IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2013] NZERA Christchurch 206
5386049

	BETWEEN	TONY JACKSON Applicant
	AND	TSL NELSON LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Shayne Boyce, Advocate for Applicant Kay Chapman, Advocate for Respondent
Submissions received:	24 September 2013 from Applicant None submitted by Respondent
Determination:	2 October 2013

COSTS DETERMINATION OF THE AUTHORITY

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[1] By way of a determination dated 28 August 2013 the Authority determined that the respondent owed $19,976.56 to the applicant in respect of time off in lieu that had accrued but was untaken at the date of his employment ending. Further amounts were awarded under the Holidays Act 2003, although the applicant's personal grievance failed.

[2] The Authority invited the parties to seek to agree how costs were to be dealt with, but they were unsuccessful in reaching agreement. A comprehensive and helpful memorandum seeking costs was received from Ms Boyce on behalf of the applicant, but Ms Chapman informed the Authority that the Respondent declined to make any further submissions because it was not trading and was insolvent.

[3] Ms Boyce informs the Authority that, since filing the statement of problem until the date of determination, the applicant has incurred by way of costs a total of $14,332.50 plus GST. Ms Boyce includes with her submissions a copy of a letter to Ms Chapman dated 17 January 2013, and marked *without prejudice except as to costs*,

which offered to settle the claim for the sum of $10,000. This offer was rejected by the respondent. Clearly, the applicant beat the offer in respect of the Authority's determination (The respondent made its own unsuccessful *without prejudice except as to costs* offer later, offering to settle for $5,000).

[4] On the basis of her *without prejudice except as to costs* letter (commonly known as a Calderbank letter) Ms Boyce seeks that costs be awarded on an indemnity basis, in the sum of $12,582.50 plus GST, being the costs incurred between the date of the Calderbank letter and the date of the determination.

[5] Ms Boyce also draws my attention to the fact that, on 28 June 2013, the Authority and the applicant were informed that the respondent raised an allegation that a document produced by the applicant had been fabricated, necessitating the setting down of a further investigation meeting, but that the respondent effectively withdrew that allegation on 15 July 2013. Ms Boyce states that she spent six hours preparing a submission in response to the fabrication allegation. This amounts to $1,050 plus GST.

[6] The principles relating to the award of costs in the Authority are well known and were first set down in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808.

[7] The principles governing the setting of costs awards in the Authority as set out in *Da Cruz* 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 is 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.

[8] The use of Calderbank offers in Authority matters is now well established. However, as such offers put pressure on the recipient, they must comply with certain basic safeguards so as not to unfairly prejudice the recipient of the offer. These safeguards have been identified in *Ogilvy & Mather (NZ) Limited v Darroch* [1993] 2 ERNZ 943 as including:

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;

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

[9] Whilst it is arguable that a letter marked *without prejudice except as to costs* sent by an applicant to a respondent is not a true Calderbank letter and, whilst even a true successful Calderbank offer is not wholly determinative of how costs will be dealt with by the Authority, it remains an important factor which the Authority should bear in mind in determining costs given that the acceptance of such an offer would have prevented the incurring of further costs.

[10] There are four main issues to consider in determining costs in this matter:

a. Were the costs incurred by the applicant reasonable?

b. What effect does the letter marked *without prejudice except as to costs* have on how costs are awarded?

c. What effect does the withdrawal of the fabrication allegation have?

d. What effect does the financial situation of the respondent have?

Were the costs incurred by the applicant reasonable?

[11] In my view, given the volume of documentation that had to be carefully analysed in working out what sums were owed in respect of the allegation regarding the failure to pay for time off in lieu that had accrued but was untaken at the termination of employment, together with all the other tasks that the proceedings necessitated, the costs charged to the applicant by Ms Boyce are eminently reasonable.

What effect does the letter marked *without prejudice except as to costs* have on how costs are awarded?

[12] I accept that the offer made by Ms Boyce on behalf of the applicant fulfilled the *Ogilvy & Mather* principles set out above. The basis of the offer was clear, it was a reasonable one, and sufficient time (21 days) was given for the respondent to properly consider it.

[13] However, I do not accept that costs should run from the date the letter was tendered, given that it was open for acceptance until 8 February 2013. Time should run from 9 February when considering what costs to award. Ms Boyce did not present a detailed breakdown of the costs incurred, so I am unable to ascertain what costs accrued between 9 February 2013 and the date of the determination.

[14] In light of this, I cannot accept that Ms Boyce's costs should be awarded on an indemnity basis. I deal with what basis I will award costs below.

What effect does the withdrawal of the fabrication allegation have?

[15] There is little doubt in my mind that the making of a very serious allegation against an applicant, which questions the honesty of that applicant but is unsubstantiated by any evidence, and which is then followed by the withdrawal of that allegation, should sound in a costs award against the respondent if the applicant has

incurred costs solely as a result of such an allegation. I therefore accept that the $1,050 incurred by the applicant in respect of this matter should be awarded against the respondent.

What effect does the financial situation of the respondent have?

[16] From an early stage in the Authority's involvement in this matter the respondent has pleaded impecuniosity. On more than one occasion, it stated, through its advocate, that it was close to going into voluntary liquidation. Despite this, it still engaged Ms Chapman to defend the claims of the applicant.

[17] The only objective proof that the Authority has seen to support the pleading of impecuniosity was a notice from a creditor of the respondent dated 26 November 2012 which showed that a five figure sum was owed to it on that date, and which gave notice that the debtor would apply for the respondent to be put into liquidation if the debt was not paid within 15 working days. A search of the Companies Office register shows that, on 2 October 2013, the respondent was not in liquidation.

[18] In light of this, I am not satisfied that no costs order should be made against the respondent. Even if the respondent is currently insolvent and not trading, that situation may change. The applicant should not be deprived of a chance to recover a proportion of his costs on the basis of unsubstantiated statements made on behalf of the respondent.

Determination

[19] Costs generally follow the event, and I see no material reason to depart from that principle here. Although the applicant was not wholly successful, he was substantially successful. I believe that a tariff approach is appropriate, with an uplift on the usual nominal daily rate of $3,500 to reflect the applicant's *without prejudice except as to costs offer*, which was beaten by the applicant. The investigation took around a full day when one takes into account telephone evidence taken separately. In light of Ms Boyce's *without prejudice except as to costs offer*, I believe that it is appropriate to increase the daily tariff to $5,000.

Order

[20] I order the respondent to pay to the applicant in respect of his legal costs, the total sum of $6,050 (comprising the cost of one full day's investigation at $5,000, plus $1,050 being the costs of the extra, unnecessary work done in preparing for an investigation into the fabrication allegation).

David Appleton
Member of the Employment Relations Authority