

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 67
5401983

BETWEEN ANNE GARRICK
Applicant
A N D PAE (NEW ZEALAND) LIMITED
Respondent

Member of Authority: David Appleton
Representatives: Kathryn Dalziel, Counsel for Applicant
Bronwyn Heenan, Counsel for Respondent
Submissions Received: 18 March 2014 from Applicant
2 April 2014 from Respondent
Date of Determination: 23 April 2014

COSTS DETERMINATION OF THE AUTHORITY

**A contribution to Ms Garrick's costs in the total sum of \$6,500.89
is to be paid by the respondent.**

[1] By way of a determination dated 5 February 2014, the Authority found that Ms Garrick had been unjustifiably dismissed and had suffered an unjustified disadvantage in her employment with the respondent. Costs were reserved, in the hope that the parties would agree how they would be dealt with between them.

[2] The parties have been unable to agree on costs, and have each, via their counsel, lodged a memorandum of submissions.

[3] The Authority's determination on the substantive matter ordered the respondent to pay to Ms Garrick the sums of \$16,000 compensation, \$1,755 loss of benefit and damages in the sum of \$255. Ms Dalziel, on behalf of Ms Garrick, relies upon two letters sent to the respondent's counsel seeking a settlement, both expressed to be sent without prejudice save as to costs (called *Calderbank* offers in this determination for ease of reference). The first letter, sent on 4 February 2013, sought

to settle matters by offering to accept \$15,000 compensation plus costs of \$2,925. This was rejected by the respondent.

[4] The second letter, sent on 12 December 2013, offered to settle matters by offering to accept \$10,000 compensation together with costs of \$7,350. Again, this was rejected by the respondent.

[5] On the basis of these letters, Ms Dalziel seeks an award of costs to Ms Garrick on an indemnity basis. Ms Garrick's legal costs amount to \$13,410, including \$1,400 for attending a mediation (although it is not clear if that sum is inclusive or exclusive of GST), a \$50 *bureau fee*, the sum of \$20.41 for mileage and a total of \$1,740 for GST. Ms Garrick also seeks reimbursement of the Authority's lodgement fee of \$71.56 and \$153.33 hearing fee for the second day of the investigation meeting. Ms Dalziel has also included a fee note from Ms Garrick's counsellor for \$240 plus GST for attending the Authority's investigation meeting on 22 January 2014, and I assume Ms Garrick seeks reimbursement of this sum also.

[6] Ms Heenan for the respondent argues that costs should not be awarded on an indemnity basis and that they should lie where they fall. This submission is based on the following arguments:

- a. Ms Heenan argues that there were no complex legal issues and that extensive submissions and evidence were not required;
- b. Ms Garrick did not succeed in arguing that the chain of causation was not broken when she was dismissed by her new employer for redundancy;
- c. The respondent's failings were not deliberate;
- d. A witness, Ms Tibbotts, was called by the Authority, not the respondent, contrary to Ms Dalziel's assertion;
- e. The efficiency of the investigation meeting was assisted by the respondent preparing the investigation bundle of documents;
- f. Ms Garrick disclosed documents at the last minute on the morning of the investigation; and

- g. Ms Gadekar, a witness for Ms Garrick, increased the time and cost of the investigation meeting because she relied on previously undisclosed notes. Her evidence was also *totally irrelevant*.

[7] Ms Heenan also argues that it is not appropriate for indemnity costs to be awarded against the respondent because they *are exceptional and require exceptionally bad behaviour* in litigation (*Bradbury v Westpac Banking Corporation*, [2009] NZCA 234). She argues that the respondent's conduct of its defence to Ms Garrick's claims does not fall into the categories of circumstances in which indemnity costs can be ordered.

[8] Addressing the fact that Ms Garrick recovered more than she offered to settle for in her two *Calderbank* letters, Ms Heenan states that Ms Garrick did not recover significantly more than she offered to settle for. Ms Heenan also submits that the effect of a *Calderbank* offer should be limited to costs incurred from the date of the *Calderbank* letter, and so should be based on costs incurred after receipt of the letter dated 12 December 2013.

[9] Ms Heenan also disputes that mediation costs should be recoverable, and asserts that Ms Dalziel has included insufficient detail to enable the Authority to judge whether Ms Garrick's legal costs were incurred reasonably. She also disputes that GST is recoverable and also that Ms Gadekar's fee should be recoverable. Finally, Ms Heenan disputes that mileage and the *bureau fee* should be recoverable.

Determination

[10] The Authority derives its power to award costs from paragraph 15 of Schedule 2 of the Employment Relations Act 2000, which provides:

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.

[11] The starting point in determining how legal costs and expenses should be dealt with in an Authority matter is an application of the principles set out in the leading

case of *PBO Ltd v Da Cruz*, [2005] 1 ERNZ 808. The principles governing the setting of costs awards in the Authority as promulgated in *Da Cruz* include:

- 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.

[12] Turning first to whether costs should lie where they fall, as is advocated by Ms Heenan on behalf of the respondent, I am satisfied that it is just for an award of costs to be made in Ms Garrick's favour. This is because Ms Garrick succeeded in her two principal applications of unjustified dismissal and disadvantage. She failed in some minor aspects of her claim (the imposition of a penalty against the respondent

and her argument that she should be awarded loss of wages after her dismissal from her new employment) but these did not constitute the main planks of her application to the Authority. Ms Heenan's other arguments for costs lying where they fall do not persuade me.

[13] The next, and more complex issue to assess is the amount of the contribution that the respondent should be ordered to make towards Ms Garrick's costs, and the two *Calderbank* offers made by Ms Dalziel need to be assessed to determine that question. As such offers put pressure on the recipient, carrying as they do the threat of an award of costs on an indemnity basis, they must comply with certain basic safeguards so as not to unfairly prejudice the recipient of the offer. These safeguards have been identified in *Ogilvy & Mather (NZ) Limited v Darroch* [1993] 2 ERNZ 943 as including:

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

[14] The first letter from Ms Dalziel dated 4 February 2013 appears to have been sent by email to Ms Heenan. It is stated at the end of the letter *We instruct that this offer remains open for acceptance by your client until 5.00pm on Monday, 4 February 2013, at which point it will lapse*. It is not known when the letter was received, but on its face it gives no more than nine hours for acceptance (assuming it was received by Ms Heenan at 08.00 am).

[15] In *Argosy Imports Ltd v Lineham* [1998] 3 ERNZ 976 the Employment Court held that an offer made only a day or two before the hearing may be seen as providing sufficient time for consideration if made as part of an ongoing process of negotiation. Whilst the contents of the letter show that a mediation meeting had taken place shortly before, and that the respondent had made an offer to settle on 1 February 2013, I am not satisfied that giving less than one working day to accept an offer satisfies the first limb of the *Darroch* test set out above.

[16] I also note that the letter does not spell out the effects of rejecting the offer in terms of indemnity costs being sought, although believe that, in this case, where the

respondent was represented by competent counsel, this is not a fatal error. The offer in the letter was otherwise transparent. However, I cannot accept this was a valid *Calderbank* offer because of the lack of reasonable time given to accept it.

[17] With respect to the second *Calderbank* letter, dated 12 December 2013, no deadline for acceptance was expressed in the letter. Accordingly, I assume that the first limb of the *Darroch* test is satisfied. I believe that the offer contained in the letter is also transparent, as it is clear what Ms Garrick sought in order to withdraw her applications to the Authority (\$10,000). It also deals with her costs to date, and also states that Ms Garrick would seek her full indemnity costs if she was successful at the Authority and achieved the \$10,000 sought, or more. I believe that this letter was a valid *Calderbank* offer therefore.

[18] The making of a successful *Calderbank* offer is not wholly determinative of how costs will be dealt with by the parties but is an important factor which the Authority should bear in mind. The Court of Appeal in *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 has advocated a *steely approach* when a court is faced with a successful *Calderbank* offer in considering what costs should be awarded, although this does not mean that the Authority must award costs on a full solicitor/client indemnity basis if an applicant beats an offer he or she previously made on a without prejudice save as to costs basis.

[19] I accept the argument of Ms Heenan that it would not be appropriate to make an award against the respondent by reference to costs incurred by Ms Garrick from the inception of her instructing Ms Dalziel's firm. I accept Ms Heenan's submission that the appropriate principle is that costs incurred from rejection of a successful *Calderbank* offer may have to be paid by the party rejecting the offer. This reflects Rule 14.11 of the New Zealand High Court Rules and is the approach adopted by the higher courts. I refer, for example, to *Prins v Tirohanga Group Limited*, EmpC Auckland AC27/07, 16 May 2007.

[20] I also note that Ms Dalziel's letter dated 12 December 2013 states that she anticipated that Ms Garrick's further legal costs to conclude a two day investigation meeting would be in the sum of \$4,000 to \$5,000 (without indicating if that included GST or not) on top of fees already incurred as at the date of the letter. Ms Heenan says that the respondent took this estimate into account in assessing whether to accept

the offer. This is logical, as it would form part of the risk assessment that the respondent had to make.

[21] I also accept Ms Heenan's submission that mediation costs should not be included in the assessment of the award to be made, nor the unspecified mileage costs and the *bureau fee*.

[22] Finally, I take into account the fact that Ms Dalziel's costs are not broken down in any meaningful way, so it is not possible to assess whether they are reasonable or not. This is not to say that the overall amount seems unreasonable, but given that *Da Cruz* requires the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable, I cannot do this without a detailed breakdown. This latter issue prevents me from ordering the respondent to contribute towards Ms Garrick's costs, from rejection of the second *Calderbank* offer, on an indemnity basis.

[23] The usual approach taken by the Authority is to award costs on a daily tariff basis, and the usual current rate is \$3,500 a day. The investigation meeting lasted almost a full day on day one, and four hours on day two. Applying the usual tariff approach, that results in a cost award of \$5,250. Although Ms Dalziel did underestimate her client's future costs by around 40% (if the estimate included GST) in her letter of 12 December 2013, I do not accept that Ms Dalziel should be bound by this estimate. If she had overestimated her client's future costs, she might have been accused of having been unreasonable.

[24] I have to balance the need to keep costs awards to a modest level, against the effect of Ms Garrick making a successful *Calderbank* offer. All in all, I believe that a fair and just approach would be to uplift the daily tariff by a modest percentage to reflect the fact that Ms Garrick made a successful *Calderbank* offer which, if accepted, would have saved Ms Garrick a further \$6,000 in fees approximately.

[25] I therefore increase the tariff to \$4,000 a day. This results in a cost award to Ms Garrick of \$6,000.

[26] I also award Ms Garrick the Authority fees incurred by her of \$71.56 and \$153.33. I do not accept that Ms Gadekar's evidence was totally irrelevant, as

claimed, and I also award Ms Gadekar's fee, including GST, as Ms Garrick is not able to reclaim that element.

Orders

[27] I order the respondent to pay to Ms Garrick the following sums as a contribution to her costs:

- a. \$6,000 in respect of her legal fees, and
- b. \$500.89 in respect of disbursements incurred.

David Appleton
Member of the Employment Relations Authority