

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 102A/10
5151136

BETWEEN KEVIN O'CONNOR
 Applicant

A N D ANCHOR PRESS LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Angela Sharma, Counsel for Applicant
 Maree Kirk, Counsel for Respondent

Submissions Received: 13 September 2010 from the Applicant
 2 September 2010 from the Respondent

Determination: 22 September 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 29 April 2010 I dismissed Mr O'Connor's claims about unjustified disadvantage and unjustified dismissal. Costs were reserved for each party to lodge and serve a memorandum if necessary, which has now been done. This determination resolves the disputed question of costs.

[2] The respondent's costs totalled \$16,748.50 (excluding GST) and \$646.49 in disbursements. I am asked to order the applicant to pay two-thirds of the respondent's costs because the respondent was completely successful, the applicant failed to accept *Calderbank* offers, the applicant's claims were tenuous but he persisted with them, he pursued irrelevant and unnecessary arguments and the conduct of the case caused the respondent to incur additional costs.

[3] It is correct to say that the respondent was completely successful in defending itself against Mr O'Connor's claims, an outcome that normally entitles a party to

costs. A submission for Mr O'Connor is that costs should lie where they fall because of his financial circumstances. That is more properly dealt with in assessing how much Mr O'Connor should contribute to the respondent's costs. I can see no other reason to depart from the usual approach that the losing party should contribute to the costs of the successful party so I will proceed with assessing costs.

[4] Often the Authority will assess costs on a daily tariff basis: see *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. Here I am asked to depart from that approach for the reasons mentioned above.

[5] Turning to the *Calderbank* issue, there were a number of offers between the parties expressed to be without prejudice except as to costs, or at least implicitly so. Proceedings were lodged in June 2009. On 25 August 2009 the applicant offered to settle matters for \$7,500.00. On 22 September 2009 the respondent offered \$3,500.00 in full and final settlement. The offer was expressed to be open for acceptance until 24 hours before the Authority's phone conference. That was rejected and the applicant then offered to settle for \$5,000.00. Perhaps without this offer being formally rejected, on 17 November 2009 by email timed at 11.17am the applicant offered to settle between \$3,500.00 and \$5,000.00. I note that the Authority's direction conference during which an investigation meeting was set down was at 10.30am the same day, so just before this offer. On 23 November 2009 the respondent offered \$2,000.00 in full and final settlement. On 26 February 2010 the applicant offered to settle matters for \$5,000.00. The parties being unable to reach agreement, the Authority investigated the matter on 25 March 2010 and the determination rejecting the applicant's claims was issued on 29 April 2010.

[6] In *PBO v Da Cruz* the Employment Court confirmed that the Authority can take into account *without prejudice* offers which I take to mean offers made *without prejudice except as to costs*, as happened here. A principled approach for the Authority includes by analogy reference to the rules applicable in the Employment Court where Regulation 68 of the Employment Court Regulations 2000 makes it clear that the Court *may have regard to any conduct by the parties tending to increase or contain costs, including any offer made by either party to the other, ... and may have regard to an offer despite that offer being expressed to be without prejudice except as to costs ... but may not have regard to anything that was done in the course of the provision of mediation services*. Traditionally a *Calderbank* offer materially alters the

incidence of costs when a claimant succeeds but fails to recover more than the value of the offer, but is otherwise of little relevance: see *Shanks v Agar t/a Rod Agar & Co* [1996] 2 ERNZ 578. However, the Employment Court Regulations permit a wider view to be taken by reference to offers by either party tending to increase or contain costs and I accept that the Authority can do so as well.

[7] The striking point that emerges from the offer history set out above is that the parties were very close but settlement eluded them. The applicant indicated a willingness to settle for the sum offered on 22 September 2009 by the respondent but did so too late. The respondent's next offer on 23 November 2009 was substantially less and the applicant's response was for substantially more. I have been given the respondent's invoices which show the respondent incurred some extra costs between 17 and 23 November but not so much as to fully explain the reduced offer while the applicant reverted to his earlier position. From this I cannot say that costs were increased by the conduct of one party over the other or that costs were contained by the conduct of one party over the other. Accordingly I find that the *Calderbank* offers should make no difference to the outcome.

[8] The respondent submits that the applicant caused increased costs because he persisted with raising issues of unjustified disadvantage despite having limitation issues pointed out to him. There was a sharp difference between the parties about the facts leading up to Mr O'Connor's dismissal for incapacity following an injury attributed to his work on a second hand printer introduced into the workplace. That history was perhaps legally irrelevant to the dismissal grievance but it would not have been fair to either party to prevent them from putting their views in front of the Authority, if only for the context of the dismissal. It was that that took the time much more than the claim that the respondent had some legal liability (apart from the dismissal) as a result of the alleged facts. I should also note that the matter took only a day to investigate in any event. Accordingly I do not accept that the misconceived claims about unjustified disadvantage add much to assessing costs against Mr O'Connor as an unsuccessful grievant.

[9] I am asked to depart from a daily tariff basis for the assessment of costs and am referred to the Authority determinations *Heffernan v the Estate of PD Heffernan*, 23 June 2006, P Cheyne (Member), CA 59A/06, *Allan v Ogilvy Wellington Ltd*, 24 April 2009, J Crichton (Member) WA50/09 and *Lloyd-Barker v The Society for the*

Prevention of Cruelty to Animals Auckland Incorporated, 26 May 2010, K Anderson (Member), AA12A/10. *Heffernan* was a very different case to this one. A son sued his father's estate in circumstances where only he and the father could have known the truth of many vague allegations of fact first made by the son after the father's death. The purpose was in furtherance of a family dispute. It was also conducted as an adjudication under the previous legislation when part of the claim predated the Employment Relations Act 2000. It bears no resemblance to the present case. *Allan* and *Lloyd-Baker* are examples of the effect of a *Calderbank* offer so are not helpful here for the reasons expressed above.

[10] I am not persuaded to assess costs on anything other than a daily tariff basis which I would fix at \$3,000.00 for the single day investigation meeting.

[11] It remains to consider the effect if any of Mr O'Connor's financial circumstances.

[12] Mr O'Connor is married with two young children. Mr O'Connor and his wife each have two part-time jobs. Their income from employment is such that they are entitled to a Working for Families Tax Credit each fortnight. As a result they are unlikely to be able to substantially improve their net income even if extra paid employment was available. They have substantial debts to their bank for housing loans and credit card, the servicing of which takes up a significant portion of the family income. It appears that there is no equity in their leasehold property and there is no indication of other realisable assets. I accept counsel's submission that Mr O'Connor's (and his family's) financial situation is dire.

[13] This is a difficult case in which to achieve a fair and just balance over costs. An award anywhere near the daily tariff amount mentioned above would be impossible for the applicant to meet without causing substantial hardship to his family. Any sum that he might be able to meet within a reasonable time will be seen by the respondent as derisory in light of its legal costs to successfully defend itself against the applicant's claims. There is also a public interest in ensuring that litigants realise that consequences follow from the unsuccessful pursuit of personal grievance claims. Balancing these broad factors I do not accept counsel's submission for costs to lie where they fall. Mr O'Connor must make a contribution to the respondent's and I fix the amount at \$1,500.00. I envisage that he will have to make arrangements to pay that sum over time.

Conclusion

[14] Mr O'Connor is to pay Anchor Press Limited costs of \$1,500.00.

Philip Cheyne
Member of the Employment Relations Authority