**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

[2013] NZERA Wellington 111
5388721

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| BETWEEN | AMANDA WECK-CLUNIE<br>Applicant |
| AND | CATHERINE BRONNIMANN<br>First Respondent |
| AND | SUE MILLAR<br>Second Respondent |
| AND | KATHLEEN PARNELL<br>Third Respondent |
| AND | LAURIEL MCKENZIE<br>Fourth Respondent |
| AND | AMANDA WECK-CLUNIE<br>Fifth Respondent |

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| Member of Authority: | P R Stapp |
| Investigation Meeting: | On the papers received by 22 August 2013 |
| Date of Determination: | 13 September 2013 |

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Costs application and background**

1. Costs were previously reserved by the Authority in [2013] NZERA Wellington 86.

2. Ms Weck-Clunie claims costs as a matter of principle for being successful. However what she did not disclose in making her costs claim is that there was a *Calderbank* letter dated 18 and 21 February 2013 in existence that conveyed an offer to settle. This has been provided by Ms Bronnimann in her costs submission in reply and discloses that the First to Fourth respondents agreed to pay to Ms Weck-Clunie a total

of $6,600 to settle and save the costs of an investigation meeting. Each of the First to Fourth respondents offered to pay by instalment arrangements different sums making up the $6,600. Ms Bronnimann's sum to pay was $4,500.

3. The law on costs is very clear. First costs are a matter of principle based on a daily tariff in the Employment Relations Authority; see *PBO Ltd (formerly Rush Security Ltd) v De Cruz* [2005] 1 ERNZ 808 (EmpC). Also, as this matter involves a *Calderbank* offer the following applies:

    a. That the offer has to be labelled "without prejudice save for costs"; see *Milne v Barnardos New Zealand* [2011] NZERA Christchurch 166.

    b. That there has to be adequate time for the offer to be considered: see *Baynes v Radius Residential Care Ltd* [2011] NZERA Christchurch 148.

    c. That there has been a signal from the Court of Appeal that there needs to be a "more steely" approach taken to awarding costs when a reasonable settlement proposal has been rejected: see *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

    d. That the *Calderbank* offer has to be transparent and clear to be capable of reasonable consideration[1]

4. In a recent publication in regard to mediation there is a chapter on costs about settlement options that covers the points above[2].

**Determination**

5. Ms Weck-Clunie's actual costs are $14,137.05 (including $452.04 disbursements) plus the filing fee ($71.56). Ms Bronnimann's (First Respondent) actual costs seem to total $4,650, and she wants consideration given to her own costs incurred in the matter.

[1] *Morrison v Design Plus Build Ltd* [2013] NZERA Christchurch 164; *Te One A Mara Ltd v Olsen* [2012] NZEmpC 176.
[2] Employment Mediation Karen Radich with Peter Franks (2nd Edition) Thomson Reuters 2013 Brookers Limited.

6. I am prepared to consider the *Calderbank* offer from Ms Bronnimann because it was made "without prejudice save for costs", which was clearly identified to Ms Weck-Clunie (letters dated 18 and 21 February 2013). There was time for the offer to be considered. The outcome of the Authority's determination [2013] NZERA Wellington 86 in Ms Weck-Clunie's favour was $2,111 for the wages she claimed. This was less than Ms Bronnimann's contribution to the proposed settlement, and certainly much less than the total offer made by the First to Fourth respondents. Also, there is no issue about the certainty and clarity of the offer made by the respondents. If there was any problem it has to do with any costs to the date that the offer was made.

7. The offers made by Ms Millar, Ms McKenzie and Ms Parnell were generous since subsequently there were no findings against them personally in the matter. The *Calderbank* offer clearly indicates that the First to Fourth Respondents attempted to settle and save costs. The parties also attended mediation with the aim of saving costs (mediation on 1 August 2012 and 18 February 2013).

8. I am not going to apply costs in regard to the Second to Fourth respondents because they were joined to the proceedings at Ms Bronnimann's instigation, and the application to join them was opposed by Ms Weck-Clunie because she had nothing against them personally and claimed that they did not employ her. Moreover the Second to Fourth respondents have not incurred costs to recover and no details of such have been provided.

9. I note that earlier in the proceedings Ms Weck-Clunie requested urgency, but cited a national organisation as a party that she tried to claim was her employer. She also sought to proceed against an un-incorporated group (SANDS). As it transpired it was obvious the two could not have legally been her employer. Ms Weck-Clunie's claims against the national organisation were strongly resisted by that organisation's legal counsel. Fortunately Ms Weck-Clunie withdrew that party from the matter as she would have been terribly exposed to a risk of costs. No costs were pursued with the Authority. Furthermore this was the cause for delays and any urgency in the matter was undermined.

10. As Ms Weck-Clunie was partially successful she is entitled to consideration for costs based on the daily tariff. She was represented in the Authority's investigation and has incurred her own costs. However because she was offered a reasonable amount to settle in an adequate time to consider the offer this has some impact on her claim. The offer was made on 21 February 2013. The Authority's timetable required preparation by 9 April 2013 and was to be completed by 23 April. It is difficult to discern from the applicant's invoices provided what the itemised costs were between 21 February and the timetable starting and whether the offer incorporated costs to that point. I note that the extensive paperwork included in the filing of the application meant that much of the work had already been carried out by Ms Weck-Clunie's representative in filing the application. Indeed Ms Weck-Clunie's supplementary statement of evidence was commendably brief. However her application and correspondence presented an overly legalistic approach that clearly did not assist to progress the matter to settlement and was unnecessary at such an early stage. It was not assisted by Ms Weck-Clunie's failure to properly include the correct respondent party in the application from the start. A brief summary of the facts and brief comments in terms of the employment relationship problem form filed in the Authority would have sufficed. However, the documents that had been assembled for the applicant were useful and as such were properly filed at the commencement of the matter.

11. Ms Weck-Clunie's invoices involve costs well past the Authority's investigation meeting held on 7 May 2013. I presume that the costs not only include further preparation and representation at the investigation meeting, but written submissions and advice after the investigation meeting also. Usually these are included in the tariff.

12. Ms Weck-Clunie sensibly should have settled to avoid further costs after 21 February considering the full amount of the *Calderbank* offer at the time, the Authority's timetable and the risks to her in regard to the application. I hold it was a reasonable offer considering the risk of her claims. The offer covered the costs at the time up until it was made because no costs prior to 21 February are now being sought and were not itemised and the offer included compensation. Her rejection of the offer was surprising, I hold. There was no explanation provided for rejecting it in clear terms.

Moreover, she has contributed unnecessarily to her own costs because the correct employer was not cited properly at the time because of her uncertainty and by taking a black and white approach in regard to the detail of her employment relationship problem, when she should have been much more pragmatic and reasonably cited Ms Bronnimann from the outset. If it was that "it is the principle of the matter" that was important to her that approach comes at a cost that she has to bear given the *Calderbank* offer. The significance of the *Calderbank* offer and the outcome in the Authority's determination makes this a matter for considering "a steely approach"[3] in making an award for costs.

13. Ms Weck-Clunie's supplementary submission reargues part of the case (paragraphs 2-11). This is entirely inappropriate and not relevant in regard to dealing with costs. Nor is it the place now to make findings in regard to claims that Ms Bronnimann has not acted in good faith. However, Ms Weck-Clunie's representative's points on the *Calderbank* offer are noted. I hold that the *Calderbank* offer did not require scope for negotiation, and there is no requirement for it to have to. It was left for the applicant to either accept or not accept. She chose not to do so for whatever reason.

14. In light of the *Calderbank* offer I do not accept that the First Respondent can be held fully responsible for prolonging the matter and putting Ms Weck-Clunie to unnecessary costs when Ms Weck-Clunie was confused about who her employer was, needed to be directed to quantify the sum of her claim, needed to amend her statement of problem to correctly identify a legal entity as the respondent, did not reasonably settle, and from the point when the parties were properly included, all the parties co-operated in the Authority's investigation once it was on track. Indeed the Authority's investigation meeting was able to be dealt with in one day.

15. I have also considered:

    i. That the *Calderbank* offer was made after the mediation was directed by the Authority.

[3] *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

ii. That the offer probably would not have been made without the input of experienced legal counsel's advice to Ms Bronnimann. Given the risks and extent of the claims against her personally, Ms Bronnimann reasonably got legal representation, although she represented herself during the investigation meeting.

iii. That Ms Bronnimann's costs have not been itemised. Therefore I am not sure what has been included to consider the merits of the sums claimed.

iv. That in the absence of any wage time and holiday records, an applicant making a claim for wages is expected to calculate the claim, but may have to bear the cost for that and any representative's help in the preparation, particularly if the claim is not successful. The applicant's complaint that Ms Bronnimann caused the costs relating to this has no merit, I hold.

v. That Ms Weck-Clunie needed to file in the Authority to get some response in the matter even if she did not know the principles that applied in law as to whom her correct employer was. Her approach to this was the cause for early delays. Because she did not initially cite Ms Bronnimann and there was confusion about the involvement of the members of the group, she could not expect Ms Bronnimann to accept full liability. Once the dimensions of the problem became clearer each person in the group personally did make a reasonable offer to settle (21 February). That offer was made in clear terms and was capable of consideration, I hold. It did result in a response from Ms Weck-Clunie.

vi. That Ms Weck-Clunie is not claiming the costs associated with citing the correct name of the employer and the costs associated with the filing of the employment relationship problem.

vii. That the parties have to bear their own costs for mediation as a matter of public policy. It is not clear from Ms Bronnimann's summary of costs whether or not mediation has been included or not.

viii. That Ms Weck-Clunie should be able to enjoy the fruits of her success. Given she was entitled to be paid, and should have been paid, her remedy was always going to be at a much lower level having regard to all her claims and the approach to the statement of problem, this is especially so when the employment relationship problem had more to with her getting paid her wages and this could have been dealt with much more cheaply if Ms Weck-Clunie had cited Ms Bronnimann from the start, focussed the real issue on the wage claim and made a much more pragmatic decision on pursuing her more risky claims for personal grievance. Thus she is responsible for the erosion of the use of her own money by failing to accept a reasonable settlement offer, I hold.

16. As Ms Weck-Clunie could have reasonably accepted the *Calderbank* offer this means that it is open to the Authority to decide: (i) to reduce the daily tariff; or (ii) not to award costs to Ms Weck-Clunie or (iii) make an award to Ms Bronnimann to contribute to her costs; see *Jaques v Annandale Logistics Ltd* [2011] NZERA Auckland 207 applied.

17. I have decided not to award costs to Ms Weck-Clunie that would otherwise apply because Ms Weck-Clunie was not fully successful on all her claims and the claims dismissed did involve a portion of the time. I have also considered the *Calderbank* offer. I have decided not to award costs to Ms Bronnimann because her costs have not been properly itemised and may include mediation. She represented herself at the investigation meeting. She failed to come forward earlier when it was clear that personal liability underpinned Ms Weck-Clunie's claim and I hold her involvement put Ms Weck-Clunie unnecessarily to some of the costs in the matter.

18. I hold that all the parties are to bear their own costs.

19. I have to say that this is an entirely troublesome situation because Ms Weck-Clunie did not accept an entirely reasonable offer to settle given the risks in regard to her claims. Her failure to accept the reasonable offer meant that she put at risk her entitlement to costs.

**Authority's order on costs**

20. That costs are to lie where they fall.

P R Stapp
Member of the Authority