

Authority recognised that was no more than a contribution to the reasonably incurred costs of OCS.

[3] Then in CA66A/09, a decision handed down on 17 July 2009, the Authority considered the question of costs incurred by OCS in persuading the Authority that the unusual claims made by the Tropotovas were outside the aegis of the Authority's jurisdiction. Costs of \$3,250 exclusive of GST were claimed on behalf of OCS and found to be reasonable by the Authority. Cost in respect to the present matter were fixed at \$1,000.

The claim for costs

[4] OCS, despite being the unsuccessful party in the substantive proceedings, makes a claim for costs.

[5] In essence, Mr McBride maintains that the effect of several *Calderbank* offers made by OCS to the Tropotovas, at various points during the lengthy proceedings, need to be taken into account and that properly considered, the effect of decided cases is to "reverse" the usual costs liability. Given it is contended that the *Calderbank* offers were more generous than the Authority's eventual decision, it is contended that the Authority ought, on principle, to make a costs order against the Tropotovas and in favour of OCS. To use Mr McBride's own words:

In this case, the applicants over an extended period sought money that they had otherwise been offered by OCS. The cost of that is properly to the applicants' account and not the respondents.

[6] OCS rely on decisions such as *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385. It is contended for OCS that a number of *Calderbank* offers were made, or to put it more accurately, that the same offer was repeated several times during the course of the proceedings such that it could not be contended for instance that the extraordinary behaviour of the original advocate retained by the Tropotovas was exclusively to blame. I accept this submission on its face; the *Calderbank* offer made by OCS was re-submitted after Mr McKenzie became the Tropotova's counsel and was still rejected.

[7] Mr McBride also refers to the fact that Natalia Tropotova was for a period legally aided and he contends that, because he says legal aid was withdrawn prior to

the substantive investigation meeting in the Authority, legal aid ought not to be a factor in the Authority's deliberations.

[8] Finally, Mr McBride seeks to revisit the earlier costs awards that I have already alluded to and to have the Authority augment those awards again placing substantial reliance on the *Calderbank* offers.

[9] Conversely, Mr McKenzie for the Tropotovas resists Mr McBride's claim for costs and argues that notwithstanding his professional obligation to seek costs in relation to Natalia Tropotova relating to the period when she was legally aided (about which more shortly), costs should lie where they fall. Of most significance in Mr McKenzie's submissions is the contention that, looked at in the round, the *Calderbank* offers made cannot be used to justify the conclusion that OCS is entitled to an award of indemnity costs. The Tropotovas acknowledge that *Calderbank* offers were made and were rejected. As to Natalia, it is contended that she did better from the decision of the Authority than would have been the case if she had accepted the *Calderbank* offer, the *Calderbank* requiring her to establish wages she was still owed. As to Liubov, while it is acknowledged that she did less well from the Authority than from the *Calderbank* offers, Mr McKenzie makes some pertinent observations in relation to matters of contribution for both women which I consider are worthy of further analysis.

[10] Generally, in relation to contribution, Mr McKenzie observes that it is a notoriously difficult and arguably subjective area and is not capable of confident prediction. In particular, Mr McKenzie doubts the Authority's assessment that a reduction of 25% in remedies ought to apply to both women because of the entirely inappropriate behaviour of their former advocate. Mr McKenzie makes the point that the Authority's obligation is to assess contribution in respect to the circumstances *giving rise to the grievance* and the subsequent behaviour of an advocate after the grievance has been crystallised, ought not to be factored into contribution. Clearly, if that aspect of the contribution were removed from the Authority's original assessment (as Mr McKenzie contends it should have been) then both the Tropotovas would have had the value of their awards increased by 25 per cent.

Discussion

[11] The first issue to deal with is the effect of legal aid. Mr McBride's submissions in this regard are misplaced. It is evident that Natalia was granted legal aid and a bill was rendered. Aid was withdrawn during the proceedings but I am satisfied that the usual rules relating to legal aid in a costs setting apply. In particular, the protection of s40 of the Legal Services Act must apply and the *exceptional circumstances* proviso would not seem to apply here.

[12] In *Awa v Independent News Ltd* [1996] 2 NZLR 184 the High Court considered the test for exceptional circumstances and decided a *fact specific* approach was required. In the present case, it is difficult to imagine what those circumstances might be. The existence of the *Calderbank* offer is, on its own, not enough nor the refusal to accept it: *Jack v Ministry of Justice* 18 March 2005 WC 6/05. Nor was the case without merit; Natalia was successful. In the end, setting aside the quite unreasonable delay in prosecuting the matter, which was a function of inadequate representation, this was a triangular personal grievance claim of modest size, not uncommon in today's environment. I find no exceptional circumstances so, in effect, if costs were to be awarded against Natalia, those costs would amount to her contribution to aid: Section 40 (2) applied.

[13] This case was dealt with throughout its progress through the system as effectively one case involving joint applicants. That poses some challenges in the costs environment when Natalia is legally aided and Liubov is not.

[14] Next, Mr McBride says the *Calderbank* offer was first made in December 2007 and he develops his argument based on the inordinate amount of time required to bring the matter to a conclusion. While acknowledging that the *Calderbank* offer was first presented as early as December 2007, the fact it was presented to the Tropotova's original advocate, who the Authority has already been roundly critical of, rather minimizes the efficacy of that early submission. While no doubt unfortunate for OCS, in equity and good conscience, I am satisfied the Authority cannot take account of the *Calderbank* offer until it was repeated to the Tropotova's current (and able) counsel. This happened on 11 February 2010 about ten days before the investigation meeting.

[15] It follows that the next question is whether the *Calderbank* offer was made within time to be efficacious. I am satisfied that Mr McKenzie would have had time to brief his clients and get their instructions before the investigation meeting commenced. Had the *Calderbank* offer been accepted at that point, OCS would have saved itself significant legal fees, to say nothing of the fees incurred by the Tropotovas.

[16] However, it is important to accurately compare the *Calderbank* offers against the decision of the Authority. Both offers were in the sum of \$5000 for compensation plus *any wages established to be due for hours worked but not paid*. There was no provision for a contribution to costs already incurred by the Tropotovas. The Authority's determination for Natalia was for \$4000 compensation plus \$1500 as a contribution to wages lost because of the dismissal. The like figures for Liubov were \$2000 compensation and \$1000 as a contribution to wages lost by the dismissal. In addition, the Authority directed the parties were to agree the treatment of 22 hours unpaid time which the Tropotovas both claimed remained unpaid.

[17] Treating the matter as a joint application, the effect of the Authority's decision is to make an award to the applicants of \$9000, allowing for the extra wages to be agreed between the parties. The effect of a sum of the *Calderbank* offers is to grant a minimum of \$10,000 because wages were to be agreed on the top of that figure. Clearly then, on general legal principle, the *Calderbank* offers take precedence over the decision of the Authority in a costs setting.

[18] Mr McKenzie argues that the Authority's determination was wrong to apportion contribution by the behaviour of the Tropotova's first representative such that a 25 per cent reduction in remedies was applied as a consequence of the behaviour of the Tropotova's first advocate. If that *missing* 25 per cent were added back, the Authority's award exceeds the *Calderbank* offers by a margin. Looking at Mr McKenzie's point as an issue of statutory interpretation he has to be correct. Contribution, in terms of section 125 of the Act, relates to the actions of the employee that contributed to the personal grievance. Subsequent behaviour of an inadequate representative cannot be a factor.

[19] A final observation is worth making. OCS seeks significant costs. The claim for the substantive investigation is \$12,000 plus disbursements. The Authority is not told what OCS's actual costs were but, on the face of it, the amount claimed is

significant for what I am satisfied was a reasonably straightforward investigation, once it was finally got underway.

[20] The investigation meeting went over onto a second day. A witness the Authority wished to hear from was not put up by OCS on the basis they had lost touch with her. Having interviewed another OCS witness, the Authority was able to find the desired witness without difficulty. Had OCS gone to a little extra trouble they would have found her and thus saved time and expense.

[21] The fundamental question remains whether the *Calderbank* offers are legally efficacious. I hold that they were not. Applying *Jackson v Moyes Motor Group Limited* [2005] ERNZ 504, a case on all fours with the present matter, I am satisfied the failure of OCS to make any proposal in respect to the pre-offer costs incurred by the Tropotovas, coupled with the very short period for consideration of the matter prior to the investigation meeting render the *Calderbank* letters ineffectual. As in *Jackson* much, if not all, of the preparation costs for the investigation meeting had already been attended to. Given the relative similarity of the *Calderbank* offers to the Authority's determination, particularly accepting Mr McKenzie's criticism of the reasoning in the substantive decision on contribution, it seems to me axiomatic that the *burden of persuading the Court (or Authority) that the offer was adequate to disentitle a successful plaintiff from recovering costs...* was borne by OCS. In the circumstances I am persuaded that making no offer at all in regard to pre-offer costs, and conveying that offer ten days before hearing, between them amount to a basis for rejecting consideration of the *Calderbank* offer.

Determination

[22] I am satisfied that this is a case where costs should lie where they fall. Notwithstanding my conclusions above, I decline to make any finding in favour of the Tropotovas. It seems to me fairness and equity demand a result where, as to costs, neither party can be seen to have profited from the other.

James Crichton
Member of the Employment Relations Authority