

Applicant \$2000 compensation and letting him retain \$2000 of wages said to have been paid in advance and consequently had a “true value of \$4000”. The actual letter of offer refers only to allowing the Applicant to retain a \$2000 “overpayment” of wages. The Respondent alleges that the Calderbank offer was “more generous” than the award ultimately made by the Authority.

[5] Its memorandum refers to the failure of the Respondent to attend mediation prior to the investigation, despite repeated attempts over several months by the Mediation Service. The Respondent alleges there were no “blanket refusal” to attend mediation and that it had attempted to resolve the matter through its Calderbank offer and a later request to have the investigation meeting adjourned to allow for urgent mediation.

[6] It also criticises a lack of detail and verification in the Applicant’s claim for costs and suggests costs should lie where they fall.

[7] Costs in this matter are to be determined in accordance with the ‘tariff-based approach’ usually applied by the Authority and described by the Employment Court in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808. The ‘tariff’ for a one-day investigation is said to range from \$1500 to \$3000. The principled discretion for modest awards of costs according to the circumstances of each case allows for the adjustment of the ‘tariff’ to account for certain factors warranting an increase or decrease of the amount to be awarded as a reasonable contribution. These factors include without prejudice offers to settle, unnecessary costs and unhelpful conduct by any parties.

[8] In this case the Applicant is entitled to costs as the successful party. The existence and rejection of the Calderbank offer does not require any reduction of those costs. Despite the Respondent’s submission to the contrary, the offer was less than ultimately achieved by the Applicant through the Authority’s award. It is also not proper to claim that the offer’s value should be considered in light of two weeks’s wages in advance retained by the Applicant. Firstly, that was a counterclaim never properly lodged by the Respondent, as determination AA 278/07 makes clear. Secondly, that amount was deducted in any event by the determination in assessing the period of wages actually lost by the Applicant.

[9] The unhelpful conduct of the Respondent regarding mediation is however a factor which warrants an increase in costs to be awarded to the Applicant. The Respondent – either through its director or solicitors at the time (not present counsel in this matter) – stymied several attempts to conduct mediation in this matter prior to investigation. I do not set out the detail. It is clear from the files of the Authority and the Mediation Service and known to the parties. If the Respondent had taken a more constructive approach, all parties may have avoided the time and expense of having to proceed with an Authority investigation and this should be accounted for in costs awarded to the Applicant.

[10] Mr McIntyre has provided a list of activities which he says he carried out as the Applicant's advocate and on which his fee for service is based. He has not provided evidence that an invoice for the fee was rendered to the Applicant but says the applicant provided a "contribution" of \$1500.

[11] Mr McIntyre clearly carried out a number of tasks for which costs can be claimed, including correspondence with the Respondent's director and its solicitors, applying for a direction to mediation, attending an Authority directions conference by telephone, corresponding with the Authority on arrangements for the investigation, attending the investigation meeting, asking some additional questions of witnesses and providing brief oral closing submissions. A reasonable contribution to the costs thereby incurred can be met within the usual 'tariff'. A case of this type, where neither the legal issues nor facts were particularly complex, would ordinarily warrant an award of \$1500 costs but weighing the unhelpful conduct of the Respondent in respect of mediation, an award of \$2000 is to be made as a reasonable contribution to the Applicant's costs. The Respondent is to pay that amount to the Applicant.

Robin Arthur
Member of the Employment Relations Authority