

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 41  
5316525

BETWEEN

X  
Applicant

A N D

THE SECRETARY FOR  
JUSTICE  
Respondent

Member of Authority: Helen Doyle

Representatives: Jeff Goldstein, Counsel for Applicant  
Alastair Sherriff, Counsel for Respondent

Submissions Received: 13 January 2012 from Applicant  
13 February 2012 from Respondent

Date of Determination: 6 March 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In my determination dated 17 November 2011, I found that the applicant had a personal grievance that he had been unjustifiably disadvantaged by a first warning. He was to be reinstated to the position he was in as if a warning had not been issued. No compensation was awarded.

[2] I reserved the issue of costs and now have submissions from both Mr Goldstein and Mr Sherriff.

**Applicant's submissions**

[3] Mr Goldstein refers to the legal principles to be applied when the Authority considers the question of costs in the Employment Court judgment of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. In *Da Cruz*, the Employment Court stated that the Authority is able to set its own procedures and set out the basic tenets that need to be considered by the Authority when considering costs. These include:

- A discretion as to whether costs are to be awarded and in what amount to be exercised in accordance with principle and not arbitrarily;
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to consider whether all or any of the parties' costs were unreasonable;
- Costs generally follow the event;
- Without prejudice offers can be taken into account;
- Awards will be modest;
- Frequently costs are judged against a notional daily rate;
- The nature of the costs case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[4] Mr Goldstein submits that the actual costs of the applicant are \$19,622.50 plus GST together with disbursements of the filing fee of \$70 and hearing fee of \$306.66. Mr Goldstein places reliance on a counter offer by the applicant headed without prejudice save as to costs in response to a *Calderbank* offer from the respondent. The email containing the offer was dated 7 April 2011. It was expressed to be open until 4pm on 13 April 2011. The applicant's offer was that the personal grievance would be withdrawn if the warning was removed from X's file together with any statement that suggests X viewed and then deliberately held onto an email with objectionable or offensive material. X also wanted payment of legal fees which to that point in time were \$12,500 plus GST. The applicant's offer was rejected by the respondent on 8 April 2011.

[5] Mr Goldstein seeks an increase in costs awarded rather than an application of the notional daily tariff because, he says, as a result of the rejection of the *Calderbank*

letter the applicant has incurred an additional \$13,795 plus GST in legal fees and an award is sought in the sum of \$16,000 plus disbursements as a contribution.

### **Respondent's submissions**

[6] The respondent accepts that the legal principles referred to in Mr Goldstein's submissions are those that are applicable to costs in this matter. Mr Sherriff, in his submission, says that the exchange of *Calderbank* offers, with each rejecting the other's offer, has the effect to neutralising the *Calderbank* offer. For completeness the offer by way of letter headed without prejudice except as to costs from the respondent was dated 21 February 2011 and was:

- X withdraw proceedings;
- Costs lie where they fall;
- The warning stays in place;
- X drafts and files a Privacy Act correction letter against the warning which the Ministry will file on its file wherever the warning resides. In this correction letter X can indicate views on the accuracy/inaccuracy of the warning and on its lack of justification.
- X stays on in employment and there is no ongoing litigation between them in an ongoing relationship.

[7] The respondent submits that the case would have been a simple one but for the applicant's unsuccessful attacks on every single procedural point related to the investigation and the disciplinary process decision. The respondent submits the scrutiny of the process had the effect of extending the Authority proceedings unnecessarily. The respondent submits it was successful in the vast majority of issues in the proceeding and sets these out as 27 out of 29. Attached to the respondent's submissions is an analysis of those issues. The respondent submits that this is relevant to costs.

[8] The respondent submits it would have sought a contribution to its costs in this matter in light of the conduct and scrutiny of the process but has decided not to given the fact that the relationship between the Ministry of Justice and the applicant is ongoing.

[9] The respondent submits costs should lie where they fall in this matter and there should be no order made as to costs.

### **Determination**

[10] The Authority has a broad general discretion whether to order parties to contribute towards costs. The discretion must be exercised in a principled way. Mr Sherriff submits that the applicant's warning would have expired by virtue of time in any event. That could be said about most warnings and has not prevented costs following the event in other cases where warnings have been found not to be justifiable. Mr Sherriff submits that the net result of the determination is simply that the applicant is deemed not to have been disciplined for conduct but it does not result in a rewriting of the history. It is still though an outcome in favour of the applicant. In terms of the submissions that the respondent was successful on the vast majority of issues in the proceeding, and that the case would have been a simple one but for the applicant's attacks on every single procedural point, that is a matter that falls to be considered as to whether there was conduct that unnecessarily increased the length of proceedings. It does not mean that costs should not follow the event in the ordinary way. The applicant was, in this case, successful and I find that costs should follow that.

[11] The investigation meeting was initially scheduled for two days on 8 and 9 June 2011 with a further day on 19 July 2011. The further day was necessary as one of the respondent witnesses was unavailable for attendance on the earlier date. It was agreed by counsel that submissions would also be presented on the 19 July date. As matters transpired, the 9 June 2011 date was not required so the investigation took place over two days on 8 June and 19 July 2011.

[12] Frequently in the Authority, costs are judged against a notional daily rate. Mr Goldstein submits that the Authority should not adopt this approach in this case, relying on the *Calderbank* offer because he submits that if the offer was accepted it would have resulted in the applicant not incurring subsequent legal fees.

[13] The Court of Appeal in *Bluestar Print Group (NZ) Ltd v David Mitchell* (2010) ERNZ 446 said this of the approach to *Calderbank* offers amongst other matters in para. 20:

*It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. Where defendants have acted reasonably in the circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors.*

[14] Although it is more usual to assess a Calderbank offer from a respondent to an applicant the Authority can have regard and take into account Calderbank offers from applicant to respondent to assess whether the respondent's conduct in not accepting the offer increased costs unnecessarily. I have considered the elements of the *Calderbank* offer. The applicant achieved an outcome whereby the warning was found to be unjustified and was to be reinstated to a position as if no warning had been issued. That was the effect of the Calderbank offer from the applicant together with reimbursement of legal fees. The applicant was not found to be entitled to special damages with respect to legal costs incurred before the first written warning was issued of \$5,827.50 so did not achieve in that regard more than what was offered in the cost element of the offer. The applicant would in any event have been entitled to a contribution towards his costs in the Authority if successful. In exercising my discretion as to costs I do not take into account the rejection of the Calderbank offer.

[15] I do not find that that this is a case where an exercise of a discretion as to costs can fairly be done on an issue by issue success basis as Mr Sherriff submits should happen. The applicant was successful in a conclusion that the warning was unjustified under s.103A of the Employment Relations Act 2000. He did not succeed in several other arguments including those about the process leading to the warning. I find that the proper approach is to consider whether those arguments had a significant effect on increasing costs and if so what that was. The case was clearly a very important one to both parties. The approach taken by the applicant was particularly thorough and examined and challenged nearly every aspect of the procedure and disciplinary outcome which ultimately led to the issue of a first written warning. I reflected carefully on whether that increased the length of the investigation meeting. Challenging every aspect of the procedure had less bearing in terms of the time required with respect to evidence and more with respect to the length and detail of final submissions. This is because many of the challenges to the process and matters such as damages were for submissions rather than evidence. If the challenges to

every element of the process were put to one side this was not a particularly factually or legally complex matter.

[16] I accept that more detailed submissions were required which in turn increased time to deliver those submissions and many of the procedural arguments and a claim for special damages were unsuccessful although viewed in isolation no particular matter had a significant effect on time and therefore costs. I would have found costs should be judged against the notional daily rate at \$3,500 per day. Taking the requirement of more detailed submissions into account there is to be a reduction for the second day of \$500 to \$3000. Costs for the first day therefore are \$3500 and the second day \$3000.

[17] In conclusion, therefore, an appropriate award of costs in this case is the sum of \$6,500 together with disbursements of \$376.66.

[18] I order the Secretary for Justice to pay to X the sum of \$6,500 being costs together with disbursements in the sum of \$376.66.

Helen Doyle  
Member of the Employment Relations Authority