IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 5
5524303

	BETWEEN	ROBYN HENDERSON Applicant
	A N D	NELSON MARLBOROUGH DISTRICT HEALTH BOARD Respondent

Member of Authority:	David Appleton
Representatives:	Anjela Sharma, Counsel for the Applicant Paul McBride, Counsel for the Respondent
Submissions Received:	7 December 2015 & 22 January 2016 from respondent 15 January 2016 from applicant
Date of Determination:	26 January 2016

COSTS DETERMINATION OF THE AUTHORITY

A. It was not unreasonable for the applicant to have rejected the respondent's Calderbank letter dated 17 September 2015.

B. I make no order as to costs, as they should lie where they fall.

[1] By way of a determination dated 3 November 2015[1], the Authority determined that Ms Henderson had been unjustifiably disadvantaged in her employment but had not been unjustifiably constructively dismissed. Ms Henderson was awarded $15,000 by way of compensation under s.123 (1)(c)(i) of the Employment Relations Act 2000 (the Act).

[1] [2015] NZERA Christchurch 166

[2] The parties were directed to seek to agree how costs were to be dealt with between them but have been unable to agree. Accordingly, both parties seek a determination as to costs from the Authority.

[3] In his cost submissions, Mr McBride draws the Authority's attention to three Calderbank letters that were sent by the respondent to the applicant, on 18 December 2014, 23 December 2014 and 17 September 2015 respectively.

[4] Ms Henderson's application to the Authority was lodged in April 2015, and so I believe that the first two Calderbank letters must be ignored, as the circumstances that prevailed at the time they were sent were quite different from those that prevailed when the third was sent; namely, live proceedings were on foot only in April 2015, which the respondent then had to address. The assessment of whether the rejection of the first two Calderbank letters was reasonable would have to be made against a situation in which proceedings had only been threatened, but where the Authority does not know what course of action had been determined in the mind of Ms Henderson at the respective points of rejection.

[5] I therefore concentrate on the third and final Calderbank letter from the respondent (hereinafter referred to as the respondent's Calderbank letter). This set out a brief rebuttal of the merits of Ms Henderson's claim as judged by Mr McBride but, in particular, explained why he believed that the sums sought by Ms Henderson[2] were unrealistic. The offer contained in the respondent's Calderbank letter was as follows:

a. $12,000 pursuant to s.123(1)(c)(i) of the Act;

b. $29,500 gross in terms of claimed lost earnings; and

c. A contribution to Ms Henderson's legal costs in the sum of $3,500 plus GST.

[6] The letter offered to reconfigure the components of the total offer of $45,000 gross, within reasons and subject to law. The respondent's Calderbank letter also offered a certificate of service, together with an expression of regret for the fact of Ms Henderson's resignation. The respondent's Calderbank letter stated that, if not

[2] According to Mr McBride these were lost income in the gross sum of $29,571, $60,000 compensation pursuant to s.123(1)(c)(i) of the Act, $80,000 in penalties payable to Ms Henderson and costs.

accepted, the respondent would produce the letter in relation to costs before the Authority and gave Ms Henderson eight days to accept the offer in writing.

[7] Ms Henderson rejected the offer contained in the Calderbank letter when Ms Sharma replied by way of a counter offer contained in a Calderbank letter dated 24 September 2015 (referred to herein as the Applicant's Calderbank letter). In this, Ms Henderson sought the following sums:

a. $25,000 pursuant to s.123(1)(c)(i) of the Act,

b. Lost income in the gross sum of $29,500;

c. Contribution towards Ms Henderson's costs in the sum of $30,000 plus GST;

d. Travel expenses incurred in anticipation of the Authority's investigation meeting in the sum of $1,500.

[8] The applicant's Calderbank letter also sought a positively worded reference, and a letter of apology, and was stated to be open for acceptance for five days.

[9] Mr McBride states that the respondent incurred costs of $35,000 plus GST together with disbursements of $1,008.27 including GST, not including the costs of correspondence, mediation, and in-house costs. Mr McBride submits that a final figure at or about $30,000 is a relevant starting point, together with disbursements.

[10] In supporting this figure Mr McBride rejects any arguments that vindication is a relevant factor to take into account and refers to other factors such as Ms Henderson's ability to pay, her lack of success on the primary cause of action, what he refers to as unnecessary obstruction by her in providing documentation and her attempts to introduce similar fact evidence which the Authority declined to take into account.

[11] Mr McBride also refers to the fact that the respondent is a publically funded body, and submits that it is not appropriate for the respondent to pay for the consequences of the Applicant's *misguided decision to gamble.*

[12] In Ms Sharma's submissions, she refers to the importance to Ms Henderson of the vindication she would have received had she been given a letter of apology and a

positive reference from the respondent, as asked for in the counter offer of 24 September 2015. She refers to the comments of the Court of Appeal in *Bluestar Print Group v Mitchell*[3] in relation to the relevance of vindication and that costs assessments are not confined solely to economic considerations. She also refers to the Employment Court case of *Gini v Literacy Training Limited*[4], in which His Honour Judge Ford declined to find that Ms Gini acted unreasonably in rejecting a Calderbank offer the terms of which did not accord with her need for vindication. Ms Sharma invites the Authority to find that Ms Henderson's rejection of the respondent's Calderbank letter was similarly reasonable.

[13] Ms Sharma also submits that the respondent should pay a contribution to Ms Henderson's costs as the Authority's proceeding was predominantly focussed on her claim for unjustified disadvantage, in which she was successful. Further, Ms Sharma states that the respondent's contention that Ms Henderson voluntarily resigned her employment was unsuccessful.

[14] Ms Sharma submits that the Authority should award to Ms Henderson costs in the sum of $14,000, being the daily tariff of $3,500 increased from the three days the investigation meeting took, to four days, on the basis of *a contribution toward the significant work undertaken prior to the hearing in addressing the respondent's claim that she voluntarily resigned her employment to seek further professional opportunities outside its organisation.*

[15] Ms Sharma also seeks an award in relation to witness travel expenses in the sum of $1,472, plus the lodgement fee of $71.56 and hearing fees (in relation to the second and third days of the investigation meeting).

The law and principles of awarding costs in the Authority

[16] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

> ***15 Power to award costs***
> *(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*

[3] [2010] NZCA 385
[4] [2013] NZEmpC 25

> *(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[17] The Authority must follow the principles set out in *PBO Ltd v Da Cruz*, [2005] 1 ERNZ 808 when setting costs awards. These include:

a. There is discretion as to whether costs would be awarded and in what amount.

b. The discretion is to be exercised in accordance with principle and not arbitrarily.

c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

d. Equity and good conscience are to be considered on a case by case basis.

e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

g. That costs generally follow the event.

h. That without prejudice offers can be taken into account.

i. That awards will be modest.

j. That frequently costs are judged against a notional daily rate.

k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[18] *Ogilvie & Mather (NZ) Ltd v. Darroch* [5] sets out the two principal criteria that must be satisfied when a Calderbank offer is made so as to not prejudice unfairly the recipient of the offer by exerting undue pressure. These safeguards are as follows:

(a) A modicum of time for calm reflection and the taking of advice before a decision has to be made to accept the offer or reject it; and

(b) The offer must be transparent if the offeror is later to be given the protection the Calderbank offer furnishes.

[19] Mr McBride refers in his submissions to the remarks of the full Employment Court in *Fagotti v Acme & Co Limited*[6], at [109], in which the Employment Court confirmed that the Court of Appeal's remarks in *Bluestar Print Group*[7] apply equally in the Authority as in the Employment Court and higher. This dispelled the doubt that had prevailed up to then that the *steely approach* was appropriate in the Authority.

Discussion

[20] The following key issues need to be determined:

a. Who can be seen to be the successful party; and

b. Whether the respondent's Calderbank letter has any effect, and if so, what.

Who was the successful party?

[21] I am of the view that neither party more clearly succeeded than the other. This is because the finding of unjustified disadvantage arose from the same underlying facts as the unsuccessful unjustified constructive dismissal claim was founded on. The essence of the Authority's determination was that there had been repudiatory acts which gave rise to unjustified disadvantage, but that the breaches were affirmed prior to the resignation, causing the constructive dismissal claim to fail. All other things being equal, this means that neither party should be awarded costs, and that they should lie where they fall.

[5] [1993] 2 ERNZ 943
[6] [2015] NZEmpC 135
[7] In which the Court of Appeal held that the *steely approach* it had earlier said was required when considering Calderbank offers applied equally to employment cases.

What is the effect of the respondent's Calderbank letter?

[22] First, the respondent's Calderbank letter must clearly be considered, following *Fagotti*. Second, I accept that the respondent's Calderbank letter satisfied the two *Darroch* criteria. Third, Ms Henderson was clearly not awarded by the Authority anything like as much as was offered in the letter. This leaves the question of whether it was reasonable for Ms Henderson to have rejected the respondent's Calderbank letter.

[23] Ms Sharma says that Ms Henderson rejected the offer because of her need for vindication. This statement is supported by the contents of her letter to Mr McBride dated 24 September 2015, in which she addressed the respondent's Calderbank letter. She stated in the letter:

> *In filing proceedings in the Authority, there is a strong element of personal vindication for my client in seeking an outcome that will hold your client to account for its actions that have caused her significant disadvantage both personally and professionally.*

[24] Ms Sharma then set out what her client would accept to settle, which included the following:

> *d) A positively worded reference on NMDHB letterhead, signed by the CEO, Mr Fleming, and appropriately dated, specifically outlining Ms Henderson's achievements and contributions to the NMDHB for the period 8 February 2010 – 10 October 2014. The reference will further acknowledge that Ms Henderson resigned her employment in a way that reflects that the parties ended on positive terms, wishing her well for the future and pursuing new career opportunities.*
> *e) A letter of apology to Ms Henderson, signed by the Chair of the NMDHB Board, on NMDHB letterhead, for the manner in which her employment came to an end, and the resultant hurt and upset caused to her that was in all the circumstances avoidable.*

[25] Mr McBride states that references and apologies are not available in the Authority, and that issues about a reference and an apology cannot justify a party proceeding with an otherwise unmeritorious claim.

[26] I do accept that vindication was an important factor for Ms Henderson. She had held a senior position within the respondent and had undoubtedly been significantly affected by the way the respondent had addressed what it had perceived to be her performance shortcomings. I accept that Ms Henderson is a proud person, and that her professional standing is of genuine importance to her.

[27] In my substantive determination I acknowledged the effect on Ms Henderson of the treatment she had suffered in assessing her humiliation, loss of dignity and injury to her feelings. I accept that the provision to her by the respondent of an apology and a positive reference would have gone some considerable way to have assuaged the feelings of hurt she had suffered. In the absence of an apology and a positive reference it was not unreasonable for her to have wanted a public finding from the Authority that the treatment she had been afforded had been unjust. She did ultimately receive that finding. Her having failed to have proven that she had been constructively dismissed does not detract from the findings of the unjust treatment she had suffered.

[28] In light of this, I therefore accept that it was reasonable for Ms Henderson to have rejected the respondent's Calderbank letter.

Are there any other factors that change the position of costs between the parties?

[29] Ms Sharma submits that Ms Henderson had to undertake significant work in addressing the respondent's claim that she voluntarily resigned her employment to seek further professional opportunities. However, I agree with Mr McBride that Ms Henderson's cause of action required her to show the reasons for her having resigned. Any work done to address the respondent's assertion was part and parcel of the work she had to do in any event. I therefore reject that submission as a reason to award costs to Ms Henderson.

[30] I also do not find that either party acted so unreasonably in their conduct of the proceedings that there should be a costs consequence.

Determination

[31] Having found that neither party was more successful than the other, that the respondent's Calderbank letter was reasonably rejected, and that there are no other key factors that change the position between the parties, I determine that there should be no order as to costs, and that costs should therefore lie where they fall.

David Appleton
Member of the Employment Relations Authority