IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 180
5520407

	BETWEEN	CHRISTOPHER HICKS Applicant
	A N D	AOTEA ELECTRIC CANTERBURY LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	No response from the Applicant Mr John Farrow, Counsel, for the Respondent
Submissions Received:	None received from the Applicant 23 October 2015 from the Respondent
Date of Determination:	20 November 2015

COSTS DETERMINATION OF THE AUTHORITY

A. I do not accept that it was unreasonable for Mr Hicks to reject the respondent's Calderbank offers for the reasons set out in this determination.

B. I order Mr Hicks to make a contribution to the respondent's legal costs in the sum of $3,000, together with a further sum of $1,392.78 in respect of disbursements incurred.

[1] By way of its determination dated 11 September 2015[1] the Authority found that Mr Hick's dismissal had been justified, but that he had been unjustifiably disadvantaged in his employment by a lack of consultation prior to his suspension. No remedies were awarded for that disadvantage, although a penalty of $750 was

[1] [2015] NZERA Christchurch 133

imposed on the respondent for its breach of employment agreement, which was made payable to Mr Hicks.

[2] Costs were reserved, and the parties given 28 days within which to agree how costs were to be disposed of between them. The parties have been unable to agree, largely because of Mr Hicks not engaging substantially with counsel for the respondent on the matter. Accordingly, the respondent has lodged an application with the Authority to fix costs by way of counsel's submissions dated 23 October 2015. No response has been received from Mr Hicks in reply to Mr Farrow's submissions on costs.

[3] The respondent seeks its full costs on an indemnity basis, in reliance upon *Calderbank* offers which Mr Hicks rejected. These costs amount to $32,358.22 exclusive of GST. In the alternative, it seeks two thirds of its actual costs, being $21,572.15.

The legal principles to apply when determining costs in the Authority

[4] The Authority's power to award costs is set out in paragraph 15 of Schedule 2 of the Employment Relations Act 2000 (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.*
> *(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.*

[5] Mr Farrow refers to the very well-known principles which the Authority must take into account when determining how legal costs and expenses should be dealt with, and which are set out in *PBO Ltd v. Da Cruz*[2]. These principles include the following:

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.

[2] [2005] 1 ERNZ 808

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.

[6] A valid Calderbank offer is an offer to settle proceedings expressed as being *without prejudice, save as to costs*, and which makes clear to the recipient of the offer that, if he or she unreasonably rejects the offer and then goes on to lose, or wins but recovers less than was offered in the Calderbank, then the maker of the offer will seek recovery of all of the legal costs that were incurred by it from the date of the offer being rejected.

[7] *Ogilvie & Mather (NZ) Ltd v. Darroch* [3]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:

[3] [1993] 2 ERNZ 943

(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.

[8] Mr Farrow refers to the recent judgement of the full Employment Court in *Fagotti v Acme & Co Ltd*[4] in which the Court confirmed that the *steely approach* which the Court of Appeal[5] had said should be applied to Calderbank offers in the courts also applied to the Authority, following some uncertainty having been previously expressed in previous Employment Court judgements on that question. This *steely approach* can be best explained by quoting directly from *Bluestar Group*, where, at [20], the Court of Appeal said:

> *…It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors.*

Discussion

[9] The Authority must determine the following questions:

a. Should Mr Hicks contribute towards the respondent's costs at all?

b. If he should, in what amount should those costs be? This will, in turn, require a consideration of the following:

i. The length of time of the Authority's investigation meeting;

ii. The effect of the respondent's Calderbank offers, if any;

iii. Any other relevant factors, as identified in *Da Cruz;* and

iv. Whether the respondent's costs are reasonable.

[4] [2015] NZEmpC 135
[5] In *Bluestar Print Group NZ Ltd v. Mitchell* [2010] NZCA 385 citing *Health Waikato Ltd v. Elmsly* [2004] 1 ERNZ 172 (CA)

Should costs be awarded against Mr Hicks at all?

[10] The starting point is that *costs follow the event*. In other words, the *loser* tends to be ordered to make a financial contribution towards the costs of the *winner*. Often, however, there is no clear *winner* or *loser*. In this case, Mr Hicks received the benefit of the penalty of $750 which was imposed upon the respondent, and there was a finding of unjustified disadvantage. However, the vast bulk of the time spent by the parties at the Authority's investigation meeting, and in their preparation, related to Mr Hicks' contention that he had been unjustifiably dismissed. That claim failed.

[11] In light of this, I am satisfied that Mr Hicks did not succeed in respect of the main aspect of his claims. Accordingly, I find that it is appropriate that costs follow the event and to order that Mr Hicks make a contribution towards the respondent's costs.

What amount should Mr Hicks' contribution be?

[12] It was held in *Davide Fagotti v Acme & Co Limited* [6] that the use of the daily tariff is still an appropriate approach for the Authority to take. The Authority's current daily tariff is $3,500. The Authority's investigation meeting lasted a day, and I see no reason why this should not be the starting point in the current case. The next step is to determine whether this sum should be increased or decreased.

[13] Mr Hicks did not fail completely in his claims, and so it is appropriate to decrease the tariff to $3,000, as it would not be just to completely ignore that partial success. The next question is whether it should then be increased from that sum. The respondent argues that it should, significantly, by reason of the Calderbank offers.

The Calderbank offers

[14] Mr Farrow refers to a communication dated 28 March 2014 as the first Calderbank offer made on behalf of the respondent. However, I do not take this into account, because it was not marked *without prejudice except as to costs*, and it was sent before Mr Hicks had been dismissed, and before he lodged his statement of problem in the Authority.

[6] [2015] NZEmpC 135

[15] The first Calderbank letter was sent by the respondent's lawyers to Mr Hicks' then lawyers, Goldstein Ryder, on 1 August 2014. It was marked *without prejudice except as to costs*, and proposed settlement on the following basis:

a. Payment of $3,500 costs plus GST;

b. A mutual non-disparaging clause; and

c. A Certificate of Service from the respondent

[16] No time limit was set by the letter for acceptance and the consequences of refusing to accept the offer were not spelled out. However, the letter was written to very experienced employment law specialists, and one can expect that the consequences were explained by Goldstein Ryder to Mr Hicks. I accept that this first offer was a valid Calderbank offer.

[17] The offer was rejected by Goldstein Ryder on behalf of Mr Hicks by way of a counter claim on 13 August 2014, which was, in turn, rejected by the respondent two days later.

[18] A further offer was made by Goldstein Ryder on 18 August 2014, which was rejected by the respondent's lawyers the following day, by way of an email marked *without prejudice except as to costs* in the following terms:

> *Aotea Electric Canterbury Limited are only prepared to settle this matter on the terms detailed in our letter of the 1st of August 2014.*

[19] On 31 March 2015 the parties attended mediation. On 8 June 2015 Webb Farry wrote to Mr Hicks (who had, by then, ceased to instruct Goldstein Ryder) a letter marked *without prejudice except as to costs.* The letter set out the history of the matter, and then stated the following:

> *Aotea does wish to take a reasonable and pragmatic approach to these proceedings and have therefore authorised us to offer a payment of $8,000.00 inclusive of GST, if any, in full and final settlement of all issues in relation to this matter. This sum is broken down as follows:*
> *a The sum of $3,500.00 towards legal costs;*
> *b The balance to cover lost wages and/or compensation under section 123(1)(b) and (c)(i) of the Employment Relations Act 2000.*
> *We would strongly recommend that you seek legal advice in relation to this offer.*
> *This offer will remain open until 4pm on 15 June 2015.*

[20] Whilst I am satisfied that Webb Farry had given Mr Hicks sufficient time within which to consider the offer, it did not spell out the consequences of Mr Hicks not accepting it; namely, that it would seek its costs on an indemnity basis if Mr Hicks did not recover from the Authority at least the amount being offered.

[21] Whilst this omission is not a serious one when the offer is made to experienced counsel, it is potentially serious when such an offer is made to an unrepresented party. Although a previous Calderbank offer had been made to Mr Hicks via Goldstein Ryder, Webb Farry could not be certain, and was not entitled to assume without more, that Goldstein Ryder had explained the full effect of rejecting a Calderbank offer to Mr Hicks.

[22] Having said that, I have seen a copy of Mr Hicks' reply to Webb Farry dated 17 June 2015. In this he rejected the offer and made a counter offer. He also stated that he has sought independent legal advice and that he was making his offer *in good faith and without prejudice except as to costs.* Whilst the legal advice he sought may not have explained to him what the effects of rejecting a Calderbank offer could be, the fact that he himself referred to making his counteroffer *without prejudice except as to costs* suggest strongly that Mr Hicks was aware of those possible effects.

[23] Whilst it is possible that Mr Hicks was just parroting the words used by Webb Farry, I believe that is not the case, as he used the words in the narrative of his email, and in a context that makes sense, and not as a heading as Webb Farry had done. This indicates that he knew the meaning of the words. On balance, therefore, I find that he was not unfairly prejudiced by the failure of Webb Farry to spell out the consequences of rejecting the offer.

[24] However, I note that the offer of the balance of $4,500 was expressed to *cover lost wages and/or compensation under section 123(1)(b) and (c)(i) of the Employment Relations Act 2000.* This does not make at all clear what the sum of $4,500 is purporting to compensate Mr Hicks for. Consequently, and furthermore, it does not make clear whether the sum is to be subject to a deduction of tax or not. That failure plainly makes the offer uncertain. Even experienced counsel could not have understood what was actually being offered.

[25] This means that the second of the two *Ogilvie & Mather (NZ) Ltd v. Darroch* tests has not been satisfied. The offer was not transparent. This was not a mere

technical failing but a fundamental failing, as it was impossible to know what sum Mr Hicks would have received in his hands had he accepted the offer.

[26] Therefore, I do not accept that the second Calderbank offer was valid, and so it cannot offer the protection the respondent wishes. Alternatively, in view of the uncertainty the offer created, it was not unreasonable for Mr Hicks to have rejected it.

Was Mr Hicks' rejection of the first offer to settle unreasonable?

[27] Mr Hicks' rejection of the first Calderbank offer dated 1 August 2014 was not unreasonable, in my view, given that it offered to settle for his legal costs alone, together with a mutual non-disparagement clause, and a Certificate of Service. This would suggest that the respondent expected Mr Hicks to recover no financial award at all in the Authority, which is not what occurred. In any event, putting aside the question of costs, which it is appropriate to do, Mr Hicks did beat that offer, as he was awarded the $750 penalty payment.

[28] In conclusion, I do not accept that either Calderbank offer can justify raising the daily tariff amount above $3,000.

Are there any other factors which may justify increasing the $3,000 contribution?

[29] I do not believe that there are any such further factors. Mr Hicks did not conduct the proceedings in a way that increased costs, and this is not contended by the respondent in any event. In addition, I must take into account the principles that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct, and that awards will be modest.

Conclusion

[30] I do not believe that there is any cogent reason to increase the costs to be awarded to the respondent above the reduced daily tariff of $3,000. I have not turned my mind to whether the respondent's solicitor-client costs were reasonable, given that the sum of $3,000 is clearly reasonable in respect of a one day investigation meeting.

[31] The respondent also seeks recovery of its disbursements. These were set out in the various copy invoices that were included with Mr Farrow's submissions. They break down as follows (excluding GST);

Disbursement	Fee $
Forms, postage and incidentals	80
Photocopying	610.50
Telephone and tolls	235.33
Accommodation and transportation	218.26
Airfares to Christchurch and return	313.91
Courier	14.78
Personal Property Securities Register search	5.22

[32] It is not clear what the *Forms, postage and incidentals* expenditure is for, and I doubt that $80 was spent on postage, given that emails are the means of correspondent by almost everyone nowadays. I disallow this claim therefore.

[33] I also disallow the Personal Property Securities Register search fee as it is, again, not clear what that was for. I do accept that the other disbursements are likely to have been incurred, and that they appear reasonable. I therefore allow them.

Orders

[34] I order Mr Hicks to pay the following sums to the respondent:

a. $3,000 in respect of its legal costs; and

b. $1,392.78 in respect of disbursements incurred.

David Appleton
Member of the Employment Relations Authority