IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 454
5445206

	BETWEEN	ERIN BURKE Applicant
	A N D	EMPLOYERS & MANUFACTURERS ASSOCIATION (NORTHERN) INCORPORATED Respondent

Member of Authority:	David Appleton
Representatives:	Susan Hornsby-Geluk, Counsel for Applicant Richard Upton, Counsel for Respondent
Submissions Received:	13 and 29 October 2014 from Respondent 28 and 30 October 2014 from Applicant
Date of Determination:	06 November 2014

COSTS DETERMINATION OF THE AUTHORITY

The applicant is ordered to pay a contribution towards the respondent's costs in the sum of $20,982.40, payable in instalments as set out in this determination.

[1] By way of its determination dated 6 October 2014[1] the Authority found that Ms Burke had not been unjustifiably constructively dismissed, had not been unjustifiably disadvantaged in her employment and that there had been no breach of her employment agreement or duty of good faith owed to her. The Authority found that the respondent owed Ms Burke the gross sum of $348.30 pursuant to the Minimum Wage Act 1983.

---

1 [2014] NZERA Auckland 405

[2] Costs were reserved in that determination. Costs had also been reserved in the determination of the Authority on a preliminary matter[2] until the substantive investigation had taken place. The parties were directed to seek to agree how costs were to be dealt with between them but have been unable to reach agreement. This determination deals with the issue of those costs.

[3] The respondent seeks a contribution towards its costs in the sum of $40,000, together with disbursements in the sum of $1,167.20. The respondent's total costs incurred, from when Mr Upton was first briefed until and including his drafting of the respondent's application for costs, totalled just over $57,000, excluding GST. In seeking to persuade the Authority to depart from its usual daily tariff approach (in which the Authority typically awards costs at the rate of $3,500 per complete day of investigation meeting) the respondent relies principally upon a letter sent by Mr Upton to Ms Burke's counsel of the time, Ms Miles, on 4 April 2014, marked *Without Prejudice Save as to Costs* (a *Calderbank* offer).

[4] Mr Upton also submits that the matter before the Authority was complex and that Ms Burke and Ms Miles adopted an approach which increased costs. In particular, Mr Upton refers to Ms Burke's approach to her claim under the Minimum Wage Act, various assertions made by or on behalf of Ms Burke for which Mr Upton says there was no sustainable evidence and, finally, what Mr Upton calls a *belligerent approach* by or on behalf of Ms Burke to the entire proceedings.

[5] Mr Upton also refers to the fact that Ms Burke is an experienced employment lawyer who, effectively, knew the costs of representation and the risks of litigation better than most other applicants.

[6] The disbursements sought by the respondent relate to two nights' accommodation in Hamilton for Mr Upton (who is based in Auckland) together with the travel costs of four of the respondent's employees attending the investigation meeting.

[7] Ms Hornsby-Geluk makes a number of submissions on behalf of Ms Burke in opposition to Mr Upton's application for costs. First, she states that the Authority's investigation meeting lasted only two and a half days, and not three days as asserted by Mr Upton. Second, she argues that the *Calderbank* offer sent by Mr Upton should

---

2 [2014] NZERA Auckland 218

be set aside on the basis that it failed to take any account of the vindication that Ms Burke was seeking. Ms Hornsby-Geluk also states that the tone of the respondent's *Calderbank* offer was *offensive and required confidentiality* which would have substantially defeated the applicant's desire for public disclosure of the facts.

[8] Ms Hornsby-Geluk also states that, at the time the respondent's *Calderbank* offer was made and rejected by Ms Burke, disclosure that she had been requesting for some time, in relation to the salaries and billings of other solicitors and consultants working for the respondent, was still outstanding. Ms Hornsby-Geluk also submits that it was not reasonable for the respondent to have engaged independent counsel when it has its own in-house legal counsel.

[9] Ms Hornsby-Geluk also lists a number of occasions in which, she submits, the respondent was tardy in complying with directions in relation to disclosure and also refers to the respondent filing *a number of unsuccessful and unnecessary memoranda.*

[10] With respect to the preliminary matter that was determined by the Authority, Ms Hornsby-Geluk submits that Ms Burke was effectively more successful than the respondent and that, if any costs are awarded separately on this matter, they should be in favour of Ms Burke.

[11] Ms Hornsby-Geluk also argues that Ms Burke achieved vindication in respect of the Authority's investigation into her substantive complaints in the sense that she achieved disclosure of documentation which supported her position.

[12] Finally, Ms Hornsby-Geluk submits that the imposition of any costs award is going to cause considerable financial hardship to Ms Burke and to her daughter, whose school fees in the sum of $20,000 are due to be paid on 20 November 2014. In addition, a similar amount will need to be paid the following year for the final year at school of Ms Burke's daughter.

The legal principles to apply when determining costs in the Authority

[13] The Authority's power to award costs is set out in para.15 of Schedule 2 of the Employment Relations Act 2000 (the Act), which provides as follows:

> ***15 Power to award costs***
> *(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*
> *(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[14] Both counsel referred to the very well-known principles which the Authority must take into account when determining how legal costs and expenses should be dealt with, and which are set out in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. These principles include the following:

a. There is discretion as to whether costs would be awarded and in what amount.

b. The discretion is to be exercised in accordance with principle and not arbitrarily.

c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

d. Equity and good conscience are to be considered on a case by case basis.

e. 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.

f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

g. That costs generally follow the event.

h. That without prejudice offers can be taken into account.

i. That awards will be modest.

j. That frequently costs are judged against a notional daily rate.

k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[15] *Ogilvie & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943 sets out the two principal criteria that must be satisfied when a *Calderbank* offer is made so as to not prejudice unfairly the recipient of the offer by exerting undue pressure. These safeguards are as follows:

(a) 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

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

[16] Mr Upton points out that the Court of Appeal has advocated that a *steely approach* is to be adopted when determining costs in circumstances where a valid *Calderbank* offer has been made[3]. However, 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. 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, and *Booth v. Big Kahuna Holdings Ltd* [2014] NZEmpC 43, ARC1/14.

Determination

Should costs follow the event?

[17] Ms Hornsby-Geluk suggests that the respondent's conduct merits the Authority reversing the costs position so that costs be awarded to Ms Burke. However, it is fair to say that both parties fought their respective grounds robustly and, at times, refused to give any quarter, even when it would have been judicious to do so.

[18] In view of this, I am quite satisfied that the respondent's conduct was not such as to merit reversing the usual principle that costs should follow the event. The

---

[3] *Blue Star Print Group NZ Ltd v. Mitchell* [2010] NZCA 385 citing *Health Waikato Ltd v. Elmsly* [2004] 1 ERNZ 172 (CA)

respondent was wholly successful in respect of the most time consuming elements of Ms Burke's claim. Arguably, it was also successful in respect of the Minimum Wage Act matter given that the respondent had acknowledged breaches of this legislation prior to the investigation meeting and had made an open offer to remedy the breaches, which was rejected by Ms Burke on the grounds that she believed a much greater amount was due to her. The Authority ultimately rejected Ms Burke's analysis of her rights under the Minimum Wage Act and the award made by the Authority to her was almost identical to the sum that had been originally offered by the respondent.

[19] As for the preliminary matter, whilst certain aspects of the Authority's determination reflected the position taken by Ms Burke, the principal matter to be determined was whether the investigation meeting should be held in public or in private. In that matter, Ms Burke was unsuccessful.

[20] Taking all relevant circumstances into account, I am satisfied that costs should follow the event, and that Ms Burke should make a contribution towards the respondent's costs. The next question is to determine the amount of that contribution. There are a number of elements to consider in doing so.

Were the respondent's costs reasonable?

[21] Although the matter was not legally complex, there were a number of evidential strands that needed to be investigated and a significant amount of data that needed to be examined and analysed in order to test the parties' respective assertions. I therefore accept that, factually, the matter was more complex than the majority of cases investigated by the Authority.

[22] I also accept that, given that a significant amount of documentation formed part of the investigation and that Ms Burke's allegations required to be addressed in some detail by each of the respondent's witnesses, the total costs incurred by the respondent fall within a band of costs that one would reasonably expect to have been incurred under the circumstances.

[23] I do not accept Ms Hornsby-Geluk's submission that it was unreasonable for the respondent to have engaged external counsel given its in-house counsel was not involved in the issues under investigation. First, it is a fundamental principle that parties may engage whomever they wish to represent them (subject to matters of conflict). Secondly, it is not unreasonable for the respondent to have sought

independent representation given the fact that senior members of the respondent had to give evidence, including its most senior member, Mr Campbell.

How long did the investigation last?

[24] Ms Hornsby-Geluk takes issue with Mr Upton's characterisation of the investigation as lasting three days, saying that it only lasted two and a half. The Authority's notes indicate that the investigation ended shortly after 2pm but I accept Mr Upton's submission that the Authority did not hear oral submissions at the end of the evidence and that, if it had, the investigation meeting would have lasted three full days.

[25] Therefore, I accept Mr Upton's submission that, given the Authority's daily tariff of $3,500, the starting point in assessing Ms Burke's contribution is $10,500 costs.

Should this starting point be reduced or increased?

[26] Mr Upton submits that the costs should be increased, taking into account what he says was Ms Burke's unreasonable approach to the Minimum Wage Act issue, her conduct which Mr Upton says increased the length of the hearing, Ms Burke's alleged belligerent approach and the rejection of the respondent's *Calderbank* offer. Ms Hornsby-Geluk submits that costs should be reduced.

Ms Burke's alleged conduct of proceedings

[27] Whilst I accept that Ms Burke's approach to the Minimum Wage Act issue appears to have been unrealistic, this matter took up very little time at the investigation meeting itself and was dealt with reasonably succinctly by Mr Upton in his submissions. Therefore, I do not accept that Ms Burke's approach to the Minimum Wage Act issue should be a reason for increasing the starting point of $10,500.

[28] Mr Upton states that Ms Burke made several assertions that were unreasonable and for which there was no evidence. These included that the Anderson Report was not independent, that Mr Low and Ms Douglas interfered with client allocations, that Mr Low had altered emails, that Mr Low had *badmouthed* Ms Burke to Ms Douglas

and that the roles held by Mr Colley and Mr Low at the EMA were restructured because of their *wrongdoing*.

[29] I do accept that two of Ms Burke's allegations in particular (that Mr Low and Ms Douglas had interfered with client allocations, and that Mr Low had altered emails) were highly speculative. I also accept that the respondent had to spend time addressing these allegations, which were very serious. However, it is impossible to assess on the information provided to what extent these issues increased the respondent's costs unreasonably, and it would not be safe for the Authority to attempt to assess that extent. Therefore, whilst I accept the principle of Mr Upton's submissions in respect of those allegations, I decline to increase the starting point in respect of them.

[30] I have already addressed the allegation about the conduct of the parties. Ms Burke was no more belligerent than many determined applicants and, in view of the fact that both parties adopted a very robust approach to the proceedings, I also decline to increase the starting point in respect of that matter.

The remaining matter to consider, therefore, is the *Calderbank* offer made by the respondent to Ms Burke.

The respondent's Calderbank offer

[31] *Da Cruz* refers to the fact that without prejudice offers can be taken into account by the Authority when fixing costs. With respect to the *Calderbank* offer from the respondent to Ms Burke dated 4 April 2014, I am satisfied that the two principles set out in *Darroch* have been satisfied.

[32] First, the letter gave Ms Burke until 5pm on Friday 11 April 2014 to accept the offer, which is a sufficient amount of time. Second, the letter spells out in a transparent way the basis upon which the offer was made. The offer was that the respondent would pay Ms Burke $20,000 pursuant to s.123(1)(c)(i) of the Act in full and final settlement of all of her claims. The offer was made on a *no admission of liability* basis, and subject to the settlement being strictly confidential, with no issue as to costs.

[33] Whilst the letter did not spell out the consequences of failing to accept the offer, it was marked *Without Prejudice Save as to Costs* and was addressed to a

lawyer (Ms Miles) who was representing another very experienced employment lawyer (Ms Burke). I am therefore satisfied that the potential consequences of failing to accept the offer would have been perfectly clear to Ms Burke.

Should the Calderbank offer be set aside?

[34] In *George v. Auckland Council* [2014] NZEmpC 100 a *Calderbank* letter sent by the respondent to the applicant was set aside by the Court on the basis that it had not been unreasonable for Ms George to have rejected a *Calderbank* offer, as it had not addressed what the Court called Ms George's *reputational concerns.* In addition, the Court held that the reasonableness or otherwise of refusing an offer to settle has to be assessed at the time the offer was made, not simply against the final result.

[35] In a letter marked *Without Prejudice Save as to Costs* from Ms Miles to Mr Upton dated 11 April 2014, in which Ms Burke's rejection of the respondent's *Calderbank* offer was signalled, reference was made to Ms Burke's *need for vindication and to protect her professional reputation.* However, it is not clear from this letter exactly what Ms Burke's concerns about the need for vindication and her reputation were. Ms Miles' letter states:

> *The fact that the Applicant is no longer at the EMA and [consultant X] is, raises a question mark over my client's reputation and this can only be removed if the facts are made public via an Authority investigation meeting.*

[36] However, I concur with Mr Upton's submission that the *George* case is distinguishable from Ms Burke's situation. The Authority heard no cogent evidence that the EMA had made any damaging public comments about Ms Burke either before or after her resignation. It would appear that, as far as the general public was concerned, or even the legal profession in general, Ms Burke had simply left her role in the EMA and had started work immediately for a reputable law firm in Hamilton. Such movements of lawyers between employers occur dozens of times a year in New Zealand and employees in general resign and join new employers hundreds of times a year. To the outside world, there appears to have been nothing about her departure that could have tarnished Ms Burke's reputation.

[37] What Ms Burke actually appears to have been concerned with when she rejected the *Calderbank* offer was to prove that she had been unfairly treated by the

respondent. However, virtually every applicant who lodges a claim in the Authority against his or her employer has this objective in mind. I do not accept that that desire alone is sufficient to warrant the setting aside of the *Calderbank* offer in this case.

Was it unreasonable for Ms Burke to have rejected the respondent's Calderbank offer in all the circumstances?

[38] In my view it was as, although Ms Burke had not received the disclosure she had been seeking by the time the Calderbank offer had expired, Ms Miles replied on behalf of Ms Burke within seven days, but did not state that Ms Burke needed sight of the disclosure before she could consider the offer. Instead, she made a counter offer to settle for $61,000 (including $6,000 costs). This sum included a payment under s123(1)(c)(i) of the Act of $35,000, which would have been an exceptionally high award for the Authority to have made.

[39] In light of this, I do not accept that, at the time the respondent's Calderbank offer was rejected by Ms Burke, she had any evidence or knowledge that justified her thinking that she could win three times the offer made by the respondent. The offer made by the respondent was not by any means exiguous or nominal, but rather was a substantial sum. Whilst it is common for parties to attempt to horse trade when negotiating a settlement, a party rejecting a substantial offer made on a Calderbank basis in the hope of achieving a greater offer must face the risks and accept the potential consequences of doing so.

What effect should the respondent's successful Calderbank offer have?

[40] Had Ms Burke accepted the *Calderbank* offer, the respondent would not have incurred subsequent costs in the region of $40,880 (excluding GST). It is, presumably, on this basis that it seeks a costs award against Ms Burke of $40,000. However, this approach does not take into account the fact that, had the *Calderbank* offer been accepted by Ms Burke, it would have paid her $20,000 as part of the settlement. Whilst a considerable amount of the parties' time would also have been saved, this is not easily quantifiable.

[41] It is rare for the Authority to award costs on an indemnity basis, which is, effectively, what the respondent is asking the Authority to do when it asks for an award of $40,000 costs, as that sum is virtually the entirety of the costs incurred since the deadline for acceptance of the respondent's *Calderbank* offer expired.

[42] It is my view that it is appropriate to increase the costs contribution potentially payable by Ms Burke to the respondent from the starting point of $10,500 on the basis of Ms Burke's unreasonable rejection of the *Calderbank* offer, but that the $10,500 should be increased to $20,000, taking into account the fact that the respondent would have had to have paid Ms Burke $20,000 had its *Calderbank* offer been accepted.

Should there be any reduction in the costs taking into account Ms Burke's financial situation?

[43] Having increased the costs from its starting point in reliance upon the *Calderbank* offer, it is now appropriate to consider whether those costs should be reduced taking into account Ms Burke's financial situation.

[44] I do not intend to set out in detail the evidence given in affidavit form by Ms Burke in respect of her current financial situation, as it is confidential to her, but it is clear that, on the figures set out in her affidavit, she will have few savings (after she pays her daughter's school fees for 2015) and little monthly disposable income after her monthly income and outgoings are taken into account. It appears that she does not own the property in which she resides.

[45] Mr Upton pointed out in his submissions in reply that a number of the assertions made in Ms Burke's affidavit evidence as to her income and outgoings are not supported by independent evidence. However, short of undertaking a rigorous and time consuming inquiry as to her means and assets, including any assets held in trust, it is appropriate that Ms Burke's evidence should be taken on trust given her professional obligations to be honest and truthful.

[46] Mr Upton drew my attention to the Employment Court case of *Gates v. Air New Zealand* [2010] NZEmpC 26 in which Judge Couch stated, at [21]:

> *The established principle is that a party ought not to be ordered to pay costs to the extent that doing so would cause undue hardship. What this principle allows for is that payment of any substantial sum will cause a measure of hardship to some litigants, particularly individuals. That is to be expected and is considered to be an acceptable consequence of unsuccessfully engaging in litigation. It also recognises that the primary focus of an award of costs should be on compensation of the successful party. It is only when payment of an award which achieves the purpose of justly compensating the successful party would cause a degree of hardship which is excessive or disproportionate that the interests of the unsuccessful party must*

> *be recognised by reducing the award which would otherwise be appropriate.*

[47] Ms Burke is employed on a salary that is significantly greater than the average weekly income from wages and salaries for the June 2014 quarter, as detailed on the Statistics New Zealand's *New Zealand Income Survey* website. Whilst she probably would have to curtail some of her monthly spending to pay costs of $20,000, I do not believe that it *would cause a degree of hardship which is excessive or disproportionate* for her to pay such a contribution, nor to curtail some monthly expenditure to enable her to do so. I therefore decline to reduce the award.

[48] However, it is clear that Ms Burke would struggle to pay a costs award of $20,000 in a single payment. It does not appear that Ms Burke owns any substantial property that could be sold to raise the sum of $20,000. The respondent effectively concedes that Ms Burke could not pay $20,000 in a single payment, and contemplates the possibility of receiving payment of costs over 12 months. This would mean monthly payments of $1,666 out of Ms Burke's net income.

[49] I consider that such a payment regime would be likely to cause Ms Burke considerable difficulty, and when I balance her income with the likely means of the respondent, consider that it would be just to impose upon Ms Burke a more achievable but nonetheless still demanding payment regime of payment in instalments of $1,000 a month.

[50] Turning to the matter of disbursements, I do not accept that it is appropriate for Ms Burke to pay for the attendance at the investigation meeting of Mr Barsi, as he did not give evidence to the Authority. However, I accept that it was necessary for Ms Douglas, Mr Campbell and Mr Lowe to attend the investigation on behalf of the respondent, and that they incurred travel costs in the total amount of $554.40, using the IRD's rate of 0.77c per kilometre. I also accept that Mr Upton incurred recoverable accommodation costs in the sum of $428. This makes a total of $982.40.

Orders

[51] I order that Ms Burke is to pay costs to the respondent in the total sum of $20,982.40, to be paid to the respondent in 20 equal consecutive monthly instalments of $1,000, together with a final payment of $982.40. The first payment is to be received by the respondent by no later than 31 December 2014, and each subsequent

payment to be received by the respondent by no later than the last working day of each following month.

David Appleton
Member of the Employment Relations Authority