IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 315
5320468

	BETWEEN	ROBERT MITCHELL Applicant
	A N D	EASTLAND GROUP LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Applicant in Person Libby Inger, Counsel for Respondent
Submissions received:	5 July 2012 from Applicant 19 June 2012 from Respondent
Date of Determination:	10 September 2012

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] By determination dated 23 May 2012, the Authority disposed of the employment relationship problem by dismissing Captain Mitchell's claim for unjustified dismissal such that Eastland Group Limited (Eastland) was held to have been completely successful in resisting Captain Mitchell's various allegations.

[2] Costs were reserved.

The claim for costs

[3] Eastland, the successful party, seeks an award of costs in the sum of $15,000 plus disbursements identified as $1,112.87. Interest is also sought on the outstanding sum from the date of determination down to the date of payment of the costs award.

[4] For the avoidance of doubt, the Authority deals with the application for interest first. The Authority is not minded to award interest in respect of the costs to

be fixed in this matter. It would not be usual practice for interest to be awarded on costs if only because a contribution to costs is simply a partial reimbursement of a cost already incurred.

[5] Eastland seeks a significant contribution to the costs it actually incurred. Actual costs amounted to $16,838.50 exclusive of GST and the contribution sought by Eastland is $15,000 together with the disbursements incurred, in full.

[6] The argument for that level of contribution relies on two factors, the first being the allegedly unreasonable behaviour of Captain Mitchell in dealing with the matter and the second is the succession of *Calderbank* offers (three in number) which Eastland served on Captain Mitchell but which he failed to accept.

The response from the unsuccessful party

[7] In his memorandum as to costs, Captain Mitchell emphasises that he was left somewhat exposed in the Authority's investigation by the absence of legal counsel, his counsel having to terminate his involvement in the matter shortly before the Authority's investigation meeting because he left the district to further his practice in Auckland.

[8] Captain Mitchell advises the Authority that he was not able to obtain alternative counsel and that he chose to deal with the matter himself. The Authority observes at this juncture that there is nothing at all to prevent a party from representing themselves and indeed this is a regular occurrence in the Authority.

[9] Captain Mitchell also identifies a drop in income as a consequence of the termination of his employment by Eastland, and indicates that, at the date that the submissions were prepared, he was not actively employed.

[10] None of those submissions, of themselves, assist the Authority to identify why the normal principles of litigation ought not to apply in the present case. There is no suggestion that Captain Mitchell is impecunious even if he is not working. The reality of litigation is that, typically, costs follow the event. That is to say, the successful party can look forward to a contribution to its costs from the unsuccessful party. A party cannot expect to undertake a legal proceeding against another, lose that proceeding in its entirety, and then not suffer the financial effects by way of an award of costs made against them. Indeed, in litigation, including in employment litigation,

a party must undertake such a proceeding in the sure and certain knowledge that if they are unsuccessful, they may face the obligation of meeting some or all of the successful party's costs.

Discussion

[11] The law on costs fixing in the Authority is well settled and the principles that ought to apply have been clearly enunciated by the Full Bench of the Employment Court in the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[12] That decision, amongst other things, approves the Authority's common practice of applying a daily tariff, and identifies various other principles which the Authority may apply, such as the Authority's discretion whether to grant costs or not, the fact that costs will typically follow the event, the fact that costs in the Authority will often be modest, and the fact that the behaviour of the unsuccessful party may sound in costs.

[13] In this particular case, Eastland says that Captain Mitchell was, to put it generally, difficult to deal with. He would say, no doubt, that he was simply busy, working at sea in his professional capacity and not able to engage. There may be some force in Captain Mitchell's argument on that point, although Eastland's submissions on the point do catalogue a wearying collection of incidents where there was a failure to engage over a lengthy period of time.

[14] Wrapped up in that whole period prior to the Authority's investigation meeting was the issuing of not less than three *Calderbank* offers from Eastland to Captain Mitchell, all of which were certainly reasonable offers to settle, and all of which would have put Captain Mitchell in a greatly better position than was the case at the conclusion of the Authority's determination of the matter.

[15] Eastland encourages the Authority to rely on the various decisions of the superior Courts requiring a "steely" approach to costs fixing where reasonable settlement proposals have been rejected. In *Blue Star Print Group (New Zealand) Ltd v. Mitchell* [2010] NZCA 385, Justice Stevens said:

> *It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve more than was previously offered.*

[16] That is precisely the situation in the present case. Captain Mitchell was offered not one but three *Calderbank* offers and he rejected the lot. It appears that each of those *Calderbank* offers was made to Captain Mitchell while his counsel was still acting and the Authority feels it is entitled to conclude that Captain Mitchell was properly advised about the risks of not accepting the *Calderbank* offers.

[17] Notwithstanding that, Captain Mitchell filed an entirely fanciful *Calderbank* offer of his own with Eastland immediately prior to the final *Calderbank* proposal from Eastland. Captain Mitchell's proposal contemplated Eastland making an entirely unrealistic award of lost wages to him and the application was promptly rejected by Eastland.

[18] While costs cannot and should not be a punishment for wrongdoing by an unsuccessful party, it is nonetheless good law that an unsuccessful party who fails to facilitate the prosecution of a matter and fails to facilitate the interests of justice by accepting *Calderbank* offers properly made, will suffer the consequences when costs come to be fixed.

Determination

[19] The Authority has frequently derived assistance when considering the three step approach enunciated by the present Chief of the Authority, Member Dumbleton, in *Graham v. Airways Corporation of New Zealand Ltd* (unreported) 28 January 2004, AA39/04. In that determination, the Authority postulated three questions to be considered:

(a) What were the actual costs incurred by the successful party;

(b) Were those costs reasonable; and

(c) What proportion of those costs ought to be met by the unsuccessful party?

[20] The Authority has already identified the actual costs incurred by the successful party and in the particular circumstances of this case thinks that those costs are reasonable given the challenges of engaging with Captain Mitchell over the period from the point at which the employment relationship problem was on foot down to the

Authority's investigation meeting. That leaves the only question really being what proportion of those costs ought to be met by Captain Mitchell?

[21] This was a case where Eastland did everything it reasonably could to try to resolve matters by agreement. It offered not one but three *Calderbank* proposals and each was rejected. Captain Mitchell had legal advice when each of those proposals was received by him and accordingly it cannot be concluded that he did not understand the force and effect of those proposed settlements.

[22] For that reason alone, it seems to the Authority that it is appropriate for a significantly higher than usual award in the present case. The Authority is minded to move away from the notional daily tariff approach in the present case precisely because Eastland has gone to extraordinary lengths to try to settle this matter by agreement and has, on each occasion, been rebuffed by Captain Mitchell. That being the position, the Authority thinks it has an obligation to follow the decisions of the superior Courts and to adopt the *steely* approach sought by the Chief Judge in *Watson v. New Zealand Electrical Traders Ltd t/a Bray Switchgear* (unreported) 24 November 2006, AC64/06.

[23] Eastland seeks a contribution to costs of $15,000 plus the totality of the disbursements incurred. While the investigation meeting was set down for two days, it was actually dealt with in one long hearing day. If the daily tariff approach were to be adopted, that might attract a contribution to costs in the region of say $4,000.

[24] However, because of the extraordinary efforts made by Eastland to try to resolve this matter by agreement, the Authority thinks the proper course is to make a substantial costs award in favour of Eastland such that its efforts in trying to resolve the matter short of the Authority are reflected in the amount of costs fixed.

[25] The Authority fixes costs in the sum of $12,000 and disbursements in the sum of $1,112.87. In accordance with the Authority's usual practice, GST is excluded from those figures.

[26] Captain Mitchell is to pay to Eastland the total amount of $13,112.87 as a contribution to Eastland's costs in this matter.

James Crichton
Member of the Employment Relations Authority