

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 174  
5408583

BETWEEN                      P  
   Applicant  
  
A N D                              Q and R  
   Respondents

Member of Authority:        James Crichton  
  
Representatives:              Ken Usmar, Advocate for Applicant  
   Mark Beech, Counsel for Respondents  
  
Submissions Received:        7 February 2014 from Applicant  
   4 April 2014 from Respondents  
  
Date of Determination:        6 May 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1]     By determination dated 10 January 2014 issued as [2014] NZERA Auckland 8, the Authority dealt with the personal grievance claims of P by a finding that two personal grievances had been proved and that in respect to the second of those grievances relating to P's unjustified dismissal, P had contributed to the circumstances giving rise to the grievance to the tune of 20%.

[2]     Costs were reserved.

**The claim for costs**

[3]     Submissions for P seek full indemnity costs of \$9,734.48 plus GST.

[4] I am provided with a comprehensive schedule of the attendances made by P's advocate in respect to the matter but not a breakdown of what the particular attendances relate to.

[5] It is apparent however that the attendances include time charged for the mediation between the parties and prior negotiations with the employer, together with the subsequent Authority investigation.

[6] Reference is also made to a settlement offer proffered by P which was rejected by Q and R and which it is suggested I should take into account on the footing it is an operative *Calderbank* offer.

### **The response**

[7] Q and R, while accepting the principle that costs follow the event, maintain that there was no justification for full indemnity costs in this situation, and that the proper approach for me to take is to deal with the matter on the Authority's traditionally daily tariff approach with a discount to reflect the 20% contribution in respect to the unjustified dismissal grievance.

[8] Furthermore, Q and R maintain in their submissions that the *Calderbank* offer relied upon by P is nothing of the sort, that the offer was made in the course of mediation between the parties and is therefore covered by the usual rules as to privilege, that the offer was not properly marked as a *Calderbank* offer with the usual intituling *Without Prejudice Save as to Costs* and therefore ought not be considered by me in a costs fixing environment.

### **Discussion**

[9] The principles applying to costs setting in the Authority are now well settled. Both parties referred, in their submissions, to the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. Amongst other things, that decision approved the daily tariff approach frequently used by the Authority, and identified the other general principles of law which apply to costs fixing in the Authority.

[10] Two of those principles are relevant here. The first is that costs in the Authority are generally more modest than they are in an adversarial environment such

a court and the Authority ought to take account of operative *Calderbank* offers in setting costs.

[11] Q and R rightly observed in their submissions that it is an unusual case where the Authority would allow costs on a full indemnity basis. There are such cases but they are the exception and the Authority will only grant costs of that magnitude where the particular matrix justifies it.

[12] In the present case, reliance seems to be placed on the purported *Calderbank* offer but I have to say I am not persuaded the offer referred to can be considered in the fixing of costs. It appears the offer was made in the context of mediation and that no proper attempt was made by P to exclude the offer from the cloak of confidentiality that applies to mediated engagements between the parties. That is the purpose of marking such offers *Without Prejudice Save as to Costs* and in the absence of those words or other labelling of settlement offers, it will be difficult for the Authority to be persuaded that the author's intention is that the matter be treated as a *Calderbank* offer.

[13] It will be particularly important that parties use the agreed nomenclature when those offers are made in the course of a mediated engagement where, by definition, the cloak of confidentiality rests over the whole engagement between the parties.

[14] Here, I am satisfied that the offer was made in the course of a mediation and without clear labelling that the author's intention was that the offer be put before the Authority in a costs setting environment, it seems to me impossible for me to consider the offer in the costs setting environment.

[15] Moreover, I must note that I have not been provided with a copy of the purported *Calderbank* offer; all that P has done is refer to it in his submissions and that is not enough if he wants to rely upon it.

[16] P is also seeking payment of costs he incurred in attending the mediation and in all of the attendances prior to the mediation which appear to include negotiations with the employer. The Authority's longstanding practice is to exclude attendances at mediation in setting costs; Authority practice is to seek to identify the costs the successful party has reasonably incurred in progressing their claim in the Authority and addressing that sum only in fixing costs.

[17] The way that the Authority most commonly attends to that task is by an application of the daily tariff approach which effectively provides a starting point from which there can be either an uplift or a diminution dependant on the particular circumstances of the case.

[18] Q and R maintain that the daily tariff ought to be applied in the present case but with a reduction of 20% to reflect the contribution to one of the personal grievances I found to be proved against them. While I accept that there may be circumstances where such a reduction is in accordance with principle, I decline to exercise my discretion in that way in the present case. There were two personal grievances found proved against Q and R. Only one of them attracted a 20% reduction. The logic of applying a reduction in the present case is not strong and I decline to adjust the tariff daily rate downwards in consequence.

### **Determination**

[19] I do not consider there is any basis for indemnity costs in the present case. I am not provided with any adequate breakdown of what costs P incurred exclusively in relation to his successful appearance in the Authority and so it is difficult to pare back the total costs claimed to a figure that relates only to the Authority's investigation.

[20] Moreover, the total amount claimed for P includes the GST component which again, the Authority's usual practice is to exclude.

[21] Looking at the matter in the round, I am satisfied the proper course of action is to simply apply the daily tariff approach without diminution. The matter was heard in one day and on that footing I direct that Q and R are to pay to P the sum of \$3,500 as a contribution to P's costs. I have not been persuaded that there is an operative *Calderbank* offer which would allow me to contemplate an uplift in the costs awarded and there is nothing else the submissions for P would justify the imposition of full indemnity costs.

James Crichton  
Member of the Employment Relations Authority