

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 441
5411897

BETWEEN

STEPHEN HOVELL
Applicant

A N D

THE COMMISSIONER OF
PAMAPURIA SCHOOL
Respondent

Member of Authority: James Crichton

Representatives: Bryce Quarrie, Counsel for Applicant
Richard Harrison, Counsel for Respondent

Submissions Received: 6 September 2013 from Applicant
26 August 2013 from Respondent

Date of Determination: 27 September 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In its determination on the substantive matter issued as [2013] NZERA Auckland 238 on 10 June 2013, the Authority determined that Mr Hovell had not suffered a personal grievance and reserved costs.

The claim for costs

[2] As the successful party, the Commissioner of Pamapurua School seeks an award of costs in the sum of \$15,000.

[3] That amount is arrived at by proposing an uplift in the traditional daily tariff approach to \$7,500 from \$3,500 on the footing that the Commissioner of Pamapurua School made a *Calderbank* offer to Mr Hovell of \$15,000 which Mr Hovell rejected.

[4] The Authority is also told in submissions for the Commissioner of Pamapurua School that the total costs incurred by the respondent in this matter amount to \$27,693.89. The claim for \$15,000 in costs is equal to around 54% of the total costs incurred.

The response

[5] Submissions for Mr Hovell agree first with the principles set out in the respondent's submissions but then seek to minimise the effect of the *Calderbank* offer which Mr Hovell rejected.

[6] It is submitted for Mr Hovell that at the time he rejected the *Calderbank* offer, he had not been aware of the evidence that would be advanced by the school's support staff to the effect that they had advised Mr Hovell that James Parker was still taking children to his home, in contravention of Mr Hovell's instruction that that practice cease.

[7] It is contended that had Mr Hovell been apprised of that evidence at the time he had the *Calderbank* letter for consideration, he might well have accepted the *Calderbank* letter because he would have been obliged to make the kind of concession he made at the Authority's investigation meeting, at an earlier date, if that material had been available to him at that earlier date.

[8] Furthermore, Mr Hovell's submissions indicate that while he is not impecunious, he is now a person of limited means living off National Superannuation for a single person of \$350 per week (his sole income) and that he has few assets, his home being the property of a family trust.

[9] For the avoidance of doubt, it is apparent that the family trust is not a device established to defeat creditors and certainly, by a significant margin, pre-dates the events in question. It is evident to the Authority from the extensive submissions filed on Mr Hovell's behalf that Mr Hovell's home was settled as trust property as a consequence of the termination of his marriage some years ago and that half of the home and the land on which it sits is subject to various trusts in favour of Mr Hovell's descendants.

[10] On the basis of those various factors, the Authority is urged to make a minimal costs award.

Discussion

[11] The principles on which costs are set in the Authority have been well canvassed in a decision of the Full Bench of the Employment Court, *PBO Ltd v. Da Cruz* [2005] 1 ERNZ at 808.

[12] Those principles include judicial support for the Authority's common approach of applying a daily tariff as a starting point in the costs fixing exercise, the principle that costs normally follow the event, the Authority's obligation to give effect to *Calderbank* offers when made and the obligation on the Authority to reflect on a party's ability to pay.

[13] In the present case, Mr Hovell was completely unsuccessful in his claim before the Authority and there is no reason in the Authority's judgment for a departure from the usual rule that costs should follow the event.

[14] Moreover, there was a *Calderbank* offer made in the present case and it is self-evident that Mr Hovell would have been materially better off to have accepted that *Calderbank* offer than to have proceeded with the Authority's investigation. Of course, the point of a *Calderbank* offer is to create an environment where the successful party, having made a *Calderbank* offer, reserves to itself the right to put that offer in front of the Court or Tribunal when costs fixing is under consideration.

[15] Mr Hovell seeks to interest the Authority in the proposition that, because the *Calderbank* offer was presented to him before all of the evidence for the respondent was available, he was effectively at a disadvantage because if all the evidence had been before him when he considered the *Calderbank* offer, he would have been able to make the concession he made at the investigation meeting and would likely have accepted the *Calderbank* offer.

[16] However, that logic seems to the Authority to be, at best, speculative. Even if the evidence in question had been available to Mr Hovell at the early stage that the *Calderbank* offer was quite properly presented to him, it cannot be assumed that he would have immediately made the concession that he subsequently made at the investigation meeting. By the investigation meeting, Mr Hovell, an intelligent man with able representation, would have readily appreciated that the weight of evidence was against him. Whether he would have made that assessment at an earlier stage is, in the Authority's judgment, not able to be readily discerned.

[17] Finally, on the question of Mr Hovell's ability to make a proper contribution to the costs of the successful party, the Authority is urged to take account of the fact that he now lives on National Superannuation and by reason of a family trust, has no real assets. It is the position that the Authority can and will take account of the impecunious nature of parties in setting costs.

[18] However, that exercise must always be informed by principle and all parties to litigation, even in the Authority, must understand that when they undertake litigation, they run the risk that if they are unsuccessful they will be asked to bear a portion of the costs of the successful party.

[19] Furthermore, submissions for the Commissioner of Pamapurua School draw the Authority's attention to the decision of the former Chief of the Authority in *Glazeley v. Oceania Group (NZ) Ltd* [2013] NZERA Christchurch 67 where Member Dumbleton made a significant costs award against an unsuccessful applicant despite evidence of financial pressure. The relevant passage from the Authority's determination is as follows:

[36] Although not impecunious Mrs Glazeley does I expect have some limitations on her ability to pay, but that should be regarded as a matter going to the discretion of the Authority to award compliance later on, if and when there arises an issue of enforcement in relation to the costs decision that the Authority should now make.

Determination

[20] The Authority is satisfied that the same approach is appropriate here. An award of \$15,000 is warranted. An alternative basis for producing a more significant figure than that would be to apportion the full costs incurred by the successful respondent after the *Calderbank* offer was rejected.

[21] In the circumstances, the contribution to costs from Mr Hovell to the Commissioner of Pamapurua School is fixed at \$15,000.

James Crichton
Member of the Employment Relations Authority