IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 363
5371675

	BETWEEN	ENVOR VALENSKY Applicant
	A N D	IDEA SERVICES LIMITED (IN STATUTORY MANAGEMENT) Respondent

Member of Authority:	James Crichton
Representatives:	Eska Hartdegen, Counsel for Applicant Paul McBride, Counsel for Respondent
Date of Determination:	12 October 2012

COSTS DETERMINATION OF THE AUTHORITY

The substantive issue

[1] This matter was set down for a two day fixture in the Authority and one working day prior to the commencement of the fixture, the matter was withdrawn by the applicant (Mr Valensky) without the issue of costs being resolved before that withdrawal was made.

[2] The respondent (Idea) now seeks an award of costs because of the costs it incurred in preparing for the fixture which did not proceed.

The claim for costs

[3] Idea seeks $8,600 as a contribution to its costs together with disbursements of $763.89. The contribution to costs is an aggregate of two sums, the first being a $3,000 contribution to total costs of $4,500 incurred down to the date of the *Calderbank* offer and solicitor/client costs of $5,500 from the date of the *Calderbank* offer.

[4] In its submissions on costs, Idea scheduled the conduct of the proceeding. In essence, Idea makes the submission that this was not a standard personal grievance claim and the time spent is said to reflect that submission. Particular factors referred to by Idea are:

(a) An interim reinstatement application;

(b) Repeated urgency applications;

(c) Issues pertaining to the respondent being in statutory management;

(d) The two day investigation meeting in prospect;

(e) Comprehensively disputed claims; and

(f) Withdrawal of the matter just prior to hearing.

[5] In essence, Idea says that Mr Valensky put it to the full cost of preparing for a two day investigation meeting, as well as the costs of an interim reinstatement application and repeated requests for urgency and then literally at the eleventh hour determined not to proceed without resolving the question of costs before attending to the withdrawal.

Mr Valensky's submissions

[6] Mr Valensky maintains that his claim in the Authority was effectively driven by his conviction that he was entitled to be paid four weeks' notice together with his contention that such payment had been agreed by Idea. However, the fact that the payment was not made contributed to Mr Valensky's conviction that he had been summarily dismissed (a view countered by Idea which says that Mr Valensky resigned during a disciplinary investigation). Mr Valensky says that the payment referred to was finally made by Idea on 28 June 2012. He contends that had that payment been made promptly, he might never have initiated the proceedings or himself incurred legal cost.

[7] What is more, Mr Valensky makes the valid observation that he could not accept the modest *Calderbank* offer when it was tendered on 24 May 2012, because he had not by that stage received payment of his notice. The *Calderbank* was of course expressed to be in full and final settlement. He says that had the order been

reversed (that is, the payment of his notice paid first and the *Calderbank* following thereafter), that might well have settled matters and ensured that neither party incurred any significant cost.

[8] Furthermore, Mr Valensky argues that because the *Calderbank* offer made by Idea was so modest ($1,500 in compensation all up) without any contribution to costs or acknowledgment that costs had already been incurred by the receiving party, the *Calderbank* offer was able to be disregarded. The Authority is referred to *Health Waikato Ltd v. van der Sluis* (unreported) 13 May 1997, CA42/96.

[9] Mr Valensky also points out to the Authority that an attempt was made to settle the matter with Idea 10 days before the fixture but despite three follow up calls made by counsel for Mr Valensky to counsel for Idea, there was no definitive response until a flat rejection was received the night before Mr Valensky withdrew the proceedings from the Authority.

[10] The Authority is asked to disregard the *Calderbank* offer (because of its inadequacy) and to direct that costs are to lie where they fall.

[11] Supporting counsel's submissions on behalf of Mr Valensky is the applicant's own affidavit of means. In that affidavit, Mr Valensky asserts that he is impecunious, has applied for over 30 positions since the termination of the employment with Idea, has not had permanent employment since the employment with Idea ended although he is currently filling in on a temporary basis for three months. He indicates that he is effectively being partially supported by his partner and at the conclusion of his short term contract, will be completely dependent on her.

The law

[12] The law on costs fixing in the Authority is well settled. The leading case is *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. In that decision of the Employment Court, Judge Shaw specifically approved the daily tariff approach frequently adopted by the Authority in cost fixing and also enunciated the principles that ought to guide the Authority in the costs fixing environment. Those principles include that costs will normally follow the event, that costs in the Authority will typically be modest, that costs are a discretionary remedy, and that the Authority will typically take into account an effective *Calderbank* offer in fixing costs.

[13] The Authority also has derived assistance from applying the principles set out in an earlier decision of the present Chief of the Authority, Member Dumbleton, in *Graham v. Airways Corporation of New Zealand Ltd* (unreported) Employment Relations Authority, Auckland, AA39/04, 28 January 2004. In that decision, the Authority postulated three questions, viz what was the quantum of costs incurred by the successful party, were those costs reasonable, and what percentage of those costs ought to be borne by the unsuccessful party?

Discussion

[14] The first matter to deal with is the ability of the Authority to consider costs fixing in the present circumstances. Usually, when proceedings are withdrawn, they are withdrawn on the basis that there is an agreement between the parties as to costs. For whatever reason, that did not happen in the present case. It is clear law that where the facts described above are in play, the Authority may award costs to the "other" party and the length of time between the withdrawal and the hearing is itself a factor: see, for instance, *ICC v. Scott* (unreported) AC45A/06, and *Data Group Ltd v. Gillespie* (unreported) Employment Court Auckland, AC16/04.

[15] Next, the Authority needs to deal with the *Calderbank* offer made by Idea. It will be recalled that Mr Valensky contends that that *Calderbank* offer is so inadequate as to be able to be ignored. The Authority does not accept that contention. The *Calderbank* offer, which was in the sum of $1,500, reflected Idea's assessment of the risks associated with the proceeding. Its view (a view it claims Mr Valensky has now come round to himself) is that Mr Valensky's claim was so lacking in merit that a *Calderbank* offer of $1,500 "all up" was, or ought to have been, worthy of consideration. The quantum of *Calderbank* offers is, and must be, a matter for the parties involved and it would be improper of the Authority to make comments about the adequacy or otherwise of *Calderbank* offers. It may also be the case that the quantum reflects, to some extent, the employer's ability to pay given it is in statutory management. Again, that point emphasises the caution the Authority must exhibit, in commenting on the *Calderbank* offers of parties. In all the circumstances, the Authority is not persuaded that it can, without more, decide that this particular *Calderbank* offer is so inadequate as to be capable of being ignored by the recipient.

[16] That being the Authority's decision on this point, it follows that the *Calderbank* offer ought to be considered as part of the mix of matters the Authority

must put into contention, because it is self-evident that Mr Valensky withdrew his proceeding without achieving any result and he would have been $1,500 better off if he had taken the *Calderbank* offer.

[17] But that analysis overlooks the next point that Mr Valensky makes and in this regard, the Authority must agree with Mr Valensky. He points out that he understood the employer had agreed to pay him four weeks' notice and yet it failed to do that and did not do that at all until fully a month after it made the *Calderbank* offer. It follows, as the Authority has already noted, that if Mr Valensky had accepted the *Calderbank* offer when tendered, he would have, of necessity, had to waive the entitlement which he felt he had to the four weeks' notice.

[18] On that basis then, the Authority is satisfied that the fair and just course of action is to take the *Calderbank* offer out of the equation because, in the particular circumstances of this case, Mr Valensky makes a fair point in saying that had he accepted the *Calderbank* offer when it was tendered, he would have foregone what he thought was an entitlement in regard to unpaid wages, and an entitlement which he understood Idea had committed itself to paying. The fact that those wages were subsequently paid by Idea would suggest that Idea itself felt the wages were due and owing.

[19] It is plain from the submissions of Idea that it incurred total costs of $13,620 plus disbursements. The Authority is satisfied that that amount falls within a reasonable range for defending proceedings of this sort in the Authority. That conclusion takes into account the unusual aspects of this case, in particular the fact of statutory management and the likely extra attendances both in that regard generally and in respect of the requirement to advise on Mr Valensky's application to proceed with his claim, the various applications for urgency and the claim for interim reinstatement.

[20] That leaves the final question being what percentage of those reasonably incurred costs Mr Valensky ought to be asked to bear and in that regard, of course, the Authority is obligated to take account of Mr Valensky's parlous financial circumstances. Certainly, on the basis of Mr Valensky's affidavit of means, he cannot be criticised for failure to mitigate loss; on the basis of the evidence before the Authority, he has used his best endeavours to find alternative employment since the end of his employment relationship with Idea but has not been successful in getting a

permanent position. He says that it would be difficult for him to make any contribution to costs *"presently"* and the Authority is inclined to agree.

[21] But that is not an end of the matter. On the basis of the positions that Mr Valensky indicates in his affidavit of means, that he has applied for, it seems clear that Mr Valensky is a person with skills and talents and he is likely to obtain gainful permanent employment in a remunerative position in the short to medium future. At that point, he should be able to meet a proper award of costs.

[22] It is clear law that in assessing a party's ability to contribute to the costs of the other party, the Authority must consider not just the income of the person concerned but also their assets and liabilities. And in the absence of any evidence as to that, the Authority's obligation is to proceed on the presumption that there is an ability to pay: *Gamble v. AgResearch Ltd* (unreported) CC6A/09, 10 September 2009 at para.[16] per Judge Couch.

[23] What is more, there is ample precedent for the view that an award of costs can be paid off over time once gainful employment has been obtained: see for instance *Bay Milk Distributors Ltd v. Jopson* [2010] NZEmpC 34 per Chief Judge Colgan, and *Tourism Holdings Ltd v. Charlesworth* [2012] NZEmpC 29 per Travis J.

Determination

[24] The Authority has concluded that, for reasons already articulated, the effect of the *Calderbank* offer must be discounted. Even without that consideration in play, Idea still seeks a reasonable award of costs and, without the *Calderbank* offer in consideration, Idea's claim might be around the $5,000 mark. The Authority thinks it appropriate to take some account of Mr Valensky's circumstances, but equally accepts the observation made on behalf of Idea that it also has its own financial challenges and it can ill afford to expend significant cost on legal services which, in the result, prove completely unnecessary.

[25] Mr Valensky protests that matters might not have proceeded as far as they did if Idea had more expeditiously dealt with the matter of payment for notice. Whether that was agreed at the time of the conclusion of the employment relationship or not, is beside the point; clearly Idea thought the money was payable otherwise it would not have made the payment, which it eventually did.

[26] In all the circumstances, the Authority thinks the proper course is for Mr Valensky to make a contribution to Idea's costs but that contribution is more modest than would have been the case were it not for the notice payment just referred to. Conversely, the payment is more than a token payment and reflects the reality that parties undertaking litigation must appreciate that there are risks in being unsuccessful or, as in this case, leaving the other party with a bundle of costs which have been expended unnecessarily.

[27] The Authority orders that Mr Valensky is to pay to Idea the total sum of $2,500 inclusive of disbursements and that that amount is to be satisfied by a payment at the rate of $50 per week, such payments to commence one month after Mr Valensky obtains full time remunerative employment.

[28] Leave is reserved for the parties, or either of them, to revert to the Authority to vary the amount of those payments either by increase or decrease, if there is a relevant change in the circumstances.

James Crichton
Member of the Employment Relations Authority