IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 301
5366652

	BETWEEN	TONY LOOKER Applicant
	A N D	AG WALTER AND SONS LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Mitchell Paewai, Advocate for Applicant Richard Upton, Counsel for Respondent
Submissions Received	No submissions from Applicant 4 July 2012 from Respondent
Date of Determination:	3 September 2012

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] By determination dated 28 June 2012, the Authority determined the employment relationship problem raised by Mr Looker by determining that he did not have a personal grievance. In consequence, A G Walter was completely successful in resisting Mr Looker's claims.

[2] Costs were reserved.

The claim for costs

[3] By memorandum dated 4 July 2012, counsel for the respondent seeks an award of costs in the sum of $10,000. The Authority is urged to depart from its daily tariff approach to reach this figure.

[4] The submission to that effect proceeds on the footing that Mr Looker's conduct contributed to the costs incurred by A G Walter together with A G Walter's reliance on a *Calderbank* offer which was rejected by Mr Looker.

The response from the unsuccessful party

[5] Despite the opportunity to do so, the advocate for Mr Looker took no steps to file costs submissions either in conformity with the timetable set by the Authority or indeed at all. Instead, he engaged in confusing exchanges with the Authority's support officers and counsel for the respondent, none of which exchanges did him any credit or assisted his client in any particular. As a consequence, the Authority has no way of assessing Mr Looker's position in respect to costs or matters such as his ability to pay, save for information which is already before the Authority as a consequence of the evidence in the substantive matter.

Discussion

[6] The law on costs fixing in the Authority is well settled and the principles that ought to apply have been clearly enunciated by the Full Bench of the Employment Court in the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[7] That decision, amongst other things, approves the Authority's common practice of applying a daily tariff and enunciates various other principles such as the Authority's discretion to grant costs or not, the fact that costs will typically follow the event, the fact that costs in the Authority will typically be modest and the fact that the behaviour of the unsuccessful party may sound in costs. In addition of course, *Da Cruz* makes clear that *Calderbank* offers *"can be taken into account"* and there is ample other law on that point as well.

[8] In the present case, Mr Looker was completely unsuccessful in his claims against the respondent employer. The way in which the case was conducted, in the Authority's opinion, contributed to the length of time the case took to deal with and thus the costs incurred by A G Walter. Furthermore, Mr Looker's insistence on raising matters which were not germane to the Authority's investigation, and to insisting on examination of witnesses who could not assist the Authority in making determinations on the matter, also added to the costs which might otherwise have been incurred.

[9] A G Walter also relies on its *Calderbank* offer as a basis for seeking a higher than usual award of costs. That offer was made on 13 February 2012 immediately after an unsuccessful mediation between the parties. The Authority is satisfied that had Mr Looker accepted that *Calderbank* offer when it was given to him, he would have been materially better off than he was as a consequence of the Authority's determination in the matter.

[10] It is a truism that the failure of a party to accept a *Calderbank* offer undermines the public interest in a fair and expeditious resolution of disputes if there is no consequence to that failure: *Aoraki Corporation Ltd v. McGavin*, [1998] 1 ERNZ 601.

[11] In the same general connection, the normal principle that costs should follow the event does no more than reflect the reality of litigation. A party cannot expect to undertake a legal proceeding against another, lose that proceeding in its entirety, and then not suffer the legal consequences. A party must undertake legal proceedings (including in the employment jurisdiction) in the sure and certain knowledge that if they are unsuccessful, they may face the obligation of meeting some or all of the successful party's costs.

[12] The only real issue is what the quantum of that contribution to the successful party's costs, ought to be. The Authority thinks it is helpful to follow the principles enunciated in *Graham v. Airways Corporation of New Zealand Ltd*, AA39/04, a decision of the Chief of the Authority, Member Dumbleton. In that decision, the Authority postulated three questions to be considered:

(a) What were the actual costs incurred by the successful party;

(b) Were those costs reasonable;

(c) What proportion of those costs ought to be met by the unsuccessful party?

[13] In the present case, A G Walter incurred total costs of around $13,500. For a matter of this kind, given the confusing and discursive way that Mr Looker's advocate ran his case, that sum is in the Authority's opinion entirely reasonable. That leaves the only issue for decision as being the amount that Mr Looker should contribute to the costs reasonably incurred by A G Walter in defeating his claim.

Determination

[14] The Authority has accepted that the acceptance of a legitimate *Calderbank* offer is a factor that, in the present case, ought to be taken into account. Further, the Authority has accepted that the approach adopted by Mr Looker's advocate in the prosecution of Mr Looker's case added to the costs of the successful party in defeating the claim.

[15] The matter effectively took around one hearing day to deal with. On the basis of the daily tariff approach, that would justify an award of $3,500 in costs. That is the starting point.

[16] But the Authority must also take into account the factors it has accepted from A G Walter's submissions as adding to the normal impost, first the *Calderbank* offer and secondly the discursive and confusing presentation of Mr Looker's case.

[17] To take account of those factors, the Authority thinks the proper course is to add to the notional daily tariff a like sum bringing the total contribution to costs to $7,000.

[18] In the absence of any submission from Mr Looker's representative, the Authority is unable to identify any factors which might mitigate against that level of contribution to A G Walter's costs. The Authority is entitled to take notice of the fact that it was told during the course of the investigation meeting that Mr Looker was continuing in employment elsewhere and on that basis there is nothing to suggest that a costs award within the range identified cannot be met.

[19] Accordingly, Mr Looker is to pay to A G Walter the sum of $7,000 as a contribution to its costs in successfully defending his claim.

James Crichton
Member of the Employment Relations Authority