IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZEAR Christchurch 44
5356173

	BETWEEN	SUE HUNT Applicant
	A N D	HILTON HAULAGE TRANSPORT LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Tim Jackson, Advocate for Applicant Amy Shakespeare , Counsel for Respondent
Submissions Received:	7 February 2013 from Applicant 31 January 2013 from Respondent
Date of Determination:	7 March 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In its substantive determination issued on 4 December 2012, the Authority rejected Ms Hunt's claims and found for the respondent (Hilton Haulage).

[2] Costs were reserved.

The application for costs

[3] As the successful party, Hilton Haulage seek a costs award against Ms Hunt. That application relies on usual legal principles as well as some unique aspects of this case.

[4] In the latter regard, Hilton Haulage say that it was not until the briefs of evidence from the applicant had been filed and served that it became clear to Hilton Haulage precisely what the claim actually was.

[5] It was at that point that a *Calderbank* letter was raised. Hilton Haulage say that was the earliest opportunity they could reasonably have made such an offer because of the difficulties in understanding precisely what it was that Ms Hunt was alleging.

[6] The *Calderbank* letter was in the usual form, providing an analysis of why the particular offer was made and identifying how Hilton Haulage viewed the parties' respective chances of success.

[7] The submission is made that because the case mounted by Ms Hunt had no substantial merit, and because she rejected *Calderbank* offers which clearly would have been more beneficial to her than the eventual result, she ought to be liable for full indemnity costs once the *Calderbank* offer had expired.

[8] In that regard, the Authority is advised that of the total costs incurred of $15,223, inclusive of GST and disbursements, a total amount of $7,309 was incurred from the expiry date of the *Calderbank* offer. It is that amount, $7,309, that is claimed by Hilton Haulage against Ms Hunt as a contribution to its costs.

The response

[9] Ms Hunt argues that costs should lie where they fall and relies on, *inter alia*, the Authority's finding that an aspect of the factual matrix was novel. It is contended that because of that, Ms Hunt was left in the position of having to seek clarification of the matter by the Authority.

[10] Moreover, Ms Hunt maintains that the *Calderbank* letter referred to earlier was inadequate and ought not to be relied upon.

[11] It is suggested that a starting point of $3,500 would be "both excessive and arbitrary" in this case and ultimately that an award of costs against Ms Hunt would be "punitive in effect'.

The law

[12] The principles that the Authority uses in dealing with costs fixing applications have been helpfully summarised and approved by the Employment Court in the case of *PBO Ltd v. Da Cruz* [2005] ERNZ 808. Those precepts include the principle that costs normally follow the event and that a daily tariff rate (currently sitting at $3,500 per day) is an appropriate way for the Authority to assess cost applications.

[13] In addition, the Authority has derived assistance from the formulation in the earlier decision of the Authority *Graham v. Airways Corporation of New Zealand Ltd* (Employment Relations Authority, Auckland, AA39/4, 28 January 2004) a decision of the present Chief of the Authority, Member Dumbleton. That decision advanced three questions which the Authority needed to consider, namely the quantum actually charged to the successful party in respect to costs, whether that quantum was reasonable in all the circumstances, and finally, what percentage of that reasonable amount ought to be paid by the unsuccessful party.

Determination

[14] The Authority is not persuaded this is a matter where costs should lie where they fall. This was not a test case and while it may be contended that an aspect of the factual matrix was novel, the fact remains that Ms Hunt raised a variety of concerns about the way that she was allegedly treated and none of those concerns was found to ground any claim in law.

[15] It follows that, as Ms Hunt was completely unsuccessful, she must bear the consequences of that in the costs environment. There are risks in litigation, one of the principal ones being an obligation to contribute to the costs of the successful party if you are unsuccessful. It cannot be right, as is submitted, that because Ms Hunt is an employee she ought to be protected from the obligation to pay costs in the event of her being unsuccessful in her claim. Had she been successful, she would have obtained an award of money value from the other party and be entitled to a contribution to her costs from them. The same rules must apply to her inversely, given that she was unsuccessful.

[16] The Authority is not attracted by Ms Hunt's argument that there was something wrong with the way in which the *Calderbank* offer was presented by

Hilton Haulage. Their explanation for the timing of the *Calderbank* offer has the ring of truth about it. Certainly, the way the statement of problem was drafted effectively argued in the alternative and it was not until the briefs were filed and served that it became apparent to Hilton Haulage (or to the Authority either) just exactly what it was that Ms Hunt was placing reliance upon. To say that is not to be critical of Ms Hunt but simply to state the fact that on a regular basis, it is not until the applicant's briefs are available that it becomes plain just how the claim is going to be prosecuted.

[17] Nor is the Authority attracted by the contention that the reasoning in the *Calderbank* offer was not clear. It seems apparent to the Authority that Hilton Haulage have aggregated the costs they think are likely be awarded with the figure they think is their maximum exposure in terms of compensation and that total sum is offered on a *Calderbank* basis. Plainly, Ms Hunt would have been a great deal better off to accept that offer than to allow the matter to go to hearing. By determining not to accept the *Calderbank* offer, she placed herself at risk of having the *Calderbank* offer presented to the Authority as a basis for an uplift in the costs that would otherwise have been awarded.

[18] In the normal course of events, as Hilton Haulage note in their submissions, an appropriate costs award would have been in the region of somewhere from $3,500 to, perhaps, $5,000. Certainly the daily tariff is presently set at $3,500. There is argument about whether the second part-day ought to qualify for a full half-day's charge, or not. There is also the question of counsel's reasonable disbursements.

[19] But in any event, the existence of a legitimate *Calderbank* offer requires the Authority, at law, to take a more "steely" approach. The whole point of making *Calderbank* offers is to try to encourage settlement and the Courts have long held that where a *Calderbank* offer is not accepted (as in this case) and the recipient of that offer subsequently does less well than they would have done if they had accepted the *Calderbank* offer, then that fact should sound in costs.

[20] In those circumstances then, it is difficult to escape the conclusion that the claim of indemnity costs from the effective expiry date of the *Calderbank* offer is the appropriate basis on which to fix costs.

[21] However, the Authority has traditionally not included GST in the fixing of costs and on that footing, Ms Hunt is to pay to Hilton Haulage the sum of $6,409 being the aggregate of the fee for the relevant period together with the disbursements which the Authority finds reasonable in all the circumstances.

James Crichton
Member of the Employment Relations Authority