IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2013] NZERA Christchurch 164
5386293

	BETWEEN	BRADLEY MORRISON Applicant
	AND	DESIGN PLUS BUILD LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Peter van Keulen, Counsel for Applicant Linda Ryder, Counsel for Respondent
Submissions received:	28 June 2013 from Applicant 12 July 2013 from Respondent
Determination:	13 August 2013

COSTS DETERMINATION OF THE AUTHORITY

Costs are awarded to the Applicant in the sum of $7,500, together with disbursements of $71.56.

[1] By way of a determination dated 30 May 2013, [2013] NZERA Christchurch 94, Mr Morrison was successful in his personal grievances of unjustified dismissal and unjustified disadvantage. He was awarded $13,185.28 by way of remedies and the respondent was ordered to pay a further $4,500 to Mr Morrison by way of penalties (totalling $17,685.28 payable to Mr Morrison). Interest was also awarded on the award of $5,185.28 of lost wages.

[2] The parties were directed to seek to agree how costs were to be dealt with between them but have been unable to do so. Accordingly, counsel have each served and lodged memoranda with their respective submissions on costs.

[3] Mr van Keulen for Mr Morrison refers the Authority to two Calderbank letters he sent to Ms Ryder, each of which was marked *without prejudice save as to costs.* The first was dated 10 May 2012, prior to Mr Morrison's resignation from his employment with the respondent company on 16 May 2012. This letter offered to settle Mr Morrison's personal grievance for $5,000 plus a contribution to his legal costs of $3,500 plus GST, together with a further payment of $5,400 in lieu of notice in return for Mr Morrison resigning. Other conditions attached to the resignation. The offer was open until 5pm on 16 May 2012 but it was rejected by the respondent.

[4] The second letter was dated 2 October 2012. It recited in some detail the history of Mr Morrison's personal grievance and negotiations between the parties. It concluded with an offer to settle the matter for $23,000 *which will cover his costs and leave him a suitable sum for compensation*. The offer was not expressed to have been subject to any time limit for acceptance but was rejected by the respondent the same day it was sent.

[5] Mr van Keulen argues that both of these offers to settle were exceeded by the Authority's awards and, accordingly, Mr Morrison is entitled to his costs on an indemnity basis from the date that the first Calderbank offer was made; that sum would be $14,793 according to Mr van Keulen. If the indemnity principle were to be adopted from the date of the second Calderbank letter, the indemnity costs would be $9,214. In the alternative, Mr van Keulen submits, Mr Morrison should have his legal costs reimbursed by way of an increased notional daily tariff of $7,000 a day, totalling $14,000 if the investigation is treated as having lasted two days, or $10,500 if the investigation is treated as having lasted one and a half days.

The Calderbank offers

[6] Costs are awarded in the Authority in accordance with the provisions of *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ENZ 808. The principles governing the setting of costs awards in the Authority as promulgated in *Da Cruz* include:

a. There is discretion as to whether costs would be awarded, and 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.

[7] The use of Calderbank offers in Authority matters is well established and, whilst the making of a successful Calderbank offer is not wholly determinative of how costs will be dealt with by the parties, it is an important factor which the Authority should bear in mind in determining costs.

[8] However, as such offers put pressure on an applicant, 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] Ms Ryder for the respondent argues that neither letter sent by Mr van Keulen satisfies the conditions of being a valid Calderbank offer.

The first Calderbank letter

[10] With respect to the first letter, Ms Ryder argues that the offer was made prior to Mr Morrison's resignation, and was therefore made prior to the constructive dismissal claim existing. The offer was to settle an unjustified disadvantage personal grievance and to agree terms for Mr Morrison's resignation. No remedies were awarded by the Authority in respect of the unjustified disadvantage grievance as it addressed the issue of remedies under the subsequent unjustified dismissal grievance. Ms Ryder submits that it would not be fair to take the first Calderbank offer into account as the matter before the Authority represented a wider range of issues than was referred to in the offer.

[11] I believe that Ms Ryder is correct in this submission. When a defending party receives what might be regarded as a Calderbank offer, it must, amongst other things, assess the likelihood that the offeror will win their claims and recover the same or more than is being offered. At the time when Mr van Keulen made the first offer, not only had Mr Morrison not resigned, but he had not lodged any claims in the Authority. Indeed, the 10 May 2012 offer stated that, if it was not accepted, it would be withdrawn and Mr Morrison would return to work. No mention is made of resigning and claiming constructive dismissal. The risks that the respondent was assessing upon receipt of the letter were, therefore, quite different than those it faced after the resignation and after the claims had been lodged.

[12] I therefore agree that the first Calderbank offer should not be taken into account when assessing costs.

The second Calderbank letter

[13] Ms Ryder also argues that the second Calderbank letter, dated 2 October 2012, is invalid and should be ignored by the Authority. She submits that the letter was not transparent as it did not quantify the settlement sum of $23,000 in any more detail. First, it is established law that a Calderbank letter must be transparent. This is

because the offeree must understand what is being offered and must be in a position to be able to assess it properly. It is certainly the case that a blanket monetary offer, without being broken down, could fail the transparency test as the recipient needs to assess what the offeror is assessing the likely remedies to be and compare that with its own assessment. However, examining the 2 October letter it makes clear that Mr Morrison had, after attending mediation, incurred legal costs in pursuing the matter of approximately $11,500 plus GST (a total of around $13,225). The letter also states that Mr Morrison was owed just over $1,600 in holiday pay. It is easy from this calculation to work out that Mr Morrison was seeking a further $8,175 in respect of his constructive dismissal claim. An alternative view is that, taking a simplistic approach where Mr Morrison has incurred liability for $11,500 of costs (excluding GST) he is seeking twice that sum altogether. I suspect this is the source of the offer to settle for $23,000.

[14] All in all, I believe that the offer is transparent, and did enable the respondent, with the assistance of its very experienced counsel, to work out what was on offer and to be able to assess it. Furthermore, by this time, the claims had crystalized and were clear to the respondent what they entailed.

[15] However, Ms Ryder deploys another argument to submit that the second Calderbank offer should be ignored by the Authority. She submits that Mr Morrison did not beat the offer he made when he offered to settle for a global figure of $23,000. Mr Morrison was awarded remedies and the benefit of penalties in the total sum of $17,685 by the Authority, plus interest on the lost wages element. In arguing that Mr Morrison beat the second Calderbank offer to settle, Mr van Keulen adds to the Authority's award the minimum legal costs that Mr van Keulen anticipates will be awarded to Mr Morrison on the notional daily tariff basis. One and a half days at a notional daily tariff of $3,500 equates to $5,250. Mr Morrison just beats $23,000 when one adds $17,685 to $5,250 and $200 interest ($23,135).

[16] Ms Ryder argues that it is not appropriate to add the $5,250 to the $17,685 (or $17,885 including interest) awarded to Mr Morrison as the whole point of the Calderbank offer is to prevent further costs being awarded to achieve the same result. I believe there is force in this argument when taken at face value. When the principal objective in sending a Calderbank offer is to avoid incurring further legal costs, it

seems artificial to argue that one must take into account the costs that will be awarded in order to beat the offer made.

[17] However, when one considers what was offered in the second Calderbank letter, it is clear that it was an offer to withdraw the proceedings in return for a sum of money that would have extinguished Mr Morrison's legal costs as they stood at that time, as well as extinguishing his claim for holiday pay, and then provided him with the balance of $8,175. Assuming that sum would have been represented as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000, that sum would have been paid free of tax. Clearly, Mr Morrison recovered more than twice that sum at the end of the Authority's investigation. This approach seems to be a reasonable one to take, as it ignores legal costs. It compares what Mr Morrison sought as his *remedy* with what he was actually awarded.

[18] One final argument deployed by Ms Ryder relies upon a previous determination of the Authority, *Patterson v Superior Motorcycles Limited* [2013] NZERA Christchurch 4, in which I declined to accept as a true Calderbank offer an offer made on behalf of an applicant on the basis that such an offer was effectively a request for money supported by a threat of indemnity costs if the money was not paid. Having considered again the relevant authorities, and in particular the judgement of Colgan CJ in *Watson v. New Zealand Electrical Traders Ltd t/a Bray Switchgear*, Employment Court, Auckland, AC64/06, 24 November 2006, I accept that it is appropriate to take into account in assessing costs an offer by an applicant to settle when it is expressed on a *without prejudice save as to costs* basis, even if it is arguably not a Calderbank offer *per se.* This approach is necessary given that required of the Authority in *Da Cruz.*

[19] Therefore, whilst it remains arguable that the second offer is not a Calderbank letter in the traditional sense of the word, I accept that it should still be taken into account when deciding the level of costs that should be awarded to Mr Morrison.

Should indemnity costs be awarded?

[20] Taking into account the principles that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct, that costs awards are to be modest and that frequently costs are judged against a

notional daily rate, I do not accept that full indemnity costs in the sum of $9,214 is reasonable in this case.

Should the notional daily tariff be increased?

[21] Mr van Keulen argues that if full indemnity costs are not to be awarded, then the notional daily rate of $3,500 should be increased to $7,000. Apart from the fact that an attempt to settle the matter was made by Mr Morrison, I see no justification in increasing the notional daily rate by doubling it. The matter itself was straightforward and not factually or legally complex and, whilst Mr van Keulen suggests that the respondent's pre investigation conduct merits an increase, this has already been addressed by way of the penalties imposed against the respondent. As far as the conduct of the respondent during the proceedings was concerned, it was not blameworthy as far as I can ascertain.

[22] However, I am minded to recognise the effect of the attempt by Mr Morrison to settle the matter in October 2012, and so I believe that an increase in the notional daily rate to $5,000 is merited. Allowing one and a half days (which includes half day for the preparation of submissions) this results in a total of $7,500.

Were Mr van Keulen's costs reasonable?

[23] Having perused the account of Mr van Keulen's activities after the second offer to settle was made, I am satisfied that the costs in respect of those activities were reasonable.

Should GST and disbursements be added?

[24] Mr Morrison faces actual costs of $21,492.50 plus GST and disbursements. As an individual, he may or may not be registered for GST but Mr van Keulen has not made any submissions on that point. Accordingly, although *Davidson v Christchurch City Council* [1995] 1 ERNZ 523 contemplates taking GST into account where the recipient of a costs award is not GST registered, in the absence of any information on that point, I exclude GST from the award.

[25] No details are given as to the disbursements that were incurred. However, I am aware that the Authority's lodgement fee would have been incurred by Mr Morrison, and so I award that sum.

Order

[26] I order the respondent to pay a contribution to Mr Morrison's legal costs in the sum of $7,500.

[27] I further order the respondent to reimburse to Mr Morrison the Authority's lodgement fee of $71.56.

David Appleton
Member of the Employment Relations Authority