IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 165
5329800

	BETWEEN	ELDAD DOLEV Applicant
	A N D	NETAFIM AUSTRALIA PTY LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Quentin Davies and Laurie Murdoch, counsel for Applicant Anthony Russell, counsel for Respondent
Costs Memoranda Received:	17 May 2012 from the Respondent 1 June 2012 from the Applicant
Date of Determination:	9 August 2012

COSTS DETERMINATION OF THE AUTHORITY

A. Eldad Dolev is ordered to pay Netafim Australia Pty Ltd $3500.00.

[1] On 17 April 2012 Member P. Cheyne issued a determination. He reserved costs, noting that *Mr Dolev has succeeded to a very limited extent. It may be that he should not be entitled to any costs as a result.*

[2] Mr Dolev has not made any application for costs.

The respondent's application for costs

[3] The respondent's costs were $15,000.00 plus GST from 28 February 2012 until the determination was issued. It seeks $10,000.00 of its costs.

[4] Counsel for Netafim submits that it is entitled to a significant contribution to its costs from Mr Dolev for a number of reasons. First, on 21 February 2012 it made a

Calderbank offer to him. The offer expired on 28 February 2012. Mr Dolev was largely unsuccessful in his claims and the respondent submits he did not receive an amount *in any way close* to the amount offered in the 21 February 2012 letter.

[5] The respondent submitted that a number of other factors should increase the amount of costs awarded to it:

- The applicant did not file with the Authority for 3 years after his employment ended. That delay compromised the ability of the respondent to respond because many witnesses had left the respondent's employment.

- The respondent advised the applicant by letter of 21 December 2011 that his claims were unlikely to succeed and asked him to reconsider his claims. He did not.

- The applicant's claim was ever-changing, with a claim for annual leave submitted for the first time when submissions were filed. That claim was different from the claim pursued prior to the hearing and different from the claim as formulated at the hearing.

- Other claims, such as that based on the Executive Incentive Scheme, were only included late in the process.

The applicant's response

[6] Counsel for Mr Dolev submits that the respondent's failure to comply with timetable directions had an impact on the applicant's ability to assess risk and caused his briefs of evidence to require re-drafting to take into account *the new information which was being provided …in a piecemeal fashion*.

[7] The applicant alleges that the *Calderbank* offer was made prior to him receiving all the relevant evidence from the respondent. He submitted that the Courts are usually cautious in awarding increased costs when there has been a *walk-away (or "drop hands") offer*.

[8] The applicant submitted that the Authority should set-off the following against any costs awarded to the *applicant* (although I am sure that is a typographical error and is meant to read *respondent*):

- The application for a compliance order;
- The telephone conferences and memoranda filed to gain discovery;
- The cost of preparing multiple briefs of evidence to address new evidence as it arose.

Determination

[9] As I was not the member who determined the substantive matter, I have had careful regard to the statement of problem, the statement in reply, submissions and the determination alongside the cost submissions lodged by the parties.

[10] The Authority's jurisdiction to make costs orders is found in clause 15 of Schedule 2 of the Act.

[11] The Employment Court has considered the effect of a *Calderbank* offer in *Ogilvy & Mather v Darroch* [1993] 2 ERNZ 943:

> *As is well known, it is an offer, invariably in writing made by one party to the other and expressed to be without prejudice except as to costs. It is an offer to compromise the action by some payment. Unless the offer is accepted, the letter is intended to be produced after the Court has dealt with the merits of the case but before it has dealt with costs. It is intended to induce the Court by this means to exercise its discretion against granting the plaintiff any costs if it has recovered less by proceeding with the case than it could have by accepting the offer.*

[12] The Judge observed in *Ogilvy* that *Calderbank* offers do not grant automatic protection in the event of lesser recovery but are a discretionary factor which can be taken into account in determining costs.

[13] The *Calderbank* offer to the applicant was made at an early stage in the proceedings before the applicant was required to commence preparation for an investigation meeting. It was a clear and unambiguous offer of $6,000.00 in full and final settlement. The offer remained open for a period of one week which was adequate time for the applicant to reflect on the strength of the case and likely outcome and the cost of proceeding further. The applicant ultimately recovered considerably less than was offered and had he accepted the offer further preparation for, and the cost of attendance at, the investigation meeting would have been avoided.

[14] I conclude that the *Calderbank* offer was a valid offer and I take it into account in exercising my discretion as to costs. I find that the usual principle that costs follow the event does not apply because of the valid *Calderbank* offer.

[15] The principles the Authority follows in considering costs applications are as set out in *PBO Limited v Da Cruz* [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819 and the leading case on Authority costs.

[16] In the present case I take the notional daily rate, which is currently $3,500.00, as a starting point for costs which should be awarded to the respondent. The investigation meeting took place over 2 days; 1 in Blenheim and 1 by telephone conference. However, for costs purposes I consider that 1 day is the correct timeframe because the Investigation Meeting in Blenheim started at 10.15 a.m. which is ¾ of an hour later than is standard and the telephone conference on 17 March 2012 was for ¾ of an hour only.

[17] The following factors suggest that the rate should be reduced or remain the same:

- The respondent initially failed to comply with the Authority's direction about the production of documents. I accept that its failure to comply may have been inadvertent but the application for compliance caused unnecessary cost for the applicant; and

- The principle that costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct; and

- The principle that costs awards are to be modest and reflect what is reasonably required in preparing for an Authority investigation.

- The respondent was not wholly successful in defending Mr Dolev's claims.

[18] On the other hand, Mr Dolev did not accept the without prejudice offer. Mr Dolev's very limited success in the claims was for a far lower amount than that offered by the Respondent to settle the claims. I take into account the Court of Appeal case of *Health Waikato v Elmsley* [2004] 1 ERNZ 172 in which the Court commented that:

> *....we think that…steely responses by the Courts where the plaintiffs do not beat* Calderbank *offers would be in the broader public interest.*

[19] Submissions were made on Mr Dolev's behalf about taking a cautious approach to increasing awards of costs for rejection of a *Calderbank* offer. However, I do not consider the case of *Hira Bhana & Co Ltd v PGG Wrightson Ltd* [2007] NZCA 342 to be applicable to this case because the *Calderbank* offer was not simply a "walk away" offer. I consider Mr Dolev's rejection of the offer to have caused greater cost to the respondent than was necessary.

[20] I note that both parties claimed that their own costs were increased by the other party's actions. I consider that there is substance in both submissions and that they cancel each other out.

[21] Weighing all the above factors in the discretionary exercise of awarding costs, I consider that the notional daily rate of $3500.00 should be paid by Mr Dolev.

Conclusion

[22] Accordingly Mr Dolev is ordered to pay Netafim Australia Pty Ltd $3500.00 as a contribution to its costs incurred in responding to his claim.

Christine Hickey
Member of the Employment Relations Authority
(Pursuant to clause 16 of Schedule 2 of the Employment Relations Act 2000)