

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 446
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BETWEEN KATHLEEN CRONIN-LAMPE
 and RONALD CRONIN-
 LAMPE
 Applicant

A N D BOARD OF TRUSTEES OF
 MELVILLE HIGH SCHOOL
 Respondent

Member of Authority: James Crichton

Representatives: Mary Wilson, Counsel for Applicants
 Paul White, Counsel for Respondent

Submissions Received: 13 September 2013 from Applicants
 5 July 2013 from Respondent

Date of Determination: 30 September 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive determinations

[1] The Authority decided Mr and Mrs Cronin-Lampe's claim in two separate determinations issued as [2013] NZERA Auckland 162 and [2013] NZERA Auckland 249.

[2] The effect of those two determinations rejected Mr and Mrs Cronin-Lampe's claims in their entirety and found for Melville High School in each case.

[3] Costs in both determinations were reserved.

The claim for costs

[4] Melville High School seeks a contribution to its costs of \$26,776 being an award of costs of \$15,000 based on the notional daily rate and indemnity costs of \$11,776 from 5 February 2013, the date of the second (and more substantial) *Calderbank* offer made by Melville High School, but rejected by Mr and Mrs Cronin-Lampe.

The response

[5] Submissions for Mr and Mrs Cronin-Lampe make the point that they are in such dire financial circumstances that they have had to request the assistance of family to meet their mortgage commitments and that they both remain seriously unwell. It is said on their behalf that “*they do not have the means to pay an award of costs*”.

[6] The Authority is also urged to conclude that the rejection of the two *Calderbank* letters by Mr and Mrs Cronin-Lampe was “*not unreasonable*” and therefore presumably, by implication, the Authority is invited not to apply the usual rule in respect of *Calderbank* offers in a costs setting environment.

[7] Moreover, Mr and Mrs Cronin-Lampe maintain that the costs charged to Melville High School were “*unreasonable*”, partly because some of the disbursements were not appropriate and because the bulk of the fees incurred by the respondent were met by its insurer.

[8] Finally, submissions for Mr and Mrs Cronin-Lampe reject the respondent’s contention that indemnity costs ought to apply in respect of an portion of the contribution claimed against Mr and Mrs Cronin-Lampe.

Discussion

[9] Both parties have referred to the leading case on costs fixing in the Authority: *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. The principles set out in that decision of the Full Bench of the Employment Court are well known and need not be recited in their totality here.

[10] However, some principles do need to be referred to. The first is the very longstanding rule that costs typically follow the event so in a case such as this, where

one party has been completely successful, the normal rule would be that the other party is obligated to make a contribution to the successful party's costs.

[11] Moreover, the existence of two *Calderbank* offers, both of them rejected by the unsuccessful parties, would ordinarily be taken into account as well because the whole purpose of making a *Calderbank* offer is to give the author of the offer the right to put that in front of the Court or Tribunal in the event that the author is successful, or at least more successful than the recipient of the letter. In the present case of course, the letters were written for Melville High School which was successful and those offers were rejected in their entirety by Mr and Mrs Cronin-Lampe.

[12] It is also well known that the Authority will take account of the financial circumstances of the party who would ordinarily be asked to make a contribution to the other's costs. In the present case, not only is there a serious financial vulnerability but also medical issues which make the prospect of an immediate return to normality (and amongst other things income generation), problematical.

[13] A particular factor in this case, which was a distressing and upsetting case for all concerned, was the Authority's earnest attempts to encourage the parties to resolve their differences by agreement. On a number of occasions, including at the beginning of the investigation meeting, at the end of it, and before submissions closing the case were due, the Authority took the trouble to emphasise to the parties the risks that each of them ran and tried to encourage them to agree a basis on which the matter could be withdrawn from the Authority.

[14] That was not because the Authority was not anxious to decide the matter, but rather because of the conviction that the best outcome for both parties was a negotiated settlement rather than a determination of the Authority.

[15] In particular, well after the hearing had concluded, the Authority reduced to writing its assessment of the risks faced by both parties and sought by that means to promote settlement by agreement. The Authority took the extraordinary step of making those observations not once but twice, the first on 8 March 2013 and the second on 19 April 2013 having previously earnestly encouraged the parties to negotiate with a view to bringing matters to a conclusion by agreement.

[16] It is apparent from the submissions now before the Authority in respect of the fixing of costs that Melville High School anyway took the Authority's observations

just referred to, to heart. Its second *Calderbank* offer filed with Mr and Mrs Cronin-Lampe on 5 February 2013 is, in anybody's terms, a significant offer and the fact that it was rejected by Mr and Mrs Cronin-Lampe can only be a source of considerable regret, not only to them but also to Melville High School which must now prepare to defend its position in a *de novo* hearing in the Employment Court.

[17] Of course, the benefit of a settlement on agreed terms is not just about the money, or at least it should not be just about the money. It must equally be about certainty and the bringing to an end of the dispute between the protagonists. The fact that the parties have not been able to come to terms means not only that Mr and Mrs Cronin-Lampe have been deprived of capital which they no doubt could have made good use of, but also means that the dispute continues and both parties now have to prepare themselves for the matter to be heard again in the Employment Court.

[18] In the earlier Authority decision of *Graham v. Airways Corporation of New Zealand Ltd* (ERA Auckland AA39/04, 28 January 2004), where the former Chief of the Authority, Member Dumbleton, postulated three steps in evaluating applications for costs. The first was the identification of the actual legal costs and expenses of the successful party, the second was a decision about whether those costs were reasonable, and finally a determination of what proportion of those costs ought to be met by the other side.

[19] As to the first, the amount charged to Melville High School is disclosed to the Authority and given the importance of the matter to the School and the extent of the claim and the factual basis for it, the Authority is satisfied that the totality of the fees charges is not unreasonable.

[20] However, the submissions for Mr and Mrs Cronin-Lampe make the important observation that the bulk of those fees was met by Melville High School's insurer and so the School technically is not entirely out of pocket. But that is not the end of the matter because the insurer has a right of subrogation.

[21] Submissions for Melville High School quite properly draw the Authority's attention to the fact that that right of subrogation entitles the insurer to seek a contribution to its costs and that the apportionment of any costs won will be a matter for the insurer to discuss with its client school.

[22] Mr and Mrs Cronin-Lampe maintain, more by implication than by explicit submission, that the fact that the insurer has met the bulk of the fees charged to the School ought to be weighed by the Authority in its costs fixing role.

[23] While considering the reasonableness of the fees charged to Melville High School, the Authority must observe that while the arguments against some of the disbursements included may have merit, the suggestion that is made on behalf of Mr and Mrs Cronin-Lampe that full indemnity costs are somehow inappropriate, cannot be allowed to stand without comment.

[24] In circumstances where there was not one but two *Calderbank* letters offering settlement sums to Mr and Mrs Cronin-Lampe, the approach taken by Melville High School to propose that full indemnity costs be recovered against Mr and Mrs Cronin-Lampe from the date of the second and more generous *Calderbank* offer, is certainly not inappropriate and is an approach regularly adopted by the Authority in responding to circumstances where parties have refused appropriate settlement offers. It is an entirely regular device of the Authority in fixing costs where there is a *Calderbank* letter that is relevant, to apply full indemnity costs from the date the offer was first made.

[25] As the Authority has already noted in respect of the *Calderbank* offers, the whole point about making a *Calderbank* offer is first to try to get settlement on the terms proposed (which for all parties brings the matter to a conclusion), but second to give a right to put the existence of that *Calderbank* letter before the Court or Tribunal in a costs setting environment.

[26] And of course, as Melville High School observed in its submissions, there is ample judicial precedent for the view that a “steely” approach to the law on *Calderbank* offers is to be applied.

[27] Furthermore, Melville High School reminds the Authority that its second (and more generous) *Calderbank* offer was issued:

... in the context of the Authority having given a clear direction that it would be best that the matter be settled, and having highlighted the best possible outcome the applicants could receive. Despite this clear direction from the Authority, the applicants persisted with a claim which ultimately failed.

[28] So on the face of it, the normal rules of costs fixing would have it that with the proffering of a generous *Calderbank* offer which was then rejected and with that *Calderbank* offer being made at least in part in response to a very clear intimation by the Authority that the parties should be looking to resolve the matter on their own terms, Mr and Mrs Cronin-Lampe's failure to pick up the offer made to them by Melville High School ought to sound in costs.

[29] But there is the issue of Mr and Mrs Cronin-Lampe's significant unwellness, which is continuing, and their evident inability to in any way satisfy any award made against them.

[30] Moreover, the involvement of a third party (the insurer) is suggested as creating another reason for the Authority to exercise its discretion and not make a costs award against Mr and Mrs Cronin-Lampe or minimise any award made.

[31] In that context, the Authority is reminded of the observation it made in the second substantive determination to the effect that although costs were reserved, the School was encouraged to not seek a contribution to costs given Mr and Mrs Cronin-Lampe's health status and their inability to work.

[32] There is one final aspect that the Authority desires to comment on before determining what percentage (if any) of the successful party's reasonably incurred costs ought to be met by the unsuccessful party. It is the question of whether the impecunious nature of the applicants in this matter ought to be a factor now when costs are fixed, or at a later date if there is an order for compliance sought in respect of the costs fixed earlier. In a recent decision of the Authority made by the former Chief of the Authority, Member Dumbleton, the Authority drew a distinction of the sort just referred to. The Authority made a significant costs award against an unsuccessful applicant despite strong evidence of financial pressure. The relevant passage is as follows:

*[36] Although not impecunious Mrs Glazeley does I expect have some limitations on her ability to pay, but that should be regarded as a matter going to the discretion of the Authority to award compliance later on, **if and when there arises an issue of enforcement in relation to the costs decision that the Authority should now make.** [emphasis added]*

Glazeley v. Oceania Group (NZ) Ltd [2013] NZERA Christchurch 67

Determination

[33] The Authority has an obligation to apply the law no matter how difficult that may seem. While the Authority has a discretion, that discretion must be informed by principle and it cannot simply be right that the Authority should abrogate legal rules simply because their consequences appear to cause hardship.

[34] That said, this is an unusual case where, notwithstanding the finding that the applicants were completely unsuccessful, the Authority was satisfied that the evidence it heard disclosed that the applicants were both seriously unwell.

[35] It is not part of the Authority's role to punish the unsuccessful litigant and the Authority did express its view that, given Mr and Mrs Cronin-Lampe's health and ability to earn income, the School might exercise its discretion in respect of seeking a contribution to its costs.

[36] In all the circumstances, the Authority is satisfied that this is one of the rare cases where costs should lie where they fall, that is, that in the peculiar circumstances of this case, Mr and Mrs Cronin-Lampe be not required to make any contribution to the costs incurred by the School in resisting Mr and Mrs Cronin-Lampe's various claims.

[37] However, it would be wrong for this decision to be interpreted as a licence for unsuccessful parties to be able to avoid the consequences of the law particularly in relation to *Calderbank* offers. This case and the decision that the Authority issues herein must be looked at on its own facts.

James Crichton
Member of the Employment Relations Authority