

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 182
5364192

BETWEEN SUSAN STEADMAN
 Applicant

A N D CANTERBURY EMPLOYERS'
 CHAMBER OF COMMERCE
 INC
 Respondent

Member of Authority: James Crichton

Representatives: Jeff Goldstein, Counsel for Applicant
 Peter van Keulen, Counsel for Respondent

Submissions received: 13 August 2013 from Applicant
 16 July 2013 from Respondent

Date of Determination: 2 September 2013

COSTS DETERMINATION OF THE AUTHORITY

Substantive determination

[1] The substantive determination issued as [2013] NZERA Christchurch 109 and dated 14 June 2013 concluded that Ms Steadman did not have a personal grievance of any kind and accordingly her claims failed in their entirety.

[2] Costs were reserved.

The claim for costs

[3] Canterbury Chamber of Commerce has been invoiced a total of nearly \$31,000 in fees for dealing with this matter together with GST and disbursements. Matters pertaining exclusively to the Authority's investigation amount to a little over \$25,000 in fees.

[4] Canterbury Chamber seek full indemnity costs or, in the alternative, costs calculated using the daily tariff approach but with an increased notional daily tariff and an increased number of days.

[5] The argument in favour of increasing both the notional daily tariff and the number of days is based on two factors. The first is Ms Steadman's failure to accept a *Calderbank* offer, and the second is her conduct of the matter which, according to the Canterbury Chamber, materially increased their costs.

[6] As to the first, Canterbury Chamber say that a *Calderbank* offer was made to Ms Steadman on 5 June 2012 and as she was completely unsuccessful in her personal grievance claim, it is axiomatic that she would have been better to accept the *Calderbank* offer. It follows that Canterbury Chamber encouraged the Authority to apply full solicitor client costs at least from the date of the *Calderbank* offer.

[7] Turning now to the conduct of proceedings, Canterbury Chamber say that Ms Steadman called various medical and other practitioners to give expert evidence, but rather than provide a brief of their evidence, simply provided their clinical notes which put counsel for Canterbury Chamber to additional cost.

[8] In addition, it is alleged Ms Steadman did not disclose the neuro-psychologist's report commissioned by ACC prior to the investigation meeting even although it was relevant to her claim and the subsequent disclosure resulted in further cost.

[9] Finally, Canterbury Chamber allege that Ms Steadman raised allegations that a senior manager of the Chamber attempted to suborn a witness and that allegation needed to be dealt with as part of the investigation notwithstanding that it was completely without foundation.

[10] The argument for both increasing the quantum of the daily tariff and increasing the number of days charged is advanced by Canterbury Chamber on the basis of previous decisions of the Authority. In particular, the submissions rely on a careful analysis of such cases in *Alex Broughton v. Microsoft New Zealand Ltd* [2011] NZERA Auckland 359, a decision of Member Larmer. In that case, the Authority carefully analyses a reasonable number of previous decisions where the Authority had been persuaded to depart by uplift from either the notional daily tariff rate set by the Authority, or the actual number of days to be charged for.

[11] In the result, the submissions offer three alternative calculations to achieve a cost award commensurate with the circumstances, first indemnity costs at \$25,000, secondly actual costs from the date of the *Calderbank* offer, being \$22,944, and thirdly, an increased daily tariff of \$7,000 calculated over 3.5 days giving a figure of \$24,500.

The response

[12] While accepting that costs usually follow the event, submissions for Ms Steadman encourage the Authority to conclude that costs should lie where they fall.

[13] In the alternative, the Authority is urged to conclude, following *Graham v. Airways Corporation of New Zealand Ltd* (ERA Auckland AA39/04, 28 January 2004) that the actual costs charged to the Canterbury Chamber are disputed because of certain publicity attaching to comments about the costs, that the costs are unreasonable, that the *Calderbank* offer cannot be relied upon and that the Authority should take into account Ms Steadman's ability to pay.

Discussion

[14] The legal principles for the fixing of costs in the Authority are now well settled and need not be recited again here. A useful judicial summary of those principles is of course contained in the decision of the Full Bench of the Employment Court in *PBO Ltd v. Da Cruz* [2005] ERNZ 808.

[15] The Authority has also regularly applied the principles enunciated in *Graham v. Airways Corporation of New Zealand Ltd* (supra) in the costs setting environment.

[16] Looking at the matter in the round then, the Authority is told that the total costs incurred by Canterbury Chamber are in the order of \$30,000. The fact that the general manager of the Chamber may have been quoted as saying that her organisation spent "more than \$10,000 in lawyers' fees" is not inconsistent with the submission made by Canterbury Chamber.

[17] Total expenditure of the magnitude just referred to is a significant investment in a matter in the Authority, but by no means unprecedented. Given the nature of the organisation, which is an entity which provides, *inter alia*, advice to members about employment relationship problems with staff, it seems to the Authority inevitable that

Canterbury Chamber would want to do a thorough job of resisting Ms Steadman's allegations. After all, had any of those allegations been found to have any force or effect, that conclusion might well have impacted on the reputation that Canterbury Chamber had with its members.

[18] What is more, this was not a straightforward personal grievance, but rather a multi-layered claim involving a constructive dismissal claim supported by allegations of failures under the Health and Safety in Employment Act amongst other things.

[19] There was extensive medical evidence, and while the Authority does not necessarily accept Canterbury Chambers' claim that that medical evidence could have been better presented by Ms Steadman, it is fair to refer to that extensive medical evidence in the context of assessing whether the total fees charged to Canterbury Chamber were reasonable or not.

[20] Furthermore, despite claims to the contrary, the Authority's investigation took 2.5 days, not the less than 2 days referred to by Ms Steadman. Importantly, the first two days of the Authority's investigation were sequential and there was a significant delay before the final half day of the investigation was able to be brought on for hearing. The Authority accepts the submission for Canterbury Chamber in that respect that that significant delay contributed to the total costs of the exercise.

[21] In all the circumstances then, and having regard to costs incurred by parties dealing with much less complex claims, the Authority is satisfied that the total costs incurred by Canterbury Chamber were entirely reasonable.

[22] As always, the real focus of the Authority's consideration must be on the third limb of the question, namely what percentage of the total cost reasonably incurred by the successful party ought to be borne by the unsuccessful party.

[23] It is a truism that costs usually follow the event and there is nothing in the present case which would encourage the Authority to depart from that principle. The reality is that there are always costs in litigation and it is one of the attendant risks of litigation that the unsuccessful party can expect to be asked to contribute to the costs of the successful one.

[24] The *Calderbank* offer falls to be considered. The Authority does not agree with Ms Steadman's contention that the *Calderbank* offer is not in play. The facts are

that a *Calderbank* offer was made to Ms Steadman by Canterbury Chamber on 5 June 2012, which offered to settle the matter for a compensatory payment of \$5,000 and a contribution to costs of \$3,500 plus GST. 5 June 2012 was after mediation between the parties and after the statement of problem and statement in reply had been filed and served, but before there had been any substantial preparation for the subsequent investigation meeting of the Authority. Because Ms Steadman was completely unsuccessful in her subsequent hearing in the Authority, she would have been materially better off to have accepted the *Calderbank* offer when it was proffered rather than rejecting it, which is what she did.

[25] Of course, the effect of a *Calderbank* letter is to entitle the author of the 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 proceeding. In the present case, the Authority is satisfied it must consider the force and effect of the rejected *Calderbank* offer in the fixing of costs. The whole point of proffering a *Calderbank* letter is to have considered in a costs setting environment if the author of the letter is more successful in the outcome than that postulated in the proposal.

[26] If the Authority were to base its decision solely on the *Calderbank* letter, it is apparent that Canterbury Chamber incurred \$22,944 in costs after the date that the *Calderbank* letter was proffered.

[27] The Authority is not attracted by the argument advanced for Canterbury Chamber that by failing to brief various medical people and only providing their notes, Ms Steadman created extra work for Canterbury Chamber and that was intrinsically unreasonable. The Authority accepts that it may have created extra work, but does not accept the next step which is that that additional work entitles Canterbury Chamber to look to an uplift on the daily tariff approach.

[28] However, the wider point that Canterbury Chamber make about the inherent complexities of the matter is well made. This was not a straightforward case involving simple factual matters and it traversed a significant period of time in a tumultuous environment after the Canterbury earthquakes and so was inherently expensive and difficult to deal with, for both parties. So as Canterbury Chamber have been successful in their defence of Ms Steadman's claim, it is their costs which the Authority must reflect on and decide what portion should be met by Ms Steadman.

Determination

[29] Given that Canterbury Chamber have suggested a variety of ways in which the Authority might conclude a formula for Ms Steadman contributing to those costs, the Authority needs to make an election.

[30] This is not a matter where there is justification for full indemnity costs. The claim was properly made, properly argued and the contention that is advanced that the claim was vexatious or completely unsubstantiated is not accepted by the Authority. Ms Steadman was entitled to make her claim and have it considered by the Authority. She has done that, the Authority has considered her claim and having considered it, has rejected it in its entirety. That does not make the claim vexatious.

[31] That said, the Authority is obliged to apply the law and in all the circumstances, having rejected the idea of indemnity costs, the Authority is satisfied that either of the other two approaches advanced by Canterbury Chamber are appropriate. This was a complex matter and there is ample justification for an increased daily tariff and an increased number of days. However, the Authority prefers to adopt the more conservative approach of simply applying the law in relation to *Calderbank* offers and on that footing Ms Steadman is directed to contribute to Canterbury Chamber the sum of \$22,944 as a contribution to the costs incurred by Canterbury Chamber in successfully defending Ms Steadman's claim.

James Crichton
Member of the Employment Relations Authority