IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 41
5293329

	BETWEEN	CHAD OLSEN AND LEANN JACKSON Applicants
	AND	TE ONE A MARA LTD AND CHARLIE AND CHRISSY PEDERSEN Respondents

Member of Authority:	P R Stapp
Representatives:	Jills Angus Burney Counsel for Applicants Michael Quigg Counsel for Respondents
Submissions received:	By 2 March 2012 on the papers
Determination:	12 April 2012

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] In a determination dated 3 November 2011[1] the Authority dismissed all Ms Jackson's claims. Mr Olsen's claim for unjustified disadvantage actions relating to three warnings and unjustified dismissal were upheld. Costs were reserved. The parties have since then not settled costs between them, and they have filed and exchanged memoranda for a determination.

[2] Both applicants in the Authority were represented by the same Counsel. The matter involved a timetable for preparation before the investigation meeting, and the investigation meeting lasted two days and included oral submissions made by Mr Quigg. This was followed up with an exchange of memoranda later because Ms Angus Burney wanted to make written submissions. The commonly adopted

[1] [2011] NZERA Wellington 170

approach to costs in the Authority is by a notional daily tariff. The notional daily tariff of $3,500 per day is the starting point.

[3] The employment relationship problem was filed in the names of both applicants: Ms Jackson and Mr Olsen. Ms Jackson was wholly unsuccessful and that rested on the nature of her relationship with the respondents. The rest of the case primarily rested on Mr Olsen's employment relationship and the issues involved with him.

[4] Ms Jackson's father had a prior involvement as the applicants' representative during the relationship with the respondents, but without filing any application in the Authority. The application was filed in the Authority later by Ms Angus Burney.

[5] Te One Mara Ltd and Mr and Mrs Pedersen were represented by Mr Quigg throughout the Authority's investigation.

Issues

[6] Principles relating to costs are set out in full in the Employment Court's judgment *PBO Ltd (formerly Rush Security) v Da Cruz*[2]. I do not need to repeat the principles, except to record I have been guided by those principles in the assessment of costs which follow.

[7] I now must consider which party gets costs and how much?

Determination

[8] Before the matter on costs was put before the Authority the applicants asked the respondents for the recovery of full costs. This was I hold entirely unrealistic. This is because:

a. Ms Jackson was entirely unsuccessful in her claim before the Authority.

[2] [2005] ERNZ 808

b. On 29 March 2011 the respondents' served a Calderbank letter on the applicants on a without prejudice basis save for costs at the end of the Authority's investigation. The offer was made before the Authority's timetable for preparation for the investigation meeting and started on 6 May 2011. The letter was sent immediately after the Authority's case management telephone conference. That means there was plenty of time for notice and consideration of the offer by both applicants.

[9] In trying to settle costs after the Authority's determination the applicants requested full costs. In response the respondents asked for full recovery of costs also. This seems to be based on the existence of a Calderbank letter. On that basis there was some reason for the respondent to approach the matter like this. However, the respondents must have known that the costs regime in the Authority is based on a tariff arrangement and to apply for full costs would be outside that approach. I accept that there is a question about the level of costs appropriate for the matter given the respondents' partial success in defending the claims involving Ms Jackson compared to Mr Olsen's successful outcome.

Considerations

[10] I consider that the notional tariff has to be $7,000 for the two days of investigation meeting, and the costs need to be proportioned between the parties because of the mixed outcome.

[11] The Calderbank offer was made to both applicants before more costs were expended and involved an offer of $15,000 to them both made in full and final settlement, and the offer remained open until 6 April 2011. The offer required acceptance from both applicants and this was reasonable given that they both are joint parties in the employment relationship problem.

[12] The respondent has been better placed to claim costs than the applicants. This is because:

a. The applicants declined to accept an offer made to settle before the Authority's investigation and save costs.

b. The Authority's award for Mr Olsen's success was slightly less than the settlement offer. In fact the offer was so closely pitched to the final outcome and was a significant sum of money, but the applicants continued with the risk of the Authority's determination being less than the sum offered.

c. Ms Jackson's case was successfully defended by the respondents.

d. The full merits of the case were heard because the applicants were joint parties in the employment relationship problem. All parties agreed to the arrangement for a full hearing.

[13] The applicants' failure to accept the offer to settle was wholly risky, I hold.

[14] Mr Olsen's issues dominated the main part of the investigation meeting in the face of a Calderbank offer, and Ms Jackson has to account for her share in the issues. There was still a need for some questions to be put to Ms Jackson in the event that she was an employee. However the evidence clearly indicated that she was not going to be successful on that matter. Her continued involvement in the matter added to the length of the investigation.

[15] I am not about to compensate Ms Jackson's father's costs for an involvement prior to the filing of the statement of problem in the Authority by Ms Angus Burney. This is because they were matters in the parties' relationship and they have to meet their own costs in the management of the relationship even if in dispute. In any event the tariff applies to cover any costs such as this.

[16] There was no cause of action for any remedy relating to the second respondents except for their involvement in the factual background. Fortunately for the applicants Te One Mara Limited and Mr and Mrs Pedersen were represented by the same person throughout the Authority's investigation. Much of the preparation involved Mr and Mrs Pedersen in the employment relationship and their relationship in Te One Mara Limited. Therefore there should not be much in the way of separate

costs for Te One Mara Limited and Mr and Mrs Pedersen as there were no remedies against them personally.

[17] Mr Olsen was successful, but must have gone into the investigation knowing that an outcome could be less than the settlement offer and with the risk of Ms Jackson's claims, and as such, he has put his own position at risk because of the existence of the Calderbank offer. His success would normally mean that costs follow the event for him. Save for the offer and outcome being so close he cannot expect any costs and he must count himself lucky not to have to pay a sum himself, given the Calderbank letter. I have limited his exposure because he had a genuine claim, and the case was brought by both parties jointly where one was unsuccessful. For this reason the tariff has remained at the level used for a two day investigation. Given the number of witnesses and the parties' agreement for a two day investigation meeting there is no question that the two days were unnecessary. The respondents at least tried to minimize any further costs by having submissions made orally at the hearing and they did accept that they may not have got the process right for Mr Olsen. This may explain the significant offer of money made at the time and recognising the risk.

[18] On another matter, there has been a reference made to and copies of memoranda for a compliance order in the Authority from Ms Angus Burney. This documentation came in about the same time as the costs memoranda and Ms Angus Burney was informed that any compliance required a separate application. In any event nothing more came of the matter. It was not pursued formally. However there has been a reference made to it in regard to costs by Ms Angus Burney. I have put this entirely to one side. First any such application would have been a separate matter for any costs once it had been filed. Second no costs for any involvement in the Authority have been incurred because it was not properly filed and disposed of. The respondents can not be expected to contribute towards that, I hold.

Orders of the Authority

[19] Ms Jackson is to pay Te One A Mara Ltd $3,500 contribution to costs. Costs are to lie where they fall between Mr Olsen and Te One A Mara Ltd.

P R Stapp
Member of the Employment Relations Authority