

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 6C/10  
5290474

BETWEEN

ROZ SERVICE  
Applicant

AND

YOUNG MEN'S CHRISTIAN  
ASSOCIATION OF  
CHRISTCHURCH INC  
Respondent

Member of Authority: James Crichton

Representatives: Jeff Goldstein, Counsel for Applicant  
Peter Zwart, Advocate for Respondent

Submissions Received: 20 August 2010 from Applicant  
22 September 2010 from Respondent

Determination: 26 October 2010

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The application for costs**

[1] By determinations dated 18 January 2010 and 28 May 2010 the Authority dealt with first the application for interim reinstatement and then the application for substantive relief, in the first instance granting interim reinstatement and in the second instance determining that Ms Service had a personal grievance by reason of having been unjustifiably dismissed.

[2] In both cases, costs were reserved.

**The claim for costs**

[3] Both parties claimed costs, the applicant on the basis of being wholly successful in both her applications before the Authority and the respondent on the basis of their *Calderbank* letters in the matter.

[4] Dealing with the applicant first, her actual costs in the matter up to and including the interim reinstatement investigation were \$12,500 exclusive of GST and a further \$10,000 was expended by her from the interim reinstatement hearing up to and including the substantive investigation meeting.

[5] The respondent first seeks to rely upon its two *Calderbank* offers to ground its own application for costs which amount to \$14,000 for the interim reinstatement investigation and \$8,000 additional for the substantive investigation.

[6] In the alternative, if the Authority is not minded to accept the effect of the *Calderbank* offers and make an award of costs in favour of the respondent, the respondent submits that any award made against it needs to take into account the fact that in respect to the interim reinstatement application, the applicant effectively put the respondent to unnecessary cost because although she applied for and was granted interim reinstatement, she then allowed the interim reinstatement proposal to effectively be abandoned, after the Authority had granted her application for interim relief. The respondent says that as a consequence they incurred additional cost which was, in a practical sense, unnecessary.

### **The legal principles**

[7] The full Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 identifies the salient principles traditionally referred to by the Authority in a costs setting and confirms the appropriateness of those principles. The full bench of the Employment Court also specifically approved the tariff based approach often adopted by the Authority in a costs environment, so long as the particular circumstances of the individual case is taken into account as well.

[8] Mr Goldstein also refers me to the unreported decision of my colleague Member Dumbleton in *Graham v. Airways Corporation of New Zealand Ltd* (Employment Relations Authority, Auckland, AA39/04, 28 January 2004). That decision, which I have frequently referred to in fixing costs, set out three principles for evaluating costs applications. The first of these is the consideration of the actual legal costs and expenses of the second party, second is the Authority's consideration about whether those costs are reasonable and third the determination of what proportion, if any, of those costs should be met by the other side.

[9] In the particular circumstances of this case, it is also necessary for the Authority to consider the effect of the *Calderbank* offers made by the respondent during the course of the litigation. As I observed in an earlier decision *Allan v. Ogilvy Wellington Ltd*, 24 April 2009:

*The effect of a Calderbank letter is, of course, to entitle the author of that letter to ask that it be considered in an application for costs where the recipient of the letter rejects the offer and the sender of the letter is successful in the proceedings.*

*If as in this case, Mr Allan does better in the decision of the Authority than he would have by forcing his Calderbank letter, then that is a material factor in the decision the Authority has to make in relation to costs.*

[10] Here, there are three *Calderbank* letters to be considered, two written by the respondent, and one written by the applicant. I consider each in chronological order. The first of the respondent's *Calderbank* letters is dated 17 December 2009 and it offers a compensatory payment of \$20,000 together with a contribution to the applicant's legal costs of \$5,000 plus GST. As the applicant's submission makes clear, there is no reference in the 17 December 2009 letter to reinstatement or interim reinstatement which on the applicant's submission was, at the time, highly material to Ms Service. She, it is submitted, sought vindication and interim reinstatement as much as anything because of the perceived damage to her career and reputation as a consequence of the allegedly unjustified dismissal.

[11] YMCA encourage me to conclude that this *Calderbank* letter of theirs falls to be considered because it proposed far greater benefits to the applicant than she would subsequently derive from the decision of the Authority.

[12] YMCA accept that costs follow the event and so, on general principles, given that the Authority granted interim reinstatement to Ms Service, one would have thought that in principle the first *Calderbank* offer of 17 December 2009 ought not to be considered. YMCA argue that it should fall for consideration because despite Ms Service seeking and being granted interim reinstatement, she ... *ultimately did not want and chose not to enforce the grant of reinstatement*. It is suggested that the Authority cannot inquire into the reasons for Ms Service's decision in that regard, or take judicial notice of the factors which became evident during the Authority's investigation which might have led to Ms Service's decision.

[13] Whether that argument has force or not is actually beside the point; the factual position is that YMCA were not successful in the subject proceedings, however viewed. The decision on the interim reinstatement application was in favour of the applicant and accordingly it would not be a proper exercise of the discretion the Authority has to consider YMCA's first *Calderbank* offer.

[14] Even if that view of the matter is not accepted, the same result is achieved by a consideration of the question whether YMCA's initial *Calderbank* letter actually addressed Ms Service's fundamental concern **at that time**. Plainly her focus was on reinstatement and reinstatement is not in any way referred to in the *Calderbank* letter. How could it be given that the *Calderbank* letter effectively sought to bring the employment relationship problem that flowed from it, to a dignified end. The very point of Ms Service's litigation was to get her job back so that her career with YMCA could continue. That in my opinion is the antithesis of the first *Calderbank* letter written by YMCA.

[15] I am satisfied then that it is not appropriate to take the first *Calderbank* letter from YMCA into account in the overall fixing of costs.

[16] The second *Calderbank* letter written by YMCA is dated 18 February 2010 and it offers a payment of \$10,000 by way of compensation together with a payment of \$15,000 plus GST in respect to costs. This second *Calderbank* offer was made by YMCA two days after Ms Service had withdrawn her claim to be permanently reinstated. It follows that, in so far as the *Calderbank* letter offers a complete solution to the litigation (by reason of the reinstatement issue being off the table) it is, in principle anyway, able to avoid the argument for striking down the first *Calderbank* offer made by YMCA.

[17] However, while on this occasion it can properly be argued by YMCA that their proposal in respect to compensation is more generous than the Authority's own decision (albeit only because of the application of a 50% contribution) the fact remains that the second *Calderbank* letter makes no offer in respect to wages at all and of course the Authority's decision involved the payment of \$10,000 gross in lost wages. On that basis then the Authority must conclude that Ms Service was better off as a consequence of the decision of the Authority than she would have been if she had accepted the second *Calderbank* offer from YMCA.

[18] Finally, I must consider the third *Calderbank* offer which is one from Ms Service to YMCA. Given it is dated 22 February 2010, it follows very shortly after the second *Calderbank* offer from YMCA. That third *Calderbank* letter proposed a payment of \$25,000 in compensation, and costs of \$15,000 plus GST. While the compensation proposed in that *Calderbank* letter was greatly in excess of the award eventually made by the Authority, again the third *Calderbank* letter makes no proposal in respect to wages and the effect of the combination of the compensatory award in the Authority's determination aggregated with the wages is to produce an amount that is very close to the amount specified in the final *Calderbank* offer.

[19] I am encouraged by Ms Service to follow the reasoning of Chief Judge Colgan in *Watson v. The New Zealand Electrical Traders Ltd T/A Bray Switchgear* 24 November 2006 AC 64/06 in allowing for *significant consideration* of the closeness between the *Calderbank* offer and the eventual determination in the fixing of costs. In this third *Calderbank* letter of course costs are proposed at \$15,000 plus GST. In the claim before the Authority now for the fixing of costs, Ms Service seeks a total of \$16,000, \$8,000 on the interim reinstatement and \$8,000 in respect to the substantive investigation.

### **Applying the principles in *Graham***

[20] The applicant, as the successful party in respect to each of the investigation meetings referred to has incurred actual costs totalling \$22,500 plus GST. The Authority is told that the hourly rate charged by counsel is \$300 per hour plus GST and on that basis the fee represents a total of 74 hours work. I am satisfied that that hourly rate is entirely appropriate for counsel of Ms Goldstein's eminence and the hours invested in the matter are also absolutely appropriate in all the circumstances.

[21] The real question is how much of that total of reasonably incurred costs ought to be met by YMCA given that I have already rejected their argument in favour of a consideration of either of their *Calderbank* letters. Further, I have accepted that Ms Service's own *Calderbank* offer does fall for consideration in the fixing of costs in her favour, although it is just one of the factors that I need to consider.

[22] This was not a straightforward matter. It was complex and challenging for both parties and the Authority. If the matter were to be dealt with on the basis of the daily tariff approach, it could certainly not appropriately be considered within the

*normal* range. If that sort of approach were to be used, a figure of perhaps \$5,000 per day (allowing for the complexity of the matter) might be appropriate, with a total figure of perhaps \$15,000.

[23] Of course, that amount marries to the amount sought by Ms Service in her *Calderbank* offer to YMCA, which was not accepted. There is precedent for significant cost awards in respect to interim reinstatement applications. Ms Service has referred to an earlier decision of mine *Begley v. Crop Mark Seeds Ltd* CA168A/09, 7 December 2009 in which the Authority awarded a successful employer resisting an interim reinstatement application, costs of \$5,000. In considering that earlier decision of mine and the complexity of it against the complexity in the present case, I am satisfied that the two are equally challenging and a similar amount in costs would not be inappropriate.

### **Determination**

[24] Looking at the matter in the round, I think the appropriate figure to fix for costs is \$15,000 and I direct that YMCA is to pay that sum to Ms Service as a contribution to the costs she has incurred in her two successful hearings in the Authority.

James Crichton  
Member of the Employment Relations Authority