

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Richard Howe (applicant)
AND	Reserve Bank of New Zealand (respondent)
REPRESENTATIVES	Alan Cressey for the applicant Alex Chadwick for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
SUBMISSIONS RECEIVED	21 & 28 February & 2 March 2005
DATE OF DETERMINATION	2 March 2005

DETERMINATION OF AUTHORITY: Costs

Employment Relationship Problem

1. In my substantive determination dated 1 February 2005 (WA 18/05) I found only in favour of the applicant, Richard Howe's, claim that the respondent, the Reserve Bank of New Zealand (the Bank), had acted in breach of its obligation to consult with Mr Howe and had thereby unjustifiably disadvantaged him. Costs were reserved.

Submissions: the applicant's position

2. In a submission received on 21 February the applicant's counsel Mr Alan Cressey, applied to the Authority for an order for costs. He says that costs should follow the event, that Mr Howe's actual costs were \$6,187.50 (GST inclusive) and that costs awarded by the Authority are usually in the range of \$2,000 per day of hearing plus full reimbursement of disbursements. The applicant therefore seeks an award of \$2,000 plus \$140 in disbursements (filing fee and photocopying).
3. On 23 December 2004 the Bank made a Calderbank offer of \$4,000. Mr Cressey says the offer was made after considerable preparation for the case had already been undertaken. Briefs and briefs in reply had been filed and exchanged already, research and draft submissions had also been prepared. The offer took no account of costs legitimately incurred up until that point. It is therefore submitted that the Calderbank offer should be disregarded as the applicant was awarded \$4,000 exclusive of any consideration of costs whereas the offer was for \$4000 inclusive of costs: *Health Waikato Ltd v Van der Sluis* [1997] ERNZ 235 (CA), etc.
4. The applicant now has a public judgment stating the Bank was wrong to behave as it did whereas the Calderbank offer was made on a without admission of liability basis and offered no apology.

Respondent's position

5. The Bank seeks costs of \$12,250 on the grounds Mr Howe refused unreasonably to settle his claim and in the end recovered no more than he could have by settling and that he refused throughout to see reason thus causing the Bank to incur costs post its Calderbank offer of \$12,250.
6. Orthodox Calderbank principles are relied on and entitle the Bank to recover costs incurred after 23 December 2004 on the ground the applicant has unreasonably proceeded with a claim that could have been readily settled and has then recovered less or not significantly more: *Ogilvy & Mather (NZ) Ltd v Darroch* [1993] 2 ERNZ 943, 952-953.

7. The Bank's offer was made after all the evidence had been exchanged and accordingly took into account all that would be put before the Authority: Mr Howe should have been properly informed.

Discussion and Findings

8. I am not persuaded by the Bank's reasoning that costs should not follow the event in the usual fashion. That is because the Calderbank offer was late in the piece and well after the filing and exchanging of witness statements and the preparation of an agreed bundle of document – all of which were agreed in a telephone conference call on 28 October 2004 to occur by 2 December.
9. I also accept that the Calderbank offer has proven to be less than what Mr Howe stood to obtain, not only in respect of costs but particularly as it took no account of the value to him of a public judgment.
10. I am satisfied that the amounts claimed on the applicant's behalf are, consistent with the well-known principles applying to costs and taking into account the nature of the claims brought, preparation time and the duration of the actual investigation, entirely realistic.

Determination

11. For the reasons set out above I find in favour of the applicant, Richard Howe's, claim that it is entitled to recover from the respondent, the Reserve Bank of New Zealand, a reasonable contribution to the costs he has reasonably incurred in succeeding in part with his claim that he was unjustifiably disadvantaged. Accordingly, I direct the Bank to pay to Mr Howe the sum of \$2,000 (two thousand dollars) plus disbursements of \$140.00 (one hundred and forty dollars).

Denis Asher

Member of Employment Relations Authority

