IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2011] NZEmpC 81
CRC 20/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AARAN CALLAGHAN Plaintiff
AND	TAEGE MANUFACTURING LIMITED Defendant

Hearing:	By memoranda of submissions filed by the plaintiff on 29 July 2011 and the defendant on 13 August 2011
Counsel:	David Beck, counsel for plaintiff Penny Shaw, counsel for defendant
Judgment:	8 July 2011

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff has challenged a determination[1] of the Employment Relations Authority which awarded him $1,000 as a contribution towards his legal costs in pursuing a personal grievance. There is no challenge to the Authority's substantive determination which found that the redundancy was genuine, the defendant's director had acted in good faith, but that the process adopted was unfair in that the redundancy of the plaintiff was predetermined and the consultation process was not a genuine opportunity for the plaintiff to consider alternatives to his redundancy. The Authority awarded the plaintiff $2,500 for behaviour of the defendant (Teage) which it found was "misguided rather than unjust".

[2] Counsel sensibly agreed that the challenge should be decided on the basis of an exchange of written submissions.

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[1] CA90/10, 15 April 2010.

[3] The Authority found that a total fee of $3,800, in round figures incurred by the plaintiff inclusive of both a mediation and an investigation meeting, together with associated attendances, was fair for the work required. It found that a significant portion of the total fee involved was for attendances at mediation and referred to a longstanding practice of the Authority not to award costs for mediation attendances. On that basis, 20 per cent of the total fee was reduced to remove the mediation component. Once GST was excluded, in accordance with what was said to be another longstanding practice of the Authority, this left a net claim of $2,800.

[4] The plaintiff had argued before the Authority that he was an hourly rate wage worker of limited means and he had had to expend more in legal fees than the compensation he was finally awarded. He sought full indemnity costs because of his lack of means and the level of the compensatory award.

[5] The Authority found Taege had relied on a Calderbank offer which the Authority said had been made "months prior to mediation". The Authority found, had the offer been accepted, this would have put the plaintiff in a stronger financial position than the result he finally achieved.

[6] The Authority found that if the matter were to be dealt with exclusively on the basis of the daily rate tariff traditionally applied to Authority hearings, which was specifically mandated by the full Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*,[2] then an award of perhaps $1,500 would be the more likely outcome considering the investigation meeting had involved no more than a half-day. Taege had argued that costs should lie where they fell. The award of $1,000 was said to have been fixed on the basis of the daily tariff approach with appropriate allowances for the arguments advanced by both parties.

[7] In his submissions in support of the challenge Mr Beck, for the plaintiff, invited the Court to exercise its equity and good conscience jurisdiction, taking into account the plaintiff's limited means and Taege's overall conduct of the proceedings, to establish a level of costs that reflected the overall justice of the case. He sought, on behalf of the plaintiff, full indemnity costs totalling $3,418.50, exclusive of GST

[2] [2005] ERNZ 808.

plus the $70.00 filing fee. As an alternative, he sought two-thirds of reasonable costs, citing *Good Health Wanganui v Burberry*.[3] Mr Beck referred to the background to the Authority's substantive determination and noted the defendant's initial refusal to attend mediation. After the parties were directed to mediation by the Authority, which was unsuccessful, the plaintiff sent a Calderbank offer on 7 September 2009 seeking $5,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), costs of $1,500 plus GST, a positive reference and a mutual non-disparaging clause.

[8] In a response, wrongly dated 20 July 2009, Taege's counsel rejected the plaintiff's offer and advanced a counter-Calderbank offer of $2,000 under s 123(1)(c)(i), a positive reference, and a mutual non-disparaging clause. Mr Beck submitted, that as the offer did not express any regret for deficiencies in the process, or, vitally, address legal costs, it was deemed to be insufficient compensation and the plaintiff rejected it and proceeded to the investigation meeting. As a result of the determination, the plaintiff recovered $500 more than the monetary component of the Calderbank offer and an entitlement to costs.

[9] Mr Beck observed that the Authority's determination made a material error of fact in paragraph 5 in finding that the defendant's Calderbank offer had been made, "in July 2009, some five months before the investigation meeting and certainly well before the costs of the investigation meeting would have been incurred." It appears to be common ground that the Calderbank offer was wrongly dated 20 July 2009 as it was a response to the plaintiff's Calderbank offer dated 7 September 2009.

[10] Mr Beck also asserted that the Authority had the ability to consider the costs associated with the mediation, citing *Waugh v Commissioner of Police*.[4] In *Waugh* costs were reserved and it was noted that there could be a dispute between the parties on the question whether the costs of mediation can or cannot be taken into account. Chief Judge Goddard noted that in *Trotter v Telecom Corp of NZ*[5] he disallowed professional costs in connection with mediations, holding that the parties owe it to each other to put in some resources towards a genuine endeavour by way of

[3] [2002] 1 ERNZ 668.
[4] [2004] 1 ERNZ 450.
[5] [1993] 2 ERNZ 935 at 937.

mediation to settle a dispute between them. The Chief Judge in *Waugh* noted that *Trotter* was a case under the Employment Contracts Act 1991, when mediation was voluntary, but under the Employment Relations Act 2000 the position was quite different as mediation is either required by the Authority or the Court or both, and is thus a necessary part of almost every proceeding. He stated:

> [163] Regulation 68 of the Employment Court Regulations 2000 does not go so far as to preclude the Court from awarding costs of mediation and cannot be construed as overriding the jurisdiction of the Court to award costs conferred on it by clause 19 of Schedule 3 to the Act which is a superior legislative instrument than the regulations.
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> [164] As Judge Shaw made clear in *National Mutual Life Assn of Australasia Ltd, (t/a AXA) v Burke* [2003] 2 ERNZ 103 at paras 21 and 22, the regulation is concerned with any conduct of the parties tending to increase or contain costs including *Calderbank* offers but not including anything that was done in the course of the provision of mediation services. However, in view of the fact that this may be a contentious area, the claim for the costs of mediation should be separated from other costs in terms of quantum but in deference to the intent of reg 68 no statement should be made as to the content of the mediation process.

[11] I note that Chief Judge Goddard required that the costs of mediation should be separated out from other costs, in terms of quantum, in a memorandum as to costs. This has not been done in the Tax Invoice, dated 3 February 2010, annexed to Mr Beck's memorandum. This presumably led the Authority to make the 20 percent reduction down to $2,734.80. However, annexed to the invoice is a document described as "Unbilled Work-In-Progress Report, dated 3 February 2010. This contains the statement "NO WIN NO FEE". This Report for 7 September 2009 states: "Attendance @ med $537.50" which I presume is a reference to the costs of mediation. That Report does not appear to have been provided to the Authority. I therefore deduct the sum of $537.50 from the $3,418.50 to produce a nett figure of $2,881.00, if the Authority's practice of not awarding mediation costs is approved.

[12] Ms Shaw, for Taege, submitted that the exchange of Calderbank offers showed the plaintiff's non-negotiable position and his claim for at least $5,000 was based on his assertion that the dismissal for redundancy was substantively unjustified. She submitted that the defendant had successfully defended the allegations that the redundancy was not genuine and that Taege had breached its obligations of good faith. The sum of $2,500 was awarded rather than the $8,000

that was claimed, with the Authority describing the amount of $8,000 as "at the high end of awards for this kind of case." She submitted on this basis that both the plaintiff and the defendant were partially successful.

[13] Ms Shaw stated that Taege's total costs were $6,187.50, including GST. This, I find, supports the proposition that the costs incurred on behalf of the plaintiff for all matters, including the mediation, were reasonable.

[14] Ms Shaw submitted that it was not appropriate for the Authority to apply the two-thirds of reasonable costs approach used in the Court, citing the *Da Cruz* decision. She accepted that costs should follow the event but submitted that the starting point should initially be the daily tariff rate, the Authority then exercising equity and good conscience to assess the appropriate amount of costs to be awarded on a case by case basis.

[15] Ms Shaw referred to *Davis v Harbour Inn Fisheries Ltd*[6] which, she submitted, recognised that the costs of parties successfully resisting claims are relevant to the issue of costs, taking into account the preparation required and the element of success and that "success" did not just amount to the awarding of remedies. She submitted that $3,000 was an appropriate starting point for a daily tariff rate, citing *Terson Industries Ltd v Loder.*[7] She submitted that, as the investigation was less than half a day, about two hours, therefore the appropriate starting point was no more than $1,500.

[16] Ms Shaw then referred to the Calderbank offer made by the defendant, submitting that it was reasonable, even if the Authority was mistaken in its view that it was made five months prior to the hearing. She submitted it was made well before the plaintiff started to incur any substantial costs relating to the investigation meeting. She submitted that, given that it is not the Authority's practice to award costs incurred up to and including mediation, the absence in the offer of a component to cover the costs of mediation was not significant and should not prevent Taege's offer being held to be a reasonable one.

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[6] CC9/07, 15May 2007.
[7](2009) 6 NZELR 345.

[17] Ms Shaw submitted that there was information before the Court, no doubt based on the Unbilled Work Report, that the plaintiff's costs were agreed to be a "no-win no-fee" arrangement and that this information had not been given to the Authority. She submitted that it is recognised that such arrangements should not impact on costs decisions, citing *The Order of St John Midland Regional Trust Board v Greig.*[8] However, she submitted they should be taken into account when assessing whether the Calderbank offer was reasonable as it was impossible to determine what, if any, liability there was for costs at the time the offer was rejected.

[18] Ms Shaw also cited *Watson v New Zealand Electrical Traders Ltd t/a Bray Switchgear*[9] which referred to *Health Waikato Ltd v Elmsly*[10] where the Court of Appeal had stated that there should be a more steely approach to costs where reasonable settlement proposals had been rejected. She submitted that if the plaintiff had undertaken a proper costs benefit analysis prior to turning down the defendant's Calderbank offer, he would not be in his present position of being of limited means and having received a modest award which does not cover the costs he has incurred. She submitted that if the plaintiff had accepted the award he would be better off and, therefore, undertook the risks of proceeding to litigation.

[19] Ms Shaw submitted that because the defendant had successfully defended significant parts of the plaintiff's claim and had made a reasonable offer at an early stage, which was rejected, it should receive an award of costs in its favour as a contribution towards its costs in the sum of $1,500. Taege also sought a contribution to its costs in the de novo challenge in the sum of $500.

Discussion

[20] The Chief Judge's decision in *Watson* involved a challenge to a costs determination of the Authority by a successful grievant. The Authority there awarded $2,500 against actual costs of $9,884.25, including GST. The grievant submitted this was unreasonable and sought a contribution of $7,500 towards those legal costs. The Chief Judge analysed the Calderbank offers that had been made in

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[8] [2004] 2 ERNZ 137.
[9] (2006) 4 NZELR 59.
[10] [2004] 1 ERNZ 172 at [53].

that case and held that, although not precisely predictive of the final outcome, the grievant's proposal for settlement was so close to the actual outcome after much more was spent on costs, that it was a significant consideration in the case. It appeared that the Authority had made no reference to this significant factor and therefore the Court held that the Authority had decided the costs question erroneously by simply adopting a tariff based quantification. After citing the *Elmsly* decision the Chief Judge said that the case was one that could have been justly settled at an early stage by a realistic acceptance by the grievant's employer of the Calderbank offer. It found that even if the Authority had taken the offer of settlement into proper account, its response could not be described as "steely". The figure of $2,500 was increased to $6,000.

[21] In the recent decision of Judge Couch in *Metallic Sweeping (1998) Ltd v Ford*,[11] his Honour referred to the acceptance by the full Court in the *Da Cruz* case of the Authority's tariff based approach so long as it was not applied in a rigid manner without regard to the particular circumstances of the case. He noted that the Authority is not bound by the *Binnie*[12] principles which extend the range of costs which the Court may award beyond that which could reasonably be labelled as modest. In addressing a submission that the defendant had unreasonably rejected an offer of settlement and that therefore she ought to fully reimburse the plaintiff for all costs incurred in resisting her claims after that date, Judge Couch stated:[13]

> There is undoubtedly a good deal of weight in this submission but it is not automatic that a party who makes an offer of settlement which is unreasonably rejected is entitled to be indemnified for all subsequent costs. This is particularly so in the context of proceedings before the Authority. Such a claim will also be limited by the extent to which the costs subsequently incurred were reasonable.

[22] Whilst I accept in the present case that Teage's Calderbank offer was close to what was finally awarded by the Authority, although it was $500 less, it made no allowance at all for costs which had been incurred to that point in time, even if the mediation costs were excluded. I therefore find it was considerably less than the amount awarded to the plaintiff by the Authority when his consequent entitlement to

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[11] [2010] NZEmpC 129.
[12] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA).
[13] At [42].

costs in the Authority is taken into account. It should not, therefore, have operated to reduce the amount of costs he would otherwise have been entitled to. Although both sides were partially successful in the Authority, the plaintiff succeeded in obtaining an award in his favour and vindication of his grievance that he had been unjustifiably treated. The costs award made by the Authority at less than the lower end of the daily tariff rate failed to recognise this factor and therefore I conclude it was erroneous in this respect.

[23] As to the issue of mediation costs, I note the recent decision *Naturex v Rogers*[14] where the Court observed that if parties are directed to mediation by the Authority or the Court, the costs of complying with this direction might found an application for costs, particularly if a direction is ignored. However, the Court also noted that reg 68(2)(b) of the Employment Court Regulations 2000, which deals only with the Court's costs discretion and not the Authority's, states that the Court "may not have regard to anything that was done in the course of the provision of mediation services". The court in *Naturex* also found that the finding of the Court of Appeal in *Just Hotel Ltd v Jesudhass*,[15] that mediation is required to be treated as confidential, reinforces the rule against costs orders for mediation. After considering the relevant authorities the Court declined to award the costs associated with a judicial settlement conference.

[24] *Naturex* and the cases cited there, provide a foundation for the practice the Authority has apparently adopted of not awarding costs for mediation and I see no reason for not approving the continuation of that practice, including its application in the present case. I therefore disregard the costs of mediation.

[25] I now consider the reasonably incurred costs of $2,881 against the Authority's award of $1,000, which is less than half of the daily rate. I consider that the award the Authority issued should be raised, but not to the level of indemnity costs, as I see nothing in this case to justify what would otherwise amount to a penalty award against the defendant. This case does not fall into any of the

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[14] [2011] NZEmpC 9.
[15] [2007] ERNZ 817, [2008] 2 NZLR 210.

categories listed by the Court of Appeal in *Bradbury v Westpac Banking Corporation*[16] in which indemnity costs have been awarded by a Court.

[26] I consider that in all the circumstances, an award of costs of $2,000 based partly on the daily tariff for half a day and partly on the somewhat modest award of $2,500 which may have increased if it had been challenged, should have been made. This would also have recognised the plaintiff's sense of grievance for the unfortunate treatment he received. In terms of s 183 of the Act, I replace the Authority's award with the amount of $2,000 for costs plus the filing fee of $70 making a total of $2,070.

[27] As to the costs on the challenge, although these have not been addressed by the parties, to avoid them having to go to yet further expense, and based on the claim the defendant made, I award the successful plaintiff the sum of $500 plus disbursements, which, if they cannot be agreed, can be determined by the Registrar of the Employment Court.

B S Travis
Judge

Judgment signed at 1.15pm on 8 July 2011

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[16] [2009] NZCA 234, [2009] 3 NZLR 400.