IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 31
ARC 68/11

IN THE MATTER OF	a challenge to a costs determination of the Employment Relations Authority
BETWEEN	ALAN MAYNE Plaintiff
AND	POLYCHEM MARKETING LIMITED Defendant

Hearing:	On the papers filed on 4, 18, 26 November and 2 December 2013
Appearances:	Mr Patterson and Ms Halloran, counsel for the plaintiff Mr Hannan and Ms Simpson, counsel for the defendant
Judgment:	26 February 2014

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] This is a de novo challenge to a costs determination of the Employment Relations Authority,[1] awarding the defendant the sum of $14,000 by way of contribution to its costs. The parties agreed to the challenge being dealt with on the papers.

[2] The plaintiff submits that the parties entered into a binding agreement, with the plaintiff agreeing to make a contribution of $5,000 to the defendant's costs in the Authority. It is said that any award made in the defendant's favour ought to reflect that agreement. The defendant submits that while an offer to settle costs was made it lapsed prior to acceptance.

[3] Because this is a challenge to a costs determination of the Authority, the starting point is cl 15 of sch 2 to the Employment Relations Act 2000 (the Act). It

[1] [2011] NZERA Auckland 460.

provides that the Authority may order any party to a matter to pay to any other party such costs and expenses "as the Authority thinks reasonable". The Authority must exercise its discretion judicially and in accordance with principle.

[4] It is common ground that the parties sought to agree a position in relation to costs following the Authority's investigation and substantive determination, as they had been encouraged to do. This is reflected in a chain of correspondence, the terms of which are pivotal to a consideration of the parties' respective positions on the challenge.

[5] On 26 August 2011 counsel for the defendant, Mr Hannan, wrote to counsel for the plaintiff, Mr Patterson, advising that costs were sought against the plaintiff and that:

> It is prepared to agree costs on the basis of what would likely be the typical tariff applicable in the Authority, say $2,500 per hearing day. On that basis it would accept agreed costs of $5,000. In fact when I review the statistics for costs awards in the Authority for hearings over 1 day $5,000 might be a bit light.
>
> If we have to apply we will certainly ask for costs closer to a solicitor/client basis and will be pointing out that (1) there was a Calderbank letter 7 February 2011 and (2) the applicants failed to point out in their SoP or evidence that Polychem Marketing did not exist prior to 1982 so could not have employed the 2 ladies, while Mr Mayne's position was in serious doubt as to whether he was ever employed by Polychem Marketing and generally as to his credibility, given the omission to get this vital fact correct.
>
> …
>
> *Please let me have your response by 5.00pm next Monday 29 August 2011*.
>
> (Emphasis added)

[6] Mr Patterson replied to Mr Hannan's email the same day seeking an extension of time to take instructions. Mr Hannan immediately responded:

> 12 noon Tuesday [30 August] then. We need time to prepare submissions if we can't agree.

[7] Mr Patterson responded: "Thanks. May have an answer on Monday".

[8] On Sunday 28 August 2011 Mr Patterson wrote again to Mr Hannan. He said:

> I have provided Alan Mayne with a copy of the ERA determination and given him some advice regarding costs. I am expecting that I will need to meet with him. *Perhaps, you would be willing to agree to having the time for seeking costs extended by consent as the parties are constructively engaged in discussions attempting to resolve the issue of costs.* Do you agree to that approach? If so I would propose sending an email to [the Authority] seeking the extension which you could indicate your consent and agreement to by way of a reply email. (Emphasis added)

[9] On 29 August 2011 Mr Hannan wrote to Mr Patterson and confirmed "agreement to extend one week".

[10] Mr Patterson then advised the Authority that the parties were attempting to resolve costs by agreement and sought "an extension to enable the [defendant] to make any application by no later than 4 PM Tuesday, 6 September 2011". Mr Hannan was copied into the email to the Authority and he forwarded confirmation that the defendant "agrees to this extension of time".

[11] Further correspondence between counsel ensued. On 2 September 2011 Mr Patterson wrote to Mr Hannan in the following terms:

> Alan Mayne has accepted my advice that on usual costs principles your client, being the successful party, is entitled to an award of costs as a contribution towards its reasonable costs which it has incurred. I do not know what your client's actual costs are. However, there will be no argument that $5,000 would represent a reasonable contribution in the circumstances.
>
> Alan Mayne is still considering whether to challenge the determination. He does not wish to prejudice [his] position regarding costs. Your offer was not made in terms that he would waive his right to challenge the determination.

[12] Mr Patterson proposed that the Authority be advised that the defendant sought a costs contribution of $5,000 and that the plaintiff would not oppose such a costs determination being made in the defendant's favour.

[13] Mr Hannan responded to this proposal by advising that the offer to settle at $5,000 had lapsed and that, given the indication that Mr Mayne might challenge the Authority's substantive determination, he would need to take further instructions.

[14] The plaintiff submits that there was an agreement that he would make a contribution to costs of $5,000. The defendant contends that there was no such agreement. Rather, the defendant submits that he only agreed to steps being taken to seek an extension of time for lodging an application for costs in the Authority.

[15] Mr Patterson submits that the offer remained open as it was couched as a matter for discussion and not flagged as only open for acceptance for a limited time. However, that is at odds with the plain wording of the offer itself, which expressly stated that it was open for acceptance until 5:00 pm on Monday 29 August 2011. It is evident that the offer was taken in this way given the subsequent request for an extension - which the defendant agreed to – until 12.00 noon on Tuesday 30 August. As counsel for the defendant point out, there would be no need to request an extension, or for an extension to be granted, if the offer remained indefinitely open for acceptance.

[16] It is clear that the offer was not accepted by the stated cut-off time, namely 12.00 noon on 30 August. Mr Patterson submits that it was further extended and that the offer was subsequently accepted on 2 September. I do not accept this submission. It is clear from the documentation that the extension being discussed between counsel in the email traffic of 29 and 30 August was directed at the timeframe for seeking costs in the Authority, not the timeframe for acceptance of the offer of settlement. This is readily apparent from the wording of Mr Patterson's email to the Authority dated 30 August, which expressly referred to an extension of time to enable the defendant to "make any application" and Mr Hannan's response, noting his agreement to "this" extension. Costs submissions were subsequently filed by the defendant within the extended timeframe for doing so.

[17] It is apparent that some time after the Authority had issued its costs determination there was an agreement by the defendant that $9,000 of the $14,000 awarded in its favour by the Authority would be retained in the plaintiff's solicitor's trust account pending the outcome of the challenge. In these circumstances the payment of the balance of $5,000 could not constitute any sort of concession on the defendant's behalf.

[18] There was no agreement to a costs contribution of $5,000 because the plaintiff did not accept the offer within the extended timeframe for doing so, namely by 12.00 noon on Tuesday 29 August 2011. As at the date he purported to accept the offer (2 September 2011) it had lapsed. Neither party otherwise takes issue with the Authority's determination, ordering the plaintiff to pay a contribution of $14,000 to the defendant's costs.

[19] The challenge is dismissed. The plaintiff is ordered to pay the defendant the sum of $14,000 by way of contribution to its costs. The Authority's determination is formally set aside and this judgment stands in its place.

[20] If costs in this Court cannot be agreed between the parties they may be the subject of an exchange of memoranda, with the defendant filing and serving any memorandum and supporting documentation within 20 days of the date of this judgment, and the plaintiff filing and serving within a further 20 days.

Christina Inglis
Judge

Judgment signed at 4.45 pm on 26 February 2014