

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 252
5306041

BETWEEN	JASON WAREHAM Applicant
AND	GARY ROOKE T/A CASEY PANELBEATERS First Respondent
AND	SIGMA HOLDINGS LIMITED T/A CASEY PANELBEATERS Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Stephen Tee for Respondent
Submissions:	2 June 2011 from the Applicant and 3 June 2011 from the Respondent
Determination:	10 June 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination issued on 9 May 2011 the Authority found Sigma Holdings Limited (SHL) acted unjustifiably in how it carried out the dismissal of Jason Wareham on the grounds of redundancy.¹ Mr Wareham was awarded \$2500 in compensation for the distress caused to him by the abrupt manner of the dismissal.

[2] Costs were reserved with the parties encouraged to agree any matter of costs between themselves and a timetable set for applying for an Authority determination of costs if they were not able to reach agreement. By letter Mr Wareham applied for a determination of costs and SHL replied with more formal submissions.

[3] The earlier determination indicated costs for the half-day investigation

¹ [2011] NZERA Auckland 191.

meeting of this relatively straight forward case would usually be set according to notional daily rate and most likely result in an award of \$1500. However this was noted to be subject to what might be said in the parties' memoranda on costs. Those documents have identified some factors which must be considered in determining who is entitled to an award of costs and, if a notional daily rate is to be applied, whether that rate should be adjusted upwards or downwards according to the particular circumstances of the case.²

[4] Costs are said normally to 'follow the event' which means the successful party is entitled to a reasonable contribution to their reasonably incurred costs. In this case Mr Wareham successfully established that how SHL carried out his dismissal was unjustified and seeks an award of costs on that basis. SHL disputes his degree of success because Mr Wareham also asserted the redundancy decision was not made for genuine commercial reasons. That claim, if upheld, would have opened up the prospect of wider and higher remedies. However the Authority found the redundancy decision was genuine and remedies were consequently limited to distress compensation for the manner of the dismissal.

[5] But even if Mr Wareham was held to be entitled to an award of costs as the successful party there are two significant problems in his application – firstly, quantifying those costs and, secondly and most importantly, he had not accepted an offer made by SHL to settle his claim for an amount which was greater than the value of the remedy which he was ultimately awarded by the Authority. SHL submits that his failure to accept that an offer – referred to by the legal colloquialism of a *Calderbank* offer – means SHL rather than Mr Wareham is entitled to an award for its costs.

[6] Mr Wareham had two representatives during the course of his personal grievance with SHL and the Authority investigation. He was initially represented by employment advocate Max Whitehead and then Patricia Cole. Ms Cole attended the Authority investigation meeting but had not attended an earlier case management conference called by the Authority although Authority records indicate she was notified of it and Mr Wareham understood she would attend with him. The Authority had directed he and Ms Cole attend in person, along with Mr Tee for SHL, because

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.

some previous timetable directions had not been complied with by Mr Wareham.

[7] Mr Wareham now states he is not able to provide all the necessary information about his costs as Ms Cole is unwell. His submission states Ms Cole does not recollect any of his conversations with her or what took place at the Authority investigation.

[8] He has provided a copy of an invoice dated 20 June 2010 for earlier representation services from Mr Whitehead's business, Whitehead Group Employment Solutions. The invoice is for \$2,275 plus GST for services provided over a total of 6.5 hours, which I calculate as being charged at an hourly rate of \$350. The narration of the invoice also indicates at least 2.8 hours of that billed time is directly related to mediation activities. In considering whether costs have been reasonably incurred the Authority does not include time taken in mediation and, usually, does not allow for hourly rates over \$250. Making adjustments for those factors, the amount of reasonably incurred costs for the purposes of the Authority's assessment totals \$1295 for 3.7 hours, or after GST (at the then-applicable rate of 12.5 per cent) \$1456.

[9] That amount could be considered in assessment of a costs award to Mr Wareham but for the second significant problem referred to above.

[10] SHL's submission includes a copy of a letter from Mr Tee to Mr Whitehead dated 4 June 2010. The letter is labelled as being "*without prejudice save as costs*" and offered to settle the grievance for a net sum of \$3500 paid as compensation under section 123(1)(c)(i) of the Employment Relations Act 2000. The offer was stated to be available for acceptance for seven days after receipt of the letter. I accept it is more likely than not that Mr Wareham was aware of this *Calderbank* offer because his letter seeking costs refers to it and because the narration in Mr Whitehead's invoice refers to discussions with Mr Wareham on 11 June 2010 and an email to SHL's solicitor requesting an "*extension to deadline*". A letter from Mr Tee to the Authority dated 9 June 2010, copied to Mr Whitehead, refers to settlement offers being exchanged.

[11] SHL's submission on costs also attached a copy of a letter to Ms Cole, dated

14 February 2011, noting the earlier *Calderbank* offer and its potential effect on Mr Wareham's exposure to costs should he not succeed in his claim or do so for an amount less than \$3500. I do not know if Mr Wareham saw that letter to Ms Cole but I am satisfied that he knew of the *Calderbank* offer when it was made in June 2010.

[12] The consequence of the level of remedy eventually awarded to Mr Wareham and his earlier non-acceptance of SHL's *Calderbank* offer for a greater amount, in the particular circumstances of his case, is to disentitle him to an award of costs. Rather SHL is entitled to assessment of whether it should be awarded costs.

[13] SHL actual legal costs incurred after the *Calderbank* offer are said to total \$4831, an amount supported by copies of invoices provided with its submission. It seeks \$3623 as a reasonable contribution to those costs.

[14] Review of the narration in those invoices indicates the attendances were related to the Authority investigation, not earlier mediation. It is not possible to discern the hourly rate on which the fees were based from the information in the invoices.

[15] In considering whether any particular circumstances of the conduct of Mr Wareham or his representatives in this case warrant an upward adjustment of the Authority's usual tariff, I have concluded a relatively small increase is appropriate. An investigation meeting notified for 14 October 2010 was vacated because Mr Wareham, through his representative, had not complied with timetable directions for lodging witness statements. A subsequent case management conference – which he attended but his then-representative Ms Cole failed to – resolved that delay but I accept SHL thereby incurred some additional legal costs which should be recognised by a \$500 increase in an award of costs. Otherwise attendance at the investigation meeting amounted to a half-day which, applying the usual daily tariff of \$3000, allows for costs of \$1500.

[16] Under clause 15 of Schedule 2 of the Employment Relations Act 2000 I order Mr Wareham to pay SHL \$2000 as a reasonable contribution to its reasonably incurred costs in defending his application after making a *Calderbank* offer in excess of what he eventually achieved as a remedy in the Authority.

[17] I am aware the net effect of this costs award is that Mr Wareham will receive only \$500 from SHL but appears to have incurred representation expenses of at least \$2629. It is an unfortunate outcome but one that results from the risk he took in rejecting the earlier settlement offer. The Authority has a wide discretion in setting costs, but it is a discretion which must be exercised in accordance with relevant principles. In this particular case taking account of settlement offers made ‘without prejudice save as to costs’ must be given considerable weight. The Court of Appeal has cautioned that the public interest in the resolution of disputes is undermined if a party is able to ignore a *Calderbank* offer without any consequences as to costs.³

Robin Arthur
Member of the Employment Relations Authority

³ See *Bluestar Print Group (NZ) Limited v Mitchell* [2010] NZCA 385 at [18] citing *Aoraki Corporation Ltd v McGavin*, [1998] 1 ERENZ 601.