” and “it was not argued before the Authority that the defendant and his partner had separate claims.” I have not been persuaded that Ms Angus Burney’s submission is consistent with the plain wording of the Calderbank offer but the different approaches contended for highlight the need for clarity and transparency in the drafting of Calderbank letters.

[39] The second matter I deal with relates to a claim advanced strongly by Ms Angus Burney that any award of costs against the defendant would result in undue hardship. In counsel’s words:

54. The Defendant does not have the means to pay the Plaintiff’s claim for costs. Both the Defendant and his partner are on the verge of bankruptcy as a result of losing his job and their much reduced income over the past three years since his dismissal in October 2009. The Defendant has been told in person by two employers in August and November 2011 following the media coverage of his claim in June

2011, that he has been “blacklisted” in the Manawatu/Horowhenua dairy industry and as a result of this blacklisting the Defendant lost three jobs between June and December 2011. He has only just been offered his first full-time job since 1 June 2011.

[40] In his affidavit as to means dated 26 July 2012, the defendant deposed:

36. My financial position is as follows:

I own no assets - I have sold them all. I don’t even own the bed I

sleep on and I have the following debts:

- Family loans $13,000.00
- Loan to the National Bank $10,000.00
- Loan to Dorchester Finance $15,000.00
- Credit Cards balances $2,500.00
- IRD [outstanding tax and penalty interest] $11,000.00
- Outstanding legal costs $9,000.00

On the payables side of the ledger I have a personal total debt of

$49,511.

My wife also owes $3500 in a costs award against her from the

Plaintiff.

37. On the receivables side of the ledger, I am owed from the Plaintiff

$14,650.78 in the award to me from the ERA.

38. I am in a single income family with a 4 year old child and earn a weekly wage of $750 net per week.

[41] As Judge Couch noted in *Metallic Sweeping (1998) Ltd v Ford*:41

[52] It is a well established principle applicable to the award of costs in the Court that they should be limited by the ability of the party concerned to pay without undue hardship. It is appropriate to observe a similar principle when fixing costs in the Authority.

[42] The plaintiff submits that any costs ordered against the defendant can be offset against the amount he has been awarded by the Authority. That may be so but it is obvious from the unchallenged evidence before the Court that the defendant, for whatever reason, is in a parlous financial situation and, in terms of the Court’s equity and good conscience jurisdiction, I would not have been satisfied in all the circumstances of the case, that justice would have been served by making a costs order against him. I record, however, that the defendant has agreed that the costs award of $3,500 ordered against Ms Jackson can be deducted from the net amount he recovered under the Authority’s determination.

[43] Finally, for the record, I agree with Ms Angus Burney’s further submission that there are no matters involving the defendant’s conduct in the course of the Authority’s investigation which affect the issue of costs. The unsuccessful involvement of his partner, Ms Jackson, was appropriately dealt with by the making of the costs order against her.

Conclusion

[44] For the reasons stated, the plaintiff's challenge against the Authority's costs determination is dismissed. The defendant is entitled to costs on the challenge which I fix in the sum of $750.

A D Ford
Judge

Judgment signed at 10.00 am on 12 October 2012

41 [2010] NZEmpC 129, [2010] ERNZ 433.
