IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 377
5349746

	BETWEEN	KATHARINA HECHT Applicant
	AND	ERSON HOLDINGS LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	W Reid, Advocate for Applicant S-J Davies, Counsel for Respondent
Submissions received:	3 August 2012 from Respondent 5 September 2012 from Applicant
Determination:	17 October 2012

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination dated 25 July 2012,[1] the Authority found that Ms Hecht was unsuccessful with her claims against the respondent. The parties were invited to resolve the matter of costs but have not been able to do so. Submissions have now been received from both parties, in anticipation of the Authority determining the appropriate costs to be awarded to the respondent as the successful party to the substantive proceedings.

[2] The respondent has incurred a total of $26,345.17 "… in legal and consulting advisor's costs." The respondent acknowledges the basic tenets established by *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*[2] including, the concept that without prejudice except as to costs offers can be taken into account. The respondent seeks

[1] [2012] NZERA Auckland 251
[2] [2005] ERNZ 808

costs in the sum of $17,387 or such other sum as the Authority sees fit. In support of a higher than usual award of costs, the respondent points to the following factors:

(a) The complete success of the case;

(b) The two reasonable and timely *Calderbank* offers;

(c) The tenuous nature of the applicant's claims regarding the substantive reasons for her dismissal;

(d) It is consistent with equity and good conscience to do so; and

(e) The requirement for the Authority to be "steely" in deciding costs where reasonable settlement offers have been rejected.

[3] In support of (b) and (e) (above), the Authority is referred to two purported *Calderbank*[3] offers that were made to Ms Hecht; firstly on 16 May 2011 and another on 21 December 2011.

[4] The submissions for Ms Hecht urge that the Authority should not depart from the usual tariff based approach[4] and that an award of costs greater than this would impose hardship upon her. In regard to the offers of settlement referred to by the respondent, it is submitted that these offers do not come within the usual *Calderbank* principles. In regard to the offer made on 16 May 2011, it is submitted for the applicant that as of this date, a personal grievance had not been raised. I accept that this is so and I also accept the submission that this was really just an offer of a payment, most probably with the intention that a personal grievance claim could be avoided. Nonetheless, given that the respondent relies on the content of the letter as being a *Calderbank* offer, a closer examination of it is appropriate.

The letter dated 16 May 2011

[5] The letter of 16 May 2011 has as an opening heading: "***Without Prejudice Save as To Costs."*** It then goes on to inform:

> I refer to our recent discussions and write to confirm the terms which Erson Holdings Limited ("we) are prepared to offer you in connection with and as a consequence of the termination of your employment due to redundancy and the issues you have raised about this.

[3] *Calderbank v Calderbank* [1975] 2 All ER 333
[4] Currently $3,500 per day of hearing.

The letter then provides further information, including:

1. That Ms Hecht's employment will terminate on 27 May 2011 (the termination date), by reason of redundancy.
2. Four weeks' is given but this does not need to be worked out.
3. Accrued holiday pay will be paid on the termination date.

At paragraph 4 of the letter the offer of a payment; said to be the first *Calderbank* offer, is recorded thus:

> Within 7 days of the Termination Date, subject to compliance with the terms of this agreement, we will pay to you (without any admission of liability) as compensation for hurt and humiliation arising from the termination of your employment the sum of $3,500 (the "Compensation Payment"). We believe the Compensation Payment can be paid to you free of deductions for tax under s123 of the Employment Relations Act.

[6] Other terms pertaining to a proposed agreement with Ms Hecht, including confidentiality, follow and then, relevant to the current matter of costs:

> 8. These terms are offered to you on the basis that you accept them in full and final settlement of all and any claims which you have against us and any of our officers or employees arising out of your employment or its termination or otherwise.
>
> 10. You confirm that in respect of this agreement you have no complaints whatsoever against us or any employee or officer of us.
>
> 11. You further warrant that neither you nor anyone acting for you on your behalf has made an application to the Mediation Service, Employment Relations Authority or issued any proceedings in the High Court or District Court against us in respect of any claim arising out of your employment or its termination.

[7] Finally, Ms Hecht was required to sign her acceptance of the offer and it was intended (by the respondent) that it would be signed by a Department of Labour mediator as a record of settlement. However, if Ms Hecht did not verify her acceptance, the offer was deemed to expire on 20th May 2011. Ms Hecht did not sign the document and hence the offer of the payment of $3,500 expired on the due date.

[8] I conclude that offer contained in the letter of 16 May 2011 was really a repetition of an offer made via a similar letter dated 2 May 2011, which had a different opening heading: "***Without Prejudice Private and Confidential."*** This was rejected by Ms Hecht via a letter dated 9 May 2011. And I accept the submission for Ms Hecht that this letter (16 May 2011) cannot be taken to be a valid *Calderbank*

offer. In support of this finding I note that firstly, it appears that a formal personal grievance had not been raised, and equally, it is established that legal proceedings had not been commenced, let alone a hearing pending. While the Employment Relations Act 2000 and the associated regulations are silent about without prejudice except as to costs offers, it is generally recognised that proceedings have to be initiated. This is shown, to some extent, by the reference, in clause 15 of Schedule 2 to the Act, to the power to award costs: "… *including expenses to witnesses*." That proceedings are required to be in train is confirmed by a reference in the Employment Court Regulations 2000 to the matters that the Court may have regard to when exercising its discretion to award costs: "… *including any offer made by either party to the other, a reasonable time before hearing*." The Employment Court has recently made reference to the above words as referring to a proceeding before the Court (and by implication, the Authority).[5]And rule 48G(1) of the High Court Rules is more specific by its reference to "*a proceeding"* in that:

> A party to a proceeding may at any time make to any other party to the proceeding a written offer that-
> (a) is expressly to be without prejudice except as to costs; and
> (b) The fact that the offer has been made must not be communicated to the Court until the question of costs is decided.

Therefore, on the basis of the above summary, I confirm my initial finding that the offer made to Ms Hecht by the respondent via the letter dated 16 May 2011 cannot be taken to be a valid *Calderbank* offer.

The offer dated 21 December 2011

[9] Via an email dated 21 December 2011 and headed "*Without Prejudice save as to Costs"*, counsel for the respondent, Ms Davies, informed the advocate for Ms Hecht, Mr Reid:

> As discussed this morning, my clients offer Ms Hecht (without admission of liability) $3,000 payable under s123(1)(c) ERA 2000.
> Please let me have your client's response as soon as possible because I intend to embark on preparing my client's briefs mid January.

It is established that this offer was made following the filing and service of the witness statements for the applicant. It is a submission for Ms Hecht that this offer

[5] *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 92 at para [15]

did not address the issue of the costs that Ms Hecht had already incurred and it would have left her with nothing after the costs for preparing for the Authority hearing were offset. But there is no evidence of this being raised as an issue or of any negotiation being attempted to ascertain if a better outcome could be negotiated. Nonetheless, given the expenses that had already been incurred by Ms Hecht, and that the issues she brought to the Authority were arguable enough (at least in their presentation), it was not unreasonable for Ms Hecht to reject the (rather cryptic) *Calderbank* offer and hence I am not persuaded that this offer should be taken into account (in favour of the respondent) when assessing an appropriate award of costs.

Assessment of a reasonable award of costs

[10] It is now well established that the general practice of the Authority is to apply a daily tariff; the current rate being $3,500 for each day of hearing time. The tariff can be increased or reduced depending on the circumstances of the case. Having addressed the matter of the offers made by the respondent to Ms Hecht (above), I now conclude that there was nothing else particularly novel about the hearing of the substantive matter that warrants an increase (or decrease) to the usual daily tariff. Ms Hecht has provided an affidavit attesting to her current financial situation but I take this to go to the submissions for the respondent seeking an award of costs over and above the usual tariff. In the round I conclude that an award of costs in the sum of $3,500 is appropriate.

Determination

[11] Taking all of the circumstances into account and exercising the discretion of the Authority pursuant to clause 15 of Schedule 2 to the Employment Relations Act 2000, Ms Katharina Hecht is ordered to pay to Erson Holdings Limited the sum of $3,500.00.

K J Anderson
Member of the Employment Relations Authority