IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 246
5341239

	BETWEEN	DEAN MICHAEL COOK Applicant
	A N D	MAGNUMMAC LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Mark Henderson and Nicola Pointer, Counsel for Applicant Elizabeth Coats, Counsel for Respondent
Submissions Received:	20 September 2012 from Applicant and letter 18 October 2012 with additional disbursement 9 October 2012 from Respondent
Date of Determination:	8 November 2012

COSTS DETERMINATION OF THE AUTHORITY

A. The respondent is to pay the applicant $5950 for costs and $1174.89 for expenses.

[1] In my determination dated 30 August 2012 I found in favour of the applicant that he had personal grievances of unjustified disadvantage and that he was unjustifiably constructively dismissed. The applicant was awarded remedies and costs were reserved.

[2] The applicant and respondent were unable to reach agreement as to costs and submissions have now been received.

The applicant's submissions

[3] Mr Henderson refers to the leading Employment Court judgment on costs in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. Mr Henderson also refers to the three step process used by the Authority in *Graham v. Airways Corporation of New Zealand Ltd* [2004] 7 NZELC 97, 421 and adopts the process as his starting point.

[4] The applicant's actual costs are set out in the submissions as $18,250.00 exclusive of GST with disbursements of $1,218.64 which include the travel expenses for two witnesses. Additionally the Authority was advised of the hearing fee incurred by the applicant for the second day of hearing in the sum of $153.33.

[5] Mr Henderson's charge out rate is $300 per hour plus GST and disbursements and he submits that the time commitment and costs expended were reasonable as were the travel expenses claimed for two of the witnesses. The costs incurred in undertaking mediation are also claimed. Mr Henderson has identified these from the 9 June 2011 invoice attached to the submissions as $1,500 plus GST.

[6] Mr Henderson submits that the applicant is not personally registered for GST and therefore it is an assessable component of legal costs. Mr Henderson refers to the usual principle that costs should follow the event and submits that the factual background in this particular matter was detailed as were submissions.

[7] Mr Henderson also refers to *Calderbank* offers that were made. The offers commenced with an offer by the respondent on 5 November 2011 of $7,500. On 7 November 2011 the applicant made a without prejudice save as to costs offer to settle his personal grievance for a payment of $45,000. There was then a counter offer from the respondent in the sum of $10,000.

[8] The investigation meeting was on 29 and 30 November 2011 and these offers were made within the month leading up to that. Mr Henderson submits that the applicant's costs from the date of the offer were $11,326.53 which amount includes GST and disbursements and that a reasonable contribution to his costs prior to 7 November 2011 would be $5,000. A total is therefore claimed of $16,326.53.

[9] Mr Henderson submits that should full solicitor/client costs not be awarded from the date of the *Calderbank* offer then there should be an uplift in any event to

reflect that litigants have an economic means of limiting their exposure to the risk of loosing out in terms of costs on a strictly tariff basis.

The respondent's submissions

[10] Ms Coats accepts on behalf of the respondent the principle that costs should follow the event and that the respondent should make a contribution to the applicant's costs.

[11] Ms Coats submits that the applicant's approach to costs is misconceived because there is a heavy reliance on the approach taken in *Graham v. Airways Corporation* at the expense of some of the key principles in *Da Cruz.* She submits that costs in this case should be determined on the basis of a daily tariff in accordance with the Authority's usual principles and there is no basis to award increased or indemnity costs.

[12] Ms Coats submits that the starting point for the Authority's consideration of costs ought to be the principles outlined in *Da Cruz.* In terms of the *Calderbank* offer Ms Coats submits that the respondent made a *Calderbank* offer on 3 November 2011 of $7,500 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[13] On 4 November 2011 the applicant declined the respondent's *Calderbank* offer and proposed a counter offer of $45,000 stating a significant amount of which would need to be paid as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000. Later that same day Mr Henderson clarified that the amount to be paid as compensation would need to be agreed before settlement could occur in an email dated 4 November 2011 attached to the respondent's submissions.

[14] On 7 November 2011 the respondent made a further *Calderbank* proposal of $10,000 compensation under s.123 (1)(c)(i) of the Act but the respondent received no response to that proposal.

[15] Ms Coats submits that the applicant's settlement proposal was not sufficiently certain and clear to be a valid *Calderbank* proposal: *Health Waikato Ltd v. Van der Sluis* [1997] ERNZ 236. She submitted that the applicant's purported *Calderbank* offer did not specify how the proposal total amount would be apportioned between the lost wages and compensatory amounts and what if any amount would be paid in relation to legal costs.

[16] Ms Coats submits that the usual practice at common law is that a *Calderbank* offer is only properly made where the party against whom the relevant claim is being made is a party which makes the offer of settlement.

[17] Ms Coats submits that even if the *Calderbank* is determined to be relevant to costs then the applicant's proposal should not be influential on the Authority's determination. She submits the parties exchanged settlement offers save as to costs very shortly before the investigation meeting by which time the applicant's statements of evidence had been filed and a large proportion of costs had already been incurred.

[18] Further she submits that the amount sought in the proposal of 4 November 2011 was very close to the amount of remedies the Authority ultimately awarded. Ms Coats submits that this is not a case for an award of indemnity or increased costs. She submits that the respondent complied with all directions of the Authority and contributed in good faith to the Authority's investigative process including the participation of three senior managers for a day of the investigation. There is no reason, she submits, for the Authority to mark its disapproval of any aspect of the respondent's conduct with costs. She submits that the case was not a complex case and did not involve extensive documentation with each party adopting a co-operative approach in terms of disclosure.

[19] Ms Coats submits that awards should not be made with respect to costs incurred at mediation and further that the respondent should not have to bear the costs of the applicant's witnesses travel expenses in this case. Ms Coats submits that the respondent also had to cover costs associated with three witnesses who were based outside of Christchurch. She submits an appropriate award would be $4,500 against the respondent.

Determination

[20] I intend to apply the principles in *PBO* in exercising my discretion as to costs. The unique nature of the Authority was recognised by the Court in *PBO*. It was recognised that the Authority's costs principles are not necessarily as comprehensive or as prescriptive as those in other Employment Court judgments.

[21] It was held in *PBO* that there was nothing wrong with the Authority's tariff based approach as long as it was not applied rigidly without regard to the particular circumstances of the case. I find that the daily tariff now recognised by the Authority

as $3500 is the appropriate starting point. The investigation meeting took place over a day and a half. If the tariff was applied in this case without any adjustment then that would be a cost award to the applicant of $5250 together with any expenses that the Authority in its discretion awards. Mr Henderson seeks costs three times the normal daily tariff.

[22] I shall start with the nature of the claim itself. It was not legally complex but there were some factual complexities with a number of issues that required addressing. The Authority was provided with comprehensive submissions and bundles of authorities. It was not a straightforward claim of the nature the Authority routinely deals with. In exercising my discretion I make an adjustment upwards to reflect the additional work required of $700.

[23] I turn now to the *Calderbank offers*. The applicant's focus is on the offer to settle for $45,000 made on 4 November 2011. I will start with Ms Coats' submission that a *Calderbank* offer is only properly made where the respondent makes the offer. In the Employment Court judgment in *Watson v New Zealand Electrical Traders Limited t/a Bray Switchgear* (2006) 4 NZELR 59 (EmpC) Chief Judge Colgan on a challenge to an Authority costs determination took into account an offer of settlement made by the applicant which was rejected. The award made in that case by the Authority was described as *so close to the actual outcome of the Authority's investigation …. that it was a significant consideration*. The costs award in that case was increased from $2,500 to $6000.

[24] The offer to settle by Mr Henderson for $45,000 was very close to but slightly below the actual outcome of the Authority's investigation. Ms Coats submits that the offer was not sufficiently clear.

[25] Although the total amount in the settlement offer was clear at $45,000 and it was clear that sum included costs, the apportionment between the compensatory amount which would be without the deduction of tax and the amount of wages and costs with deduction of tax was not clear. This was further clarified as something that would have to be agreed before settlement could take place in an email from Mr Henderson to Ms Coats following the emailed offer on 4 November 2011. In that email Mr Henderson said; *You will have just received an email from my secretary* [the without prejudice save as to costs offer]. *To avoid doubt, agreement would need to be*

reached as to the portion of compensation under the $45k offered before full and final agreement can occur.

[26] I am not satisfied that the offer could be seen as certain. The apportionment would impact on the value of the offer to the applicant but was as at 4 November 2011 not certain and yet to be agreed. In conclusion the offer was not certain at 4 November. I do not conclude it is relevant therefore to the determination of costs.

[27] I do not find that this is a case where indemnity costs should be awarded. There was no conduct on the part of the respondent to justify indemnity costs. Mediation was not directed and the parties participated in mediation before the statement of problem was lodged with the Authority. I do not take costs incurred in mediation into account.

[28] The Authority has discretion as to whether to meet the expenses of two witnesses' travelling to attend at the investigation meeting. Ms Coats submits that the respondent had to meet the costs for three witnesses based outside Christchurch and should not be required to contribute further. She also submits that the applicant did not explore the possibility of ways to limit the costs involved such as video conferencing. The two witnesses in question were both important in the circumstances of this case. Their evidence and presence at the investigation meeting was very helpful to the Authority. I find that there should be a contribution to their travel expenses of $950. I will only allow the other expenses to the extent that they are payments to third parties. There is to be reimbursement of the filing fee of $71.56 and the hearing fee of $153.33

[29] In conclusion therefore there is an award of costs to the applicant in the sum of $5950 together with expenses in the sum of $1174.89.

[30] I order MagnumMac Limited to pay to Dean Cook the sum of $5950 being costs and $1174.89 being expenses.

Helen Doyle
Member of the Employment Relations Authority