



[2] Hazara Auto Recyclers Limited (Hazara) seeks costs on the basis that Mr Khan declined two Calderbank offers both of which it says would have resulted in higher payments, net of income tax, than the amounts awarded in the determination.

[3] Hazara should have filed an application for costs by no later than 28 September 2023 rather than 18 October 2023 which was the date on which submissions were received together with an application for leave.

[4] The grounds for leave were that counsel had suffered a bereavement and was preoccupied with all the matters arising from such an event. Under the circumstances leave for the late filing for costs is granted. It is noted that Mr Khan was also late in filing his memorandum as to costs and again under the circumstances leave is granted.

### **The parties' positions**

#### *The Applicant*

[5] The Authority awarded Mr Khan:

- (a) Four weeks wages in lieu of notice (\$28 an hour for 40-hour week) which equates to \$4,480.00 gross.
- (b) \$17,000.00 as compensation for humiliation, loss of dignity and injury to Mr Khan's feelings.

[6] The applicant accepts he received and rejected two offers of settlement, first an offer for \$17,000.00 under s 123(1)(c)(i) of the Act plus costs of \$3,450.00 (totalling \$20,450.00) on 27 February and secondly on 27 April 2023 an offer of \$20,000.00 under s 123(1)(c)(i) of the Act plus costs of \$3,450.00, totalling \$23,450.00. The investigation meeting commenced on 3 May 2023.

[7] Mr Khan submits that although the offer of 27 April 2023 exceeds the amount awarded by the Authority, wages were not included in the Calderbank offer. Other submissions on behalf of Mr Khan relate to his unsuccessful claims in respect of bonuses and commissions and say that he was entitled to be suspicious because transactions such as the sale and purchase of cars ought to have been properly documented. He submits that it is appropriate that costs lie where they fall.

*The Respondent*

[8] Hazara says that both the Calderbank offers were reasonable attempts to settle the claim and they acknowledge the merits of the unjustifiable dismissal claim but not the claim for unpaid bonus/commission. They argue that the bonus commission claim was the most substantive issue before the Authority therefore they were in essence the successful party because:

- (a) The respondent was the successful party on the most substantive issue.
- (b) The applicant declined two Calderbank offers.
- (c) Both parties were put to unnecessary costs by the applicant's refusal to accept the offers.

[9] Hazara seeks costs based on the daily tariff, namely a sum of \$4,500.00 plus travel and accommodation expenses of \$906.69.

**Conclusion and Orders**

[10] The tariff-based approach is the approach usually adopted by the Authority which has a discretion to raise or lower the tariff depending on the circumstances. In this case the matter took one day and accordingly the tariff costs would equate to a sum of \$4,500 for the successful party.

[11] However, Hazara is arguing that because two Calderbank offers were issued, tariff costs should be awarded to it ostensibly on the basis of the two Calderbanks and the fact it successfully defended the claims for bonuses and commissions.

[12] The first Calderbank offer made was on 27 February 2023, some nine weeks before the investigation meeting. This offer was for a total sum of \$20,450.00 with \$3,450.00 of that sum reflecting costs. At this point neither party had incurred the expense of preparing witness statements. That sum however is slightly less than the sum awarded by the Authority. Further, the 27 February offer did not take into account the four weeks wages the Authority deemed were owing to Mr Khan.

[13] The second Calderbank offer was made on 27 April 2023, six days before the investigation meeting commenced. By this stage, witness statements, submissions etc., were already prepared. I consider that a Calderbank offer made six days prior to an investigation meeting would generally be open to an applicant to reject. This is because

most of the work for the investigation meeting would have already been completed and a Calderbank offer made six days before the hearing would be made too late to impact on costs in any meaningful way.

[14] Although not directly submitted, I accept that much of Mr Khan's argument at the investigation meeting centred on his claim for bonuses and commission. These claims appeared to be based on changes made to an employment agreement which the evidence showed had never been sent to Hazara and accordingly it had never consented to changes in the agreement. I accept that those arguments prolonged the length of the hearing.

[15] Under the circumstances I accept Mr Khan's submission that it is appropriate that costs lie where they fall and so order. I also note that if I had been inclined to award costs to Hazara, they would not have included travel and accommodation costs simply because Hazara had retained out of town counsel.

Geoff O'Sullivan  
Member of the Employment Relations Authority