IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 26
5394411

	BETWEEN	ERU COOPER JUNIOR Applicant
	A N D	CMP CANTERBURY LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Peter Moore, Advocate for Applicant Andrew Shaw, Counsel for Respondent
Submissions Received:	23 February 2016 for Applicant 9 February 2016 for Respondent
Date of Determination:	10 March 2016

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In my substantive determination issued as [2015] NZERA Christchurch 193 on 8 December 2015, I rejected Mr Cooper's claim in its entirety and found for the respondent.

[2] Costs were reserved.

The claim for costs

[3] The successful respondent seeks costs of $8,750 representing the daily tariff for a two and a half day hearing.

[4] CMP Canterbury Limited (CMP) refers to the extensive nature of Mr Cooper's claims, the delay in bringing the matter to hearing, and the various attempts to settle the matter, as ground for an uplift.

[5] As to the first, it is the case that Mr Cooper argued six causes of action but of course he is entitled to do that. Equally, the consequences of doing that unsuccessfully may be revisited in the costs environment.

[6] It is also true that there was an unreasonable delay in bringing the matter to hearing; I have already commented adversely on that in the substantive determination and I do not propose to dwell on that matter again here.

[7] It is appropriate that I refer to the attempts to settle the matter and comment particularly on the *Calderbank* offer of 30 July 2015.

[8] The parties had two mediations in the context of a continuing employment relationship and there were two attempts during the hearing itself to try to resolve matters by agreement.

[9] The *Calderbank* offer is an operative *Calderbank* offer because CMP was completely successful and the offer it made to settle on 30 July 2015, well in advance of the Authority's investigation meeting, would, if accepted by Mr Cooper, have placed him in a materially more advantageous position than the determination I made in this matter.

[10] Notwithstanding the existence of an operative *Calderbank* offer, the application for costs from CMP proceeds exclusively on the basis of the notional daily rate with no uplift attributed either to the nature of Mr Cooper's claim and the way it was presented, or the *Calderbank* offer itself.

The response from Mr Cooper

[11] The response from Mr Cooper proposes a payment by Mr Cooper of $40-50 per week over a two year period giving a total contribution to CMP's costs *"in the range of $4,000 to $5,000"*.

[12] Mr Cooper suggests that the length of the investigation meeting was more like two hearing days rather than two and a half hearing days (by deducting the time taken by the parties to try to negotiate their own settlement) and on that basis a notional daily tariff would be struck at $7,000 rather than $8,750.

[13] Mr Cooper urges on me his limited means and contends that that means his ability to find a modest amount of money to contribute to CMP's costs is equivalent to its ability to find a much greater sum.

Determination

[14] The law on costs fixing in the Authority is well established. The Authority has had the benefit of guidance from the Employment Court in two significant decisions, *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 and more recently in the Full Court decision of *Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135. It suffices to say that the Employment Court has broadly supported the Authority's daily tariff regime, and that the traditional legal principles that costs usually follow the event and that *Calderbank* offers which are operative must be given proper weight, also apply.

[15] Mr Cooper's submissions correctly observe that the costs regime is designed to emphasise the point, lest it be in any way obscure, that unsuccessful litigants must accept the burden of contributing to the costs of the successful party.

[16] Moreover, the Courts have long held the view that operative *Calderbank* offers ought to be given proper weight because the whole point of a successful *Calderbank* offer is to provide a basis on which parties can remove their dispute from the Court system and agree it on their own terms. The corollary is that the failure to accept a *Calderbank* offer in circumstances where the recipient of the offer then goes on to lose his or her case, is to have that case remain in the Court system occupying time and resource, when it might have settled.

[17] It is also the case that there have been a number of judicial pronouncements of recent times concerning the ability of this Authority to write down costs awards on the basis of the impecunious nature of the unsuccessful party: see for instance *Stevens v. Hapag-Lloyd* [2014] NZEmpC 125 (Inglis J).

[18] In the same general connection, there is now some doubt about whether the Authority has power to order payment of costs on a time basis as is suggested for Mr Cooper.

[19] In all the circumstances, I think the proper course of action in the present case is to accept Mr Cooper's submission that the starting point for consideration ought to

be two days rather than two and a half days and on that footing the starting point is $7,000 being two days at the notional daily rate.

[20] CMP does not seek an uplift in the notional daily rate, either because of the way in which the matter was conducted by Mr Cooper (a relevant consideration) or the operative *Calderbank* offer (another relevant consideration).

[21] Given the doubt that now exists about whether the Authority has power to order time payment in effect for costs awards, I decline to do so. I note that Mr Cooper remains in the employ of CMP and that should enable the parties to agree a process for the payment of costs.

[22] I direct that Mr Cooper is to pay $7,000 to CMP Canterbury Limited as a contribution to its costs.

James Crichton
Chief of the Employment Relations Authority