IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 33
5390391

BETWEEN	MICHAEL BOSKETT-BARNES (Also known as Michael Boskett) Applicant
AND	CLAUDIA KALTENSTADLER First Respondent
	And
	HARAKEKE TRUST Second Respondent

Member of Authority:	Christine Hickey
Representatives:	Jeanette Walker, Advocate for the Applicant Mark Donovan, Counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	From the Respondent on 17 November 2014 None from Mr Boskett- Barnes
Determination:	10 March 2015

COSTS DETERMINATION OF THE AUTHORITY

A. Michael Boskett-Barnes must pay Claudia Kaltenstadler and the Harakeke Trust $3,500 towards their legal costs.

[1] On 1 September 2014 I issued a determination dismissing Mr Boskett's claims because I determined he was not an employee of Ms Kaltenstadler or of the Harakeke Trust (the Trust). Ms Kaltenstadler and the Trust seek costs.

[2] The Authority's jurisdiction to make costs orders is found in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Costs are at the discretion of the Authority.

[3] Each case is to be treated in light of its own circumstances. The primary purpose of costs is to compensate the successful party. Ms Kaltenstadler and the Trust were successful in defending Mr Boskett's claims.

Attempts to obtain Mr Boskett's views on the application for costs

[4] On 17 November 2014 the Authority received submissions from Mr Donovan on Ms Kaltenstadler's behalf seeking $9,500 in legal costs.

[5] On 18 November 2014 the Authority officer wrote to Ms Walker, who had represented Mr Boskett at the investigation meeting enclosing the submissions applying for costs. Mr Boskett was given 14 days after receipt of the letter within which to respond to the application for costs.

[6] No response was received within that time. On 5 December 2014 the Authority officer sent a further email to Ms Walker asking for a response. On 9 December Ms Walker contacted the Authority officer advising that she had no instructions on the issue of costs and that she had forwarded Mr Donovan's submissions to Mr Boskett.

[7] On 22 December 2014 the Authority officer emailed Mr Boskett directly asking if he wished to make submissions on costs. He responded on the same day that he would respond *to the matter of costs.*

[8] On 23 December 2014 the Authority officer emailed Mr Boskett to let him know he had until 30 January 2015 to make his submissions. She also advised him, on my instructions:

> *… if you intend to make submissions reliant on your financial situation you would have to give evidence of your income and outgoings by way of an* ***affidavit*** *attaching any relevant financial documents.*

[9] No submissions or any other communication has been received from Mr Boskett. On 13 February 2015 both parties were advised that in the absence of a

reply from Mr Bosket the Authority was prepared to make a determination on costs. Nothing has been received from Mr Boskett since then.

Principles governing costs

[10] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and were outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*,[1] a judgment of the Full Court of the Employment Court.

[11] The Court in the *Da Cruz* case noted that in exercising its discretion the Authority frequently judges costs against a notional daily hearing rate. Costs must be reasonable and costs awards are generally modest.

[12] *Ogilvie & Mather (NZ) Ltd v Darroch*[2] sets out the two principal criteria that must be satisfied when a *Calderbank* offer[3] is made so as to not prejudice the recipient of the offer by exerting undue pressure. The safeguards are:

- A modicum of time for calm reflection and the taking of advice before a decision has to be made to accept the offer or reject it; and

- The offer must be transparent if the offeror is later to be given the protection the *Calderbank* offer furnishes.

[13] The Authority takes as its starting point the notional daily tariff of $3,500 per day of investigation meeting and weighs up the particular circumstances of each case to assess whether that amount should be adjusted up or down.

[14] Mr Donovan points out that the Court of Appeal has advocated that a *steely approach*[4] is to be adopted when determining costs in circumstances where a valid *Calderbank* offer has been made. The Employment Court has expressed some doubts about the appropriateness of the Authority adopting such an approach, and especially the awarding of costs on an indemnity basis.[5]

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[1] [2005] ERNZ 808
[2] [1993] 2 ERNZ 943
[3] An offer to settle that is without prejudice save as to costs.
[4] *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446
[5] I refer to the cases of *Mattingly v. Strata Title Management Ltd* [2014] NZEmpC 15, *Harvey Norman Stores (NZ) Pty Ltd v. Boult* [2014] NZEmpC 28, *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmp 2 and *Booth v Big Kahuna Holdings Ltd* [2015] NZEmp 5.

[15] However, Calderbank offers should be considered in the exercise of the Authority's discretion as one of the factors that may lead to an increase in the amount of costs awarded, or even, in some cases, lead to reversing the flow of costs.

The parties' submissions

[16] Mr Donovan submits that an increase in the daily tariff is justified largely because the respondents made two *Calderbank* offers to Mr Boskett:

- the first by email on 9 June 2014 which contained an offer to settle all claims, including any outside of the Authority's jurisdiction, for $8,000; and
- the second by letter dated 13 June 2014 which contained an offer to settle all claims, including any outside of the Authority's jurisdiction, for $10,000.

[17] Mr Donovan's submissions say that the respondents have incurred costs, including disbursements, of $14, 602.75 (incl GST). He attached the two invoices that relate to the period from 6 June 2014 until the submission were drafted and supplied to the Authority. The two invoices amount to $10,609.95 including GST.

[18] The respondents seek $9,500 in costs from Mr Boskett, a significant increase above the daily rate to reflect:

- Their total success in defending Mr Boskett's claims; and
- That the majority of their legal costs would not have been incurred had Mr Boskett accepted either of the settlement offers.

[19] Having had no submissions from Mr Boskett I cannot take into account his view of what costs might be reasonable.

Issues

[20] The issues that need to be resolved are:

(i) What is the appropriate starting point for costs?

(ii) What factors, including the Calderbank offers, might move the costs up or down from the starting figure?

What is the appropriate starting point for costs?

[21] The respondents were successful in defending Mr Boskett's claims so Mr Boskett, as the losing party, should pay a reasonable contribution to their costs in defending his claims.

[22] The investigation meeting took almost one day, and submissions were received from Mr Donovan at the meeting and from Ms Walker on 28 July 2014. I consider the starting point for my consideration of costs to be $3,000 which reflects that the meeting did not take quite a full day.

What factor/s might bring down the amount to be paid?

[23] The meeting took place in Christchurch for Ms Kaltenstadler's convenience with Mr Boskett and Ms Walker travelling to the meeting. Meetings usually take place where the employment was based. The investigation would more usually have been held in Nelson or Blenheim. Mr Boskett and Ms Walker drove from Blenheim and Kaikoura respectively for the meeting and then had to travel back again after the meeting.

[24] I consider that Mr Boskett's ready offer to come to Christchurch for the meeting decreased Ms Kaltenstadler and the Trust's potential costs in that Ms Kaltenstadler and Mr Donovan did not need to travel for the meeting. That is a factor that tends towards a decrease from the starting point of $3,000.

What factors might increase the amount to be paid?

[25] There are no factors apart from the Calderbank offers which I need to consider in exercising my discretion on whether to increase the starting point.

[26] The two offers were certain enough in that they were clear on what was being offered to fully and finally settle all and any particular concerns and claims made by Mr Boskett.

[27] The question remains whether sufficient time was offered in either offer for Mr Boskett to exercise calm reflection and give him a real opportunity to take advice on the offers. The first offer was made to Ms Walker on Monday, 9 June 2014 at 1.25 pm and gave Mr Boskett until 5 pm on Thursday, 12 pm to accept or it would be withdrawn.

[28] In all the circumstances given the number and type of claims Mr Boskett had against the respondents I do not consider that was sufficient time for Mr Boskett to exercise calm reflection as well as gain Ms Walker's advice.

[29] The second offer was made on the following day, Friday, 13 June 2014. Mr Boskett was given an increased monetary offer and a time of 5 pm on Thursday, 19 June to accept or reject the offer.

[30] I consider that Mr Bosket had, by a slim margin, sufficient time to calmly consider the second Calderbank offer with the benefit of Ms Walker's advice. With the particular benefit of hindsight he was unwise to reject it.

[31] Mr Boskett's rejection of the offer meant that both parties were put to additional expense they need not have been had Mr Boskett accepted the offer to settle. The respondents did what they could to avoid further costs by attempting to settle with Mr Boskett.

[32] However, I do not consider that the second Calderbank offer is sufficient on its own to raise the contribution to costs to $9,500 as Mr Donovan submits it should if I applied a *steely approach*. Indeed I am not sure that it is appropriate to adopt a steely approach.

[33] In *Booth v Big Kahuna Holdings Limited* [6] Judge Inglis said:

> *[15] Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party.*[7] *The point is particularly apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues, particularly (although not exclusively) for employees. This has particular relevance to the weight that might otherwise be given to Calderbank offers in the Authority, and whether the 'steely' approach that is said to apply in this Court should have equal application in that forum.*
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> *[16] … I pause to note, however, that the Court of Appeal's observations as to the desirability of a 'steely approach' to Calderbank offers in Bluestar Print Group (NZ)*

[6] [2015] NZEmpC 4

[7] Although there is no suggestion that Mr Donovan's hourly rate of $275 per hour is anything other than reasonable.

> *Ltd v Mitchell were directed at Employment Court proceedings. It is not immediately apparent that they were intended to have broader application.*
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> *[17] An indicator of what the Authority itself regards as the sort of legal costs that might reasonably be warranted in terms of a 'garden variety' case can perhaps be gauged from its notional daily rate of $3,500. Parties who choose to incur costs in excess of this rate are entitled to do so but cannot confidently expect to recoup any additional sums.*

Conclusion

[34] Having had regard to the principles set out in *Da Cruz*, the time taken for the investigation meeting, Mr Boskett and Ms Walker's travel to Christchurch and the Calderbank offer of 13 June 2014, I consider that a contributory award towards the Applicant's actual costs of $3,500 is reasonable.

Christine Hickey
Member of the Employment Relations Authority