

[4] Counsel for Ms Savage argues that costs should lie where they fall on the basis that the Board created the first personal grievance situation by writing a letter which erroneously dismissed Ms Savage for redundancy in breach of the Board's contractual obligations, and by failing to properly communicate its intentions in relation to the outcome of the 28 November 2007 meeting between the parties. In each case, Ms Savage relies on findings made by the Authority in the substantive decision which were adverse to the Board.

[5] However, the Board points out, correctly, that it was completely successful in its defence of Ms Savage's claim notwithstanding the factual findings made by the Authority about the adequacy of the Board's process.

[6] The Board also says that Ms Savage increased the Board's costs by advancing a number of spurious arguments and/or by changing the basis of her claim during the course of the proceedings.

[7] I am satisfied that the factual position is that the Board was completely successful in the defence of the claim brought by Ms Savage and while she is entitled to prosecute her claim in any way that she sees fit, there are consequences of the prosecution of AN unmeritorious claim which, in accordance with the normal rules applying in the Authority, typically follow the event.

[8] I accept Ms Savage's argument that the Board may have contributed to the confusion that clearly existed between the parties, but she might well have considered that fact in evaluating whether to proceed or not with her claim. Further, there are *Calderbank* letters to consider which arguably reflect the Board's acceptance that, notwithstanding the usual words about denial of liability, will be seen by the impartial observer as the employer's attempt to try to resolve matters by agreement short of litigation with some acknowledgment that there might be litigation risk for the employer.

The legal principles

[9] The Full Court in *PBO Ltd v. Da Cruz* AC2A/5 identified and referred to the salient principles relied upon by the Authority in a costs setting and confirmed the appropriateness of reference to those principles. In giving the decision of the Full Court, Judge Shaw also specifically approved the tariff-based approach often adopted

by the Authority in a costs environment as long as the particular factual matrix of the instant case was taken into account as well.

[10] For my part, I have regularly found it useful in a costs setting environment to rely on the unreported decision of my colleague Member Dumbleton in his decision of *Graham v. Airways Corporation of New Zealand Ltd* (Employment Relations Authority Auckland, AA39/04, 28 January 2004). In that decision, the Authority identified three steps in evaluating cost applications. The first was the identification of the actual legal costs and expenses incurred by the successful party; the second was a determination about whether those costs were in fact reasonable; and the third was what proportion of those reasonably incurred costs ought to be met by the other side.

The *Calderbank* letters

[11] There are two *Calderbank* letters. Copies of those *Calderbank* letters have been provided to the Authority. The first dated 2 September 2008 proposes a payment to Ms Savage of \$5,000 by way of compensation and a contribution to her legal costs of *up to* \$4,500 plus GST. The second *Calderbank* letter is dated 3 February 2009 and increases the compensation offer to \$8,000 leaving the contribution to legal fees unchanged.

[12] I am satisfied that both *Calderbank* letters comply with the law in relation to those documents and can properly be considered by the Authority in a costs setting.

[13] While counsel for Ms Savage accepts that, in principle, the *Calderbank* letters ought to be taken into account in relation to the Authority's decision as to costs, it is argued that in the particular circumstances of this case, those *Calderbank* letters ought to be given no weight.

[14] I do not agree. I am not persuaded that, because of findings I made that the Board may have contributed to the confusion surrounding the end of the employment relationship, I should completely ignore *Calderbank* letters which appear to me to have been made in good faith by the eventually successful party with a view to trying to resolve matters by agreement and, as I said earlier, might well appear to an outside observer to take into account the very points that Ms Savage's counsel is now making in respect of the Board's potential culpability. The fact of the matter is that the Board was completely successful in the decision made by the Authority, notwithstanding the apparent blemishes that were identified.

[15] I am satisfied I should consider the *Calderbank* letters and factor them into the setting of costs but not on the basis that I completely overlook the prospect that the Board may, to some extent, have allowed the confusion to develop. I am satisfied that the short point is that Ms Savage was given not one but two opportunities to rethink her position and to effectively conclude matters honourably and with a payment to her which could reasonably be seen as some acknowledgment of the prospect that the Board may have not got the matter perfectly right. The fact that Ms Savage chose not to accept either of those *Calderbank* offers and to proceed means that she is vulnerable to the setting of costs against her in accordance with the normal rules.

Discussion

[16] Applying the principles in *Graham's* case to the present application, it is clear that the total amount incurred by the Board is in the order of \$42,000 inclusive of GST and disbursements. Ms Savage's counsel is critical of that total sum on the basis that her costs were approximately \$16,500 in total or barely more than a third of the costs of the Board. It is suggested that that puts the reasonableness of the costs incurred by the Board into sharp relief.

[17] I turn then to consider whether the costs incurred by the Board are, in all the circumstances, reasonable. The Board says in its defence that it was required to deal with a number of spurious and insubstantial points raised by Ms Savage and also had to cope with sudden changes of direction by her in the course of the progressing of the matter through the Authority's process. I think some of those allegations are well made, but there is still a significant difference between the quantum of costs incurred by the Board on the one hand and the quantum of costs incurred by Ms Savage on the other. I think the proper course is to reflect that difference in the consideration of the daily tariff and any allowance I make in respect of the *Calderbank* letters.

[18] I think a principled approach to the present matter is to look at the two days hearing time and apportion to each of those days a tariff-based calculation of \$3,000 making a total base figure of \$6,000.

[19] Then I think the Authority must consider the effect of the two *Calderbank* letters which Ms Savage rejected. I agree with the Board's logic of claiming costs from the point at which the first of those two *Calderbank* letters was presented to Ms Savage. It states the obvious to say that Ms Savage would have been better served

by accepting either one of the *Calderbank* letters than to have allowed the matter to go to decision in the Authority because she was completely unsuccessful in the Authority's decision but would at least have achieved some financial benefit from either one of the *Calderbank* proposals.

[20] In the period from the presentation of the first *Calderbank* letter to the end of the proceedings for the Board's solicitors, the Board incurred costs of in the order of \$29,000. I do not think that requiring payment of full solicitor/client costs for the period from the *Calderbank* letter to the conclusion of the matter is appropriate. I accept Ms Savage's submission that such a conclusion would be punitive, but applying general principles, costs ought to follow the event. The Board was completely successful and the Board made two efforts to try to resolve matters with Ms Savage prior to incurring the bulk of its costs, without any success whatever. I think the proper course is to apportion a sum of \$10,000 as the contribution that Ms Savage should make to the consequence of her decision not to accept the first of the *Calderbank* offers.

[21] In effect, the Board incurred only around \$13,000 in costs prior to the final *Calderbank* offer so the bulk of their costs were incurred after the first *Calderbank* was rejected by Ms Savage.

[22] Turning then to the final question posed in *Graham*, namely what percentage ought to be met by the losing party of the successful party's legal costs, the effect of my conclusion is that the sum of \$6,000 payable as a daily rate component together with \$10,000 payable on account of the two *Calderbank* offers, produces a total contribution from Ms Savage to the Board of \$16,000. That sum represents 30% of the total costs incurred by the Board in the matter, but also reflects the two *Calderbank* letters presented to Ms Savage and some of the argument that Ms Savage advances about the Board's potential culpability. More importantly, that figure represents around 50% of the costs incurred by the Board post *Calderbank*.

Determination

[23] I am satisfied that a proper exercise of the Authority's discretion is to require Ms Savage to pay to the Board the sum of \$16,000 as a contribution to the latter's legal costs.

James Crichton
Member of the Employment Relations Authority