IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 127
5499467

	BETWEEN	WARREN NEWETT BANKS Applicant
	AND	HOCKEY MANAWATU INCORPORATED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Barbara Buckett, Counsel for Applicant Phillip Drummond and Ruth Oakley, Counsel for Respondent
Investigation Meeting:	On the papers by way of submissions
Determination:	23 December 2015

COSTS DETERMINATION OF THE AUTHORITY

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[1] In my determination of 10 November 2014 I declined Mr Banks' application for interim reinstatement pending the substantive investigation of his personal grievances.[1] On 29 June 2015, following the substantive investigation of those matters I dismissed Mr Banks' claims to have been unjustifiably dismissed and unjustifiably disadvantaged by actions of his employer, Hockey Manawatu Incorporated (HM)[2]. The issue of costs was reserved in both matters and falls to be determined following the receipt of submissions from counsel for each party.

[2] Counsel for HM seeks a contribution to costs of approximately $20,000, which it submits is an uplift of approximately 100% on the starting point of $10,500. That starting point represents three days of investigation calculated at the Authority's notional daily tariff of $3,500. Mr Drummond has itemised the commencement and

[1] [2014] NZERA Wellington 114.
[2] [2015] NZERA Wellington 62.

finishing times for each of the two and a half days of investigation, submitting that in round terms it approximated three days.

[3] Mr Drummond submits an uplift in the daily tariff is justified because of the manner in which application for interim reinstatement was made, and the lack of good faith demonstrated by the applicant in applying for interim reinstatement under urgency. The presentation of the application, without an accompanying affidavit; the resulting correspondence and preliminary conference; and the subsequent filing of three affidavits for the applicant himself all contributed to the time taken in preparation for the interim reinstatement hearing. The applicant's lack of good faith related to an email he had sent to a family member three weeks before lodging the application in which he indicated he had no intention of returning to his employment.

[4] Additionally Mr Drummond submits the application for reinstatement was misconceived and had no prospect of success as was subsequently established in the Authority's determination of 29 June 2015.

[5] Mr Drummond also cites the *Without Prejudice Save as to Costs* offer made by HM on 1 September 2014 (the first Calderbank offer), as a factor that should be taken into account in considering a costs award. The offer, which was open for acceptance until 3 September 2014, comprised several components, the monetary parts of which amounted to approximately $19,000, or approximately $15,000 once a contractual entitlement was excluded. That offer expired by effluxion of time but was also subsequently formally rejected by Mr Banks.

[6] A second Calderbank offer was made by HM on 29 October 2014. This was an offer for both parties to " '*drop hands' e.g. that both parties pay their own costs and go their separate ways, by way of full and final settlement of all matters between the parties*". This offer was available to 4 p.m. on 30 October 2014, which was the day before the scheduled investigation meeting to hear the interim reinstatement application.

[7] HM submits it has been put to significant cost in defending a claim that was subsequently found to lack merit, as a result of Mr Banks deciding not to accept what Mr Drummond referred to as a generous offer.

[8] The respondent also cites the conduct of the applicant, alleging it lengthened the time of the hearing and increased costs. In this regard, counsel for HM cites the a number of factors including:

a. the sheer volume of correspondence and documents;

b. two disadvantage claims brought by Mr Banks which required responses from HM before being abandoned on the first day of the substantive hearing;

c. the applicant's attempt to obtain discovery of privileged documents which resulted in additional time being spent before and during the hearing when an interlocutory hearing had to be held within the substantive hearing to address the issue;

d. further disadvantage claims brought by Mr Banks all of which had to be addressed, and none of which was successful;

[9] Mr Drummond submits that Mr Banks, having elected to run the litigation in this way, and having had all his claims dismissed, should have to meet part of the increased costs of HM as a result of these factors. He notes that some three weeks before the interim injunction investigation meeting Mr Banks was put on notice, by email to his legal representative, of HM's view that his claim had little prospect of success and he was at risk of incurring "*unrecoverable costs and a costs award*" against him.

[10] Counsel for the respondent noted that HM's actual costs had been $43,500 (excluding GST and disbursements). He acknowledged HM had two counsel acting for it, the full cost of which should not be borne by Mr Banks. However, in view of the volume of documentation, number of witnesses, the urgency of the interlocutory application, and indications from the applicant of complaints to both the Privacy Commissioner and the Law Society, the retention of two counsel was justified. A costs award of $20,000 would meet approximately half of HM's costs.

[11] In addition, disbursements in the sum of $400 were sought comprising photocopying and courier costs.

[12] In response, counsel for Mr Banks opposes any award higher than one based on the Authority's notional daily tariff, but submits costs should lie where they fall to reflect the justice between the parties. In support of this proposition Ms Buckett submits that Mr Banks acted in good faith at all times in his dealings with HM and that allegations to the contrary were baseless and not in accord with the evidence.

[13] Ms Buckett also alleges the respondent, through its conduct unnecessarily increased the time required at the investigation meeting. In her view the applicant had expedited matters by its preparation of witness statements, a bundle of evidence and legal submissions. In contrast, the efficacy of the investigation was frustrated by "constant delays due to tardiness in information supply and the poor preparation of documentary material by the respondent" which, in Ms Buckett's submission, led to at least one additional day of hearing time.

[14] With regard to the Calderbank offers Ms Buckett cites High Court authority for the proposition that the rejection of such an offer does not automatically expose the unsuccessful party to an award of solicitor-client costs, but merely goes to the discretionary considerations in assessing contribution to be made to the successful party's costs.

[15] She also submits that, as neither Calderbank offer addressed the primary remedy sought by Mr Banks, which was reinstatement, it would be unjust to him to allow his rejection of those offers to be used against him. Ms Buckett cites *Gaut v BP Oil NZ Ltd*[3] as authority for that proposition. She further submits the Calderbank offer made on 1 September 2014 represented little value to Mr Banks in exchange for relinquishing his permanent employment and was not the offer a fair and reasonable employer would make, particularly as it included his contractual entitlement to commission and the offer of compensation was less than the amount to which he would be entitled as notice under his employment agreement.

[16] Ms Buckett rejects the respondent's claims of additional attendances being required because of the way the application for interim reinstatement had been presented. In her submission the respondent's conduct leading up to and during the hearing resulted in unnecessary costs being incurred by both parties. She refers, amongst other matters, to the difficulties the applicant had in obtaining information

[3] [2011] NZEmpC 111 at [24].

from HM. Ms Buckett submits that any award the Authority makes against Mr Banks should be reduced due to the respondent's tardiness in producing relevant documentation.

[17] Other submissions made on behalf of the applicant are that counsel for HM has not provided sufficient detail of its costs for a determination to be made as to whether they were reasonable; it would be unreasonable for the applicant to have to contribute to the costs for two counsel; and that if the Authority awarded costs on the basis of its daily tariff, this should be at a substantially reduced rate based on two days not three as sought by HM.

Discussion

[18] Counsel for both parties cited the well-known and well-established principles applicable to an award of costs in the Authority as identified in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*.[4] The appropriateness and applicability of those principles to costs awards in the Authority has recently been reconfirmed by the Full Court of the Employment Court.[5]

[19] The principles include the discretionary nature of costs awards, a discretion which is to be exercised in accordance with principle rather than arbitrarily. Costs generally follow the event, which normally results in the successful party being entitled to a reasonable contribution to its actual costs from the unsuccessful party. Costs for each case are considered in the light of the particular circumstances. They are frequently judged against a notional daily tariff. Where a party's conduct has increased costs unnecessarily, that may be taken into account in the award made.

[20] It is appropriate in this case that costs be awarded to HM. Mr Banks failed in his bid for interim reinstatement and was unsuccessful in all personal grievance claims he brought to the Authority. I do not accept Ms Buckett's submission that costs should lie where they fall.

[21] Mr Drummond's submission regarding the number of days to be taken into account in awarding costs is reasonable. The interim reinstatement investigation took approximately four hours, and the substantive investigation continued into the evening

[4] [2005] 1ERNZ 808.
[5] *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

on both of its two scheduled days. This resulted in the two hearings taking a total of twenty four hours. Increased costs would have been incurred over and above those that would be expected for two and a half days of hearings. I therefore take as a starting point an award of costs for three days at the Authority's notional daily tariff, totalling $10,500.

[22] Each party has claimed the other's actions added to the length of time taken to investigate the matter. There may be some merit to both claims but I am not persuaded that either party was at fault to the extent that an uplift, or a decrease, in the daily tariff would be warranted on that account. Nor am I willing to attribute a lack of good faith to Mr Banks in bringing an application for interim reinstatement to the Authority under urgency. I made no such finding at the time and it would be inappropriate to do so now.

[23] The Court has recently confirmed that the Court of Appeal's recommended "*steely approach*"[6] to Calderbank offers applies in the Authority as well as the Court[7]. In this instance HM made two such offers to Mr Banks. The first Calderbank offer was made when Mr Bank's employment was still afoot: his employment was not terminated until almost one month later. At that stage he had raised a personal grievance for disadvantage but the Calderbank offer could not address prospectively the grievance for unjustified dismissal he subsequently raised.

[24] I also note the offer was made by email on 1 September 2014 and was open for acceptance only until 12 noon on 3 September 2014. It was sent to the office of Mr Banks' legal representative at 8.24 p.m. Given the lateness of the hour the office was unlikely to be open and Mr Banks would not have been aware of the offer until the next day. That was an unreasonably short time frame for a response in the circumstances.

[25] The second Calderbank offer was made on 29 October 2014 and was essentially an offer for both parties to walk away, and bear their own costs. There was no monetary component on offer and, as Ms Buckett has noted, the offer did not address the primary remedy Mr Banks was seeking, that of reinstatement. The offer was open for acceptance for 27 hours which, again, is a very short time frame. For

[6] *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385.
[7] n5 at [109].

these reasons I conclude neither of the respondent's two Calderbank offers justifies an uplift to the daily tariff.

[26] Mr Drummond acknowledged the applicant should not have to bear the full cost of the two counsel who represented HM. I am not persuaded it should have to bear any of the costs of the second counsel. That was a choice made by the respondent and could not be regarded as a necessity in the circumstances.

[27] Taking all matters into account I find an appropriate award of costs to be $10,500. The disbursements for photocopying and couriers, which were charged to HM in invoices submitted by Ms Oakley, copies of which were attached to the respondent's submissions, appear reasonable and are awarded in full.

Determination

[28] Warren Banks is ordered to pay Hockey Manawatu Incorporated the following sums pursuant to clause 15 of Schedule 2 to the Employment Relations Act 2000:

a. $10,500 in costs; and

b. $400 in disbursements.

Trish MacKinnon
Member of the Employment Relations Authority