IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2014] NZEmpC 28
CRC 33/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	HARVEY NORMAN STORES (NZ) PTY LIMITED Plaintiff
AND	KELVIN BOULT Defendant

Hearing: on the papers - submissions received 9 August 2013

Appearances: Blair Edwards, counsel for the plaintiff
no appearance for the defendant

Judgment: 26 February 2014

JUDGMENT OF JUDGE A A COUCH

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[1] This judgment decides a non de novo challenge to a costs determination of the Employment Relations Authority.

[2] The defendant was employed by the plaintiff as a computer repair technician at its Ashburton store until his dismissal for redundancy in September 2009. In 2011, the defendant commenced proceedings in the Authority alleging, amongst other things, unjustifiable dismissal. That claim was dismissed by the Authority[1] which subsequently issued a costs determination.[2] The defendant was ordered to pay the plaintiff $3,500 for costs and $1,556 for disbursements.

[1] [2012] NZERA Christchurch 96.
[2] [2012] NZERA Christchurch 173.

[3] The plaintiff challenges the costs aspect of that determination, which was based on the daily rate of $3,500 currently applied by the Authority. The plaintiff's claim is that the Authority erred in law by failing to give sufficient weight to:

(a) an offer of settlement without prejudice except as to costs made prior to the Authority's investigation meeting; and

(b) "the unnecessary costs incurred by the plaintiff as a result of the defendant's frivolous claims".

[4] The proceedings in the Court were commenced in September 2012. No statement of defence was filed but it was not until March 2013 that proof of service was provided. Subsequently, the advocate who had represented the defendant before the Authority informed the Registrar of the Court that the defendant would not be taking any part in the proceeding. Although that position was reached in March 2013, the plaintiff took no further steps until prompted by the Court. On 8 July 2013, I issued a minute in which I said:

> [5] If the plaintiff wishes to seek judgment, affidavit evidence of any facts relied on and a memorandum of submissions must be filed by **Friday 9 August 2013**. The matter will then be decided on the papers. Any claim for costs will be addressed at the same time.

[5] Mr Edwards then provided a memorandum of submissions and an affidavit of Ms Van Niekirk, the plaintiff's Human Resources Manager, in support.

Offer of settlement without prejudice as to costs

[6] The defendant lodged his statement of problem with the Authority on 30 June 2011. The plaintiff has not provided a copy of that statement to the Court but Ms Van Niekirk details the remedies sought which totalled about $45,000.

[7] On 3 November 2011, Mr Edwards wrote to the defendant's representative, Kevin Murray, making an offer in full and final settlement of all the defendant's claims. The offer was of $750 compensation and a contribution of $250 to costs.

The offer was expressed to be open for 21 days and was made "without prejudice except as to costs". Such offers are often referred to as *Calderbank* offers.[3]

[8] The defendant did not accept that offer and, in the Authority's substantive determination, all of his claims were rejected. In its costs determination, the Authority described the offer as follows:

> [12] The *Calderbank* offer to the applicant was made at an early stage in the proceedings before the applicant was required to commence preparation for an investigation meeting. It was a clear and unambiguous offer in full and final settlement. The offer remained open for three weeks which was adequate time for the applicant to reflect on the strength of the case and likely outcome and the cost of proceeding further. The applicant ultimately failed in his application. Had he accepted the offer further preparation for, and the cost of attendance at, the investigation meeting would have been avoided for both parties.
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> [13] I conclude that the *Calderbank* offer was a valid offer and I take it into account in exercising my discretion as to costs. I find that the usual principle that costs follow the event does not apply because of the valid *Calderbank* offer.

[9] I agree with this assessment.

[10] In describing the manner in which it should exercise its discretion to award costs, the Authority referred to the principles summarised in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz.*[4] In that judgment, the full Court referred to the summary of principles applicable to the Court provided in *Okeby v Computer Associates (NZ) Ltd*[5] and said:

> [44] The costs principles which the Authority now applies are not necessarily as comprehensive or as prescriptive as those set out in *Okeby* and similar earlier judgments. The Authority is able to set its own procedure and has, since its inception, held to some basic tenets when considering costs. These include:
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> - There is a discretion as to whether costs would be awarded and what amount.
> - The discretion is to be exercised in accordance with principle and not arbitrarily.
> - The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

[3] See *Calderbank v Calderbank* [1975] 3 All ER 333(CA).
[4] [2005] ERNZ 808 at [44].
[5] [1994] 1 ERNZ 613.

- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- It is open to the Authority consider whether all or any of the parties costs were unnecessary or unreasonable.
- That costs generally follow the event.
- That without prejudice offers can be taken into account.
- That awards will be modest.
- That frequently costs are judged against a notional daily rate.
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[45] We hold that these principles are appropriate to the Authority and consistent with its functions and powers. They do not limit its discretion and proper application of them should ensure that each case is considered in the light of its own circumstances. While these general principles are applicable also to the Court, the Authority is not bound by the *Binnie* principles[6] which extend the range of costs which the Court may award beyond what could reasonably be labelled "modest."

[11] The Authority then said:

[7] One of those principles is that costs generally follow the event; that is, the successful party can generally expect a modest contribution to its costs from the unsuccessful party.

[8] However, if an applicant rejects a reasonable offer to settle before the hearing (*Calderbank* offer) for an amount more than what the applicant receives after the decision is made the respondent can usually expect the unsuccessful applicant to contribute to its costs.

[9] The Employment Court has considered the effect of a *Calderbank* offer in *Ogilvy & Mather v Darroch* [1993] 2 ERNZ 943:

> As is well known, it is an offer, invariably in writing made by one party to the other and expressed to be without prejudice except as to costs. It is an offer to compromise the action by some payment. Unless the offer is accepted, the letter is intended to be produced after the Court has dealt with the merits of the case but before it has dealt with costs. It is intended to induce the Court by this means to exercise its discretion against granting the plaintiff any costs if it has recovered less by proceeding with the case than it could have by accepting the offer.

[6] This is a reference to *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA).

> [10] The Judge in *Ogilvy* observed that *Calderbank* offers do not grant automatic protection in the event of lesser recovery but are a discretionary factor which can be taken into account in determining costs.

[12] Later, the Authority noted:

> [14] In the Court of Appeal case of *Health Waikato v Elmsley* [2004] 1 ERNZ 172 the Court commented that:
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> > *....we think that…steely responses by the Courts where the plaintiffs do not beat* Calderbank *offers would be in the broader public interest.*

[13] In these passages, the Authority has correctly directed itself to the principles applicable to the exercise of its discretion to award costs generally and where a valid *Calderbank* offer has been rejected. The only possible exception is the Authority member's conclusion at [13] of the determination that "I find that the usual principle that costs follow the event does not apply because of the valid *Calderbank* offer." Had the defendant been successful to an extent but obtained less than the amount offered, that conclusion would be sound. Where, as in this case, the applicant has been entirely unsuccessful, the conclusion does not follow because the event favours the respondent. I note, however, that this possible error did not affect the outcome.

[14] In the opening passage of his submissions, Mr Edwards emphasised that the plaintiff's challenge is non de novo and relies on the proposition that the Authority erred in law.

[15] In the balance of his submissions on this point, Mr Edwards referred me to the jurisprudence developed in the Court of Appeal regarding *Calderbank* offers in the employment jurisdiction.[7] Each of these decisions emphasises the public interest in settling litigation and the role that *Calderbank* offers can play in encouraging settlement.

[16] Mr Edwards also referred me to two determinations of the Authority in which the unreasonable rejection of a *Calderbank* offer had been taken into account by

[7] These included *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601 3 NZLR 276 (CA), *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 (CA) and the *Health Waikato* case referred to by the Authority.

awarding costs in excess of the daily rate. In particular, Mr Edwards relied on the following passage in *Hunt v Hilton Haulage Transport Ltd*:[8]

> [19] But in any event, the existence of a legitimate *Calderbank* offer requires the Authority, at law, to take a more "steely" approach. The whole point of making *Calderbank* offers is to try to encourage settlement and the Courts have long held that where a *Calderbank* offer is not accepted (as in this case) and the recipient of that offer subsequently does less well than they would have done if they had accepted the *Calderbank* offer, then that fact should sound in costs.
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> [20] In those circumstances then, it is difficult to escape the conclusion that the claim of indemnity costs from the effective expiry date of the *Calderbank* offer is the appropriate basis on which to fix costs.

[17] While I do not question the statements of principle made in the decisions of the Court of Appeal, they should be applied with caution in the Authority. As the full Court explained in the *PBO* decision cited earlier,[9] the principles enunciated by the Court of Appeal in cases such as *Binnie* bind the Court but not the Authority. While the Authority may properly take the unreasonable rejection of a *Calderbank* offer into account in fixing costs, it would be wrong to say that the Authority is required, as a matter of law, to do so by increasing the award of costs above the daily rate. It will always be a matter of discretion.

[18] Had this been a de novo challenge, it would be open for the Court to substitute its view of an appropriate award of costs for that of the Authority. As this is a non de novo challenge and it is advanced solely on the basis of error of law, however, the plaintiff can only succeed on this point if I am satisfied that the manner in which the Authority exercised its discretion was so unreasonable as to amount to an error of law. On the material before me, I am not satisfied that is so.

"Unnecessary costs"

[19] The second ground of challenge is that the defendant pursued claims which were hopeless, causing the plaintiff unnecessary cost in responding to them. As noted earlier, the plaintiff did not provide the Court with a copy of the statement of

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[8] [2013] NZERA Christchurch 44.
[9] See para [10] above and the *PBO* decision at [45].

problem. This leaves the substantive determination and Ms Van Niekirk's affidavit as the only sources of evidence on this issue.

[20] In its substantive determination, the Authority referred only briefly to claims other than the personal grievance alleging unjustifiable dismissal. In para [1], the Authority referred to the defendant lodging "a statement of problem setting out various complaints arising from [his] employment." In para [2], the Authority referred to a record of settlement of all matters arising out of the employment relationship up to 17 April 2009, some five months prior to the defendant's dismissal. This led the Authority member to say "Accordingly, I will not refer to the earlier matters canvassed in the present statement of problem." In para [3], the Authority recorded "Mr Murray near the end of the investigation meeting confirmed that the only matter for determination by the Authority is Mr Boult's claim of unjustified dismissal."

[21] In her affidavit, Ms Van Niekirk said:

> 3.3 From the outset, it was clear that many of Kelvin's claims were frivolous and/or lacked merit due to either being:
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> a. the subject of a mediated agreement; or
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> b. raised outside of the statutory time limit of 90 days; or
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> c. a breach of privacy claim that did not fall within the Authority's jurisdiction.

[22] Later, she referred again to claims which had been settled and went on to say:

> 4.9 Kelvin also included a claim for a redundancy compensation payment, which had already been paid to him on the termination of his employment.

[23] Ms Van Niekirk then referred to several claims being withdrawn and said:

> 4.11 However, by this stage, Harvey Norman had already incurred costs associated with the preparation of pleadings and evidence in reply in relation to those claims that did not relate to the unjustified dismissal claim. Those costs were clearly incurred unnecessarily and were a result of Kelvin's unwarranted and unreasonable conduct.

[24] No further detail of the claims said to be "frivolous" was provided, nor was there any evidence of the amount of costs said to have been incurred unnecessarily in

responding to these claims. The most I can take from the material before me is that the defendant pursued several claims which, by withdrawing them in the course of the investigation meeting, he acknowledged were unmeritorious. As a result, the plaintiff incurred some costs unnecessarily. In its costs determination, the Authority was clearly aware of this issue as it acknowledged Mr Edwards' submission on the point:[10]

> The statement of problem raised a number of *frivolous* claims, including those that were out of time and some that were subject to a settlement agreement. Nonetheless the claims required formal response but were withdrawn after the respondent had prepared pleadings and evidence in response to the claims

[25] As I have concluded earlier, the Authority properly directed itself to the principles applicable to the exercise of its discretion to award costs, in particular the statement of those principles in the *PBO* decision. Applying those principles, it cannot be said that, as a matter of law, the Authority was bound to make an increased award of costs to the plaintiff because some of its actual costs had been unnecessarily incurred. Equally, given the vague and unquantified nature of the evidence before the Court, it is impossible to say that the Authority's determination was so unreasonable in this regard as to amount to an error of law.

Conclusion

[26] The plaintiff's challenge is unsuccessful. As the defendant did not participate in the proceeding before the Court, there will be no order as to costs.

A A Couch
Judge

Signed at 8.45 am on 26 February 2014

[10] At [3].