

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 136
5361848

BETWEEN

DEBORAH HOFF
Applicant

A N D

THE WOOD LIFECARE
(2007) LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Anjela Sharma, Counsel for Applicant
Jeff Goldstein and Linda Ryder, Co-Counsel for
Respondent

Submissions Received: 10 May 2013 from Applicant
13 May 2013 from Respondent

Date of Determination: 5 July 2013

COSTS DETERMINATION OF THE AUTHORITY

A. The Respondent is to pay a contribution to the Applicant's costs in the sum of \$10,500 plus disbursements.

[1] By way of a determination dated 13 March 2013, [2013] NZERA Christchurch 53, Ms Hoff succeeded in her personal grievance for unjustified dismissal but had her remedies reduced in accordance with the principles of *Salt v Fell* [2008] ERNZ 155 and pursuant to s. 124 of the Employment Relations Act 2000 (the Act).

[2] Costs were reserved, the parties being ordered to seek to agree how costs were to be dealt with between them. In the absence of such agreement within 28 days of the date of the determination, any party seeking a contribution to their costs was to serve and lodge a memorandum by way of its counsel and any response was to be served and lodged within a further 14 days. The date for the first memorandum was therefore Wednesday 10 April 2013.

[3] By way of a memorandum from Ms Sharma dated 10 April 2013, she sought on behalf of her client an order that the matter of costs *be set aside* until after her challenge in the Employment Court had been determined. She asked in addition that, if the Authority was going to decline to grant the application, an extension of time for submissions on costs be granted.

[4] Mr Goldstein replied to that application asking that the cost issue be completed as a matter of urgency so that the Authority's determination on costs could be included in the challenge to the Employment Court.

[5] My decision on the applicant's first application was to decline it on the basis that a challenge in the Employment Court does not normally justify staying costs in the Authority. I granted an extension of 14 days for any party seeking costs to serve and lodge a memorandum with a further 14 days for any response.

[6] On 22 April 2013 Ms Sharma sought a further extension within which to serve and lodge her memorandum in respect of costs, as she had been affected by flooding in the Nelson area, and I granted an extension until 7 May 2013. That date was 27 days after the date originally set.

[7] On 7 May 2013, instead of serving and lodging her memorandum on costs, or seeking a further extension of time, Ms Sharma lodged another application, entitled *application for stay of execution*. It was accompanied by an unsworn affidavit from Mrs Hoff. Mr Goldstein communicated with the Authority to say that he opposed the application for a stay and the Authority did not require him to elaborate upon that position.

[8] For a number of reasons, by way of a Minute dated 8 May 2013 I declined to dispense with and/or delay a costs determination. At the same time, I declined to grant Ms Sharma yet another extension within which to serve and lodge her submissions on costs on the basis that she had already been granted two extensions within which to make submissions in relation to costs. Nonetheless, Ms Sharma served and lodged costs submissions on 10 May. The respondent, whose third deadline had not passed, served and lodged its submissions within that deadline.

[9] I recite the above because Ms Sharma has made representations in her costs submissions that Mrs Hoff would be prejudiced by my declining to extend another indulgence to Ms Sharma in respect of her lodging her costs submissions. On careful reflection, I agree with her that it would not be just to penalise Mrs Hoff for the actions of her representative. I therefore do take into account Ms Sharma's submissions in this costs determination.

Ms Sharma's submissions on costs

[10] Ms Sharma refers to the Authority's discretionary power to award costs and refers me to the seminal case of costs in the Authority of *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ENZ 808. As Ms Sharma states, the Authority's discretion on costs is to be exercised according to what is reasonable and just to the parties, and costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct.

[11] The notional tariff is a starting point only, and is not a fixed rate. It will be adjusted upwards or downwards to reflect the particular circumstances of the case. As a general rule costs follow the event, and Ms Sharma submits that there are no reasons why this general rule should not be followed in the present case.

[12] Calderbank (without prejudice, save as to costs) offers had been sent between the parties which had been rejected by the recipients. Ms Sharma submits that the effect of Calderbank offers on an award of costs is fully discretionary.

[13] Ms Sharma also says that the respondent spent considerable time putting repetitive questions to Mrs Hoff's counsellor and medical practitioner, which she submits was not necessary. She also says that she thinks that the exercise of a costs application is *a somewhat futile one, largely because the findings of the Authority work significantly against the applicant*.

[14] Finally, Ms Sharma states that Mrs Hoff seeks \$15,000 contribution from the respondent in relation to her costs, together with \$78.25 plus GST in disbursements and the \$71.56 filing fee.

Mr Goldstein's submissions on costs

[15] Mr Goldstein submits that the overall outcome of the proceedings must be taken into account along with the *Da Cruz* factors and that, accordingly, costs should be awarded in favour of the respondent. He says that Mrs Hoff's substantive claims had little or no merit and that the Authority only found in her favour on a relatively minor procedural point. He also submits that the matter was unnecessarily lengthened by the manner in which Mrs Hoff's case was conducted (but does not specify how).

[16] Mr Goldstein states that the respondent's costs were \$25,847 plus GST, not including costs incurred up to and including mediation, together with a further \$1,000 in respect of the costs of his submissions on costs.

[17] Mr Goldstein refers to the Calderbank offers that passed between the parties, and enclosed copies of them. Mrs Hoff's offer to settle, dated 8 June 2012, sought \$18,000 plus \$4,500 costs, plus GST. Mr Goldstein's letter on behalf of the respondent, dated 11 June 2012, offered \$5,000 plus \$4,500 costs, plus GST. The Authority awarded Mrs Hoff the sum of \$3,778.13 in respect of lost wages, and \$2,500 in respect of compensation under s. 123(1)(c)(i) of the Act (a total of \$6,278.13). These sums had been reduced as stated in paragraph 1 above from \$7,556.25 in the case of the lost wages and \$10,000 in the case of the s. 123(1)(c)(i) compensation.

[18] Mr Goldstein argues that, when deciding whether Mrs Hoff *beat* the respondent's offer in its Calderbank letter one should deduct tax from the wages element. That gives a net amount receivable by Mrs Hoff of \$5,316.27 he says. Mr Goldstein cites the case of *Watson v NZ Electrical Traders t/a Bray Switchgear* 24/11/06, AC64/06 to support his argument that a pre-investigation offer that is very close to what is awarded should be taken into consideration. He also says that this case also confirmed that it was the net (post tax) figure that should be taken into account when comparing a Calderbank offer to the outcome.

[19] At [8] of *Watson*, His Honour Chief Judge Colgan states the following in reference to the plaintiff in that case recovering in the Authority only around \$150 less than he had offered to settle for in a pre-investigation Calderbank letter:

Although not precisely predictive of the final outcome, I consider that Mr Watson's proposal that Bray Switchgear settle for \$6,000 was so

close to the actual outcome of the Authority's investigation after much more was spent on costs by the parties, that it is a significant consideration in this case. Put another way, had Bray Switchgear paid this sum within a reasonable time of Mr Watson's offer, it would have saved itself significant legal costs as well as those incurred unnecessarily by Mr Watson. It follows, in my conclusion, that there is therefore an obligation on Bray Switchgear to contribute significantly to the post-offer costs that Mr Watson incurred as a result of Bray Switchgear's refusal to settle at that early stage.

[20] Mr Goldstein submits that it was unreasonable for Mrs Hoff to reject the respondent's Calderbank offer, and that the respondent was unreasonably required to incur additional costs from 18 June 2012 (when its offer expired) until the completion of the matter. Accordingly, the respondent seeks the entirety of its costs incurred from that date until the conclusion of the matter, which amount to \$26,412.50 plus GST. In the alternative, it seeks the cost of three days' investigation meeting at the daily tariff of \$3,500 (making a total of \$10,500) or, in the further alternative, an order that each party bears its own costs.

Determination

[21] In accordance with the very well-known principles of *Da Cruz*, the starting point is that costs usually follow the event. In this case, despite what Mr Goldstein submits about Mrs Hoff's substantive claims having little or no merit, Mrs Hoff did succeed in her personal grievance before the Authority. Where contributory conduct is taken into account to reduce or deny remedies, it cannot also be taken into account in determining the issue of costs *White v Auckland District Health Board* [2008] NZCA 451, [2008] ERNZ 635. Therefore, despite the reduction in the remedies awarded to Mrs Hoff, that does not reverse the general principle that, having been successful, she is entitled to costs.

[22] However, it is necessary to consider the effect of the Calderbank offer made by the respondent to Mrs Hoff. The use of Calderbank offers in Authority matters is now well established and, whilst the making of a successful Calderbank offer is not wholly determinative of how costs will be dealt with by the parties, it is an important factor which the Authority should bear in mind in determining costs.

[23] However, as such offers put pressure on an applicant, 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.

[24] Examining Mr Goldstein's letter to Ms Sharma dated 11 June 2012, I am satisfied that it fulfils these basic *Darroch* requirements. First, it gave Mrs Hoff seven days within which to accept the offer, which is generally an adequate timeframe in the absence of a request for further time. Second, the letter is a classic Calderbank letter, in that it sets out the offer clearly and unambiguously, and also spells out the consequences of non-compliance.

[25] However, how close did Ms Hoff get to beating the offer? First, when considering this aspect of the offer, one takes into account the sums awarded after reduction. This was the approach taken in the Authority case of *Peagram v Heritage Productions Ltd* CA 43A/07 for example.

[26] The next issue is whether the pre or post tax award should be considered. As stated by Mr Goldstein, the approach taken in *Watson* was to take into account the sum awarded after deduction of income tax (at [3]). However, CJ Colgan did not expressly address the issue of tax in his judgement, and if he had taken a gross figure for the wages awarded, the applicant in that case would have probably beaten the \$6,000 offer to settle that the applicant had made, which would not have changed the outcome of *Watson*.

[27] His Honour Judge Ford did expressly address the question of taxation in assessing Calderbank offers, however, in *Gini v Literacy Training Limited* [2013] NZEmpC 25 and, at paragraphs [25] to [27], rejected an argument by the respondent in that case that post taxation figures should be taken into account when assessing the question of whether or not a Calderbank offer has been beaten. He cites a later case of Chief Judge Colgan than *Watson*, namely *Gilbert v the Attorney-General in respect of the Chief Executive of the Department of Corrections* [2009] 6 NZELR 441, in which Colgan CJ stated at [40]:

... Not only must awards of compensation for lost remuneration be of the gross sums lost, but it is not for the Court to inquire into questions of tax on these sums as it would have to in the grossing up/netting down exercise. ...

[28] Given this position, it is the pre taxation figure that I must consider when deciding how close the respondent's Calderbank offer got to the amount eventually awarded to Mrs Hoff. She was awarded a total of \$6,278.13 gross. This sum is 25.56% greater than the \$5,000 offered by the respondent in its Calderbank letter dated 11 June 2012. (Calculated as follows $(\$6,278 - \$5,000) / (\$5,000 \times 100) = 25.56$). This is not sufficiently close, in my view, to justify the Authority taking the Calderbank offer into account and disturbing the usual principle that costs follow the event.

[29] Turning to Ms Sharma's submissions, she states that she is claiming \$15,000 contribution to her client's costs, but does not explain why, although I infer that she may be referring to the questioning of the counsellor and medical practitioner, referred to above, to justify an uplift from the daily tariff of \$3,500. Indeed, Ms Sharma does not set out at all in her eight page submission what costs have been incurred by her client. Accordingly, I cannot assess whether her costs are reasonable or not. I cannot, therefore, assess whether she is entitled to more than the usual daily tariff of \$3,500.

[30] In any event, taking into account the nature of the allegations made in the investigation meeting by both parties, I am not satisfied that the respondent took an excessively long time in the conduct of its case. Whilst it is certainly the case that the cross examination conducted by the respondent's counsel was thorough, I do not consider that it was unreasonably so. Indeed, I was assisted by the cross examination of both counsel.

[31] All in all, I believe that it is appropriate to award costs to Mrs Hoff at the usual daily tariff of \$3,500 a day. Taking into account how long it is likely to have taken both parties' representatives to have prepared submissions, I accept that three days is the appropriate length of time against which to calculate the total costs due.

[32] I accept that Mrs Hoff should also be awarded the filing fee of \$71.56.

[33] Ms Sharma also states that disbursements in the sum of \$78.25 plus GST had been incurred, but does not describe what they are. However, as this sum is relatively

modest, I award the sum of \$78.25 plus GST on the basis that they are likely to have been legitimately incurred.

Orders

[34] I order the respondent to pay to Mrs Hoff as a contribution to her legal costs, the following amounts:

- (a) \$10,500;
- (b) \$71.56 filing fee; and
- (c) \$78.25 plus GST.

David Appleton
Member of the Employment Relations Authority