IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 487
5329745

	BETWEEN	BAHRAM NAFISSI Applicant
	AND	NEW ZEALAND SCHOOL OF EDUCATION LTD Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Diana Christensen, Advocate for Applicant Marie Wisker, Counsel for Respondent	
Costs Submissions	7 November 2011 from Applicant 9 November 2011from Respondent	
Determination:	11 November 2011	

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination dated 14 October 2011 ([2011] NZERA Auckland 445), the Authority found that the Applicant, Mr Bahram Nafissi, had been unjustifiably dismissed from his employment by the Respondent, New Zealand School of Education Ltd ("NZSE").

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and Ms Christensen, on behalf of Mr Nafissi, has filed a submission in respect of costs.

[3] The matter involved 1 day of meeting time. Ms Christensen, citing actual costs of 22,624.25 plus disbursements of $565.61, plus GST, is seeking a contribution to costs of $5,000.00.

[4] Ms Wisker for NZSE has filed a submission in relation to the costs submission by Mr Nafissi which contains a counter-claim for costs by NZSE in the sum of $2,500.00 plus GST.

[5] Ms Wisker submits that the Respondent made a Calderbank[1] offer, that is a without prejudice save as to costs offer, to Mr Nafissi. This offer was made in a letter to Ms Christensen, Mr Nafissi's representative, dated 23 June 2011 ("the Offer"), which is before the Authority.

[6] Both Ms Wisker and Ms Christensen refer in their submissions to *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[2] and submit that the principles on which an award of costs are made are well settled. These well established principles are that costs generally follow the event, without prejudice offers can be taken into account, and costs are modest. I have relied upon the principles as set out in *Da Cruz* in determining this matter.

Determination

[7] Mr Nafissi filed a Statement of Problem with the Authority on 10 December 2010. After an unsuccessful mediation, Mr Nafissi filed his brief of evidence on 21 June 2011.

[8] The Offer was made on 23 June 2011. The amount proposed for settlement contained in the Offer was $12,000.00.

[9] Mr Nafissi rejected NZSE's offer on 28 June 2011, and counter-offered in a sum in excess of $30,000.00 ("the Counter-offer").

[10] The Authority Investigation Meeting was held on 9 August 2011. The Offer was made more than six weeks in advance of the Investigation Meeting and consequently before more than initial preparation costs had been incurred. There was ample time for Mr Nafissi to consider the Offer prior to the Investigation Meeting.

[11] It is necessary to consider what effect the Offer should have upon the award of costs in this matter. The Court of Appeal in *Health Waikato Limited v Van Der Sluis*[3] observed that: "*the Calderbank letter field is fully discretionary".* The nature of this wide discretion is that if the Authority awarded a lesser amount than the amount offered in the Calderbank letter, there would be no absolute protection to the party which had made the offer in terms of costs. Equally, the Authority may take into consideration a Calderbank letter when more has been awarded than was offered.

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[1] *Calderbank v Calderbank* [1976] Fam 93 (CA)

[2] [2005] 1 ERNZ 808

[3] [1997] 10 PRNZ 514

[12] The Court of Appeal in *Aoraki Corporation Ltd v McGavin*[4] in commenting on the exercise of this discretion, noted that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore these Calderbank offers without costs being impacted:

> *The discretion as to costs is a judicial one to be exercised according to what is reasonable and just to both parties and the public interest in the fair and expeditious resolution of disputes requires that full weight be given to the extent to which costs were properly incurred subsequent to the non-acceptance of an offer of settlement at a figure above the amount eventually awarded in the litigation.*

[13] The need for a "*more steely*" approach to costs where reasonable settlement proposals have been rejected was noted by the Court of Appeal in *Health Waikato Limited v Elmsley*.[5]

[14] While Mr Nafissi succeeded in his unjustifiable dismissal claim before the Authority, his application had raised multiple claims which required investigation by the Authority and on the majority of which Mr Nafissi was not successful. Mr Nafissi was awarded a total of $11,607.81 by the Authority. The settlement offer of $12,000.00 and the counter offer of settlement in a sum in excess of $30,000.00 made by Mr Nafissi must be viewed in this context.

[15] Ms Wisker, on behalf of NZSE, submitted that $14,400.00 plus GST, were incurred by NZSE after Mr Nafissi rejected the NZSE Calderbank offer.

[16] Ms Wisker submits that the Authority should exercise its discretion to award costs to NZSE. In support of this application Ms Wisker submits that:

- Mr Nafissi was not successful in respect of the majority of complaints he had made;

- The finding by the Authority that Mr Nafissi had been unjustifiably dismissed arose not from pre-determination on the part of NZSE but through NZSE acting upon erroneous legal advice reasonably and prudently sought,

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4 [1998] 1 ERNZ 601
5 [2004] 1 ERNZ 172 (CA) at [53]

- Mr Nafissi raised serious allegations, these being the complaints against NZSE made to Immigration and the NZQA authorities, which necessitated NZSE incurring costs in defending them;

- Mr Nafissi had no genuine grounds for claiming reinstatement given that when Mr Nafissi raised the personal grievance on 23 November 2010 following the termination of his employment on 14 October 2010, the remedies claimed were inconsistent with reinstatement; and

- The conduct of Mr Nafissi was unreasonable and increased costs in that Mr Nafissi adopted an unreasonable approach taken from the outset, which lead to Mr Nafissi having an unrealistic expectation of recovery from the litigation and rejecting the reasonable Offer.

[17] Ms Christensen on behalf of Mr Nafissi submits that an award of costs to Mr Nafissi in excess of the notional daily tariff rate is merited on the basis that:

- The Offer was unacceptable on the basis that the case was of high importance to Mr Nafissi who sought reinstatement;

- Mr Nafissi was successful in his claim that he had been unjustifiably dismissed;

- The Offer was not made in a timely manner, having been received after Mr Nafissi's briefs of evidence had been filed;

- The Counter-offer was reasonable in that Mr Nafissi was withdrawing his claims to reinstatement, overtime and bonus. Further that the claim for hurt and humiliation was reasonable in the circumstances of Mr Nafissi having lost his employment with NZSE unjustifiably; and

- In all respects Mr Nafissi respects acted reasonably.

[18] The principles governing an award of costs as set out by the Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* include:[6]

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[6] 2005] 1 ERNZ 808 at para [44]

> *Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.*
>
> *It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.*

[19] Mr Nafissi was the successful party in the matter before the Authority, and whilst not successful in all of the claims before the Authority, he did succeed on the principle claim that he was unjustifiably dismissed by NZSE. It is a principle that costs normally follow the event[7], and I do not find that this is a case in which that principle should be displaced.

[20] Turning to consideration of the Offer in relation to Mr Nafissi's claims for a costs award in excess of the notional daily rate, I find that the Offer was a genuine attempt to resolve the matter without further expenditure on litigation made at a relatively early stage in the proceedings, although I note that it was not made until after Mr Nafissi had filed his brief of evidence. I accept Ms Wisker's submission that NZSE incurred significant costs following the Offer. I have concluded that taking all these circumstances into account, the Offer should be given full weight.

[21] I have considered the Counter-offer. I accept that throughout the course of the proceedings Mr Nafissi's conduct had the effect of increasing costs unnecessarily in that Mr Nafissi had an unrealistic expectation of recovery. I also take into consideration that the Offer was not made until after Mr Nafissi's filing of his brief of evidence, although that date was still more than six weeks prior to the Authority's Investigation Meeting.

[22] In respect of Mr Nafissi's unrealistic expectations of recovery I note that Mr Nafissi's originating claim was for a total of $182,000.00 gross. The Authority Member first assigned the case advised the Applicant to reconsider the quantum of his claim which presented a barrier to settlement of the issues between the parties. Despite this advice, the amended Statement of Problem contained a similarly unrealistic level of claims, including a claim for compensation alone of $75,000.00, a matter which was addressed at the outset of the Investigation Meeting.

[23] I determine that this is case in which it is appropriate to adopt a "*more steely*" approach to costs having considered all of the circumstances, I can see no justification

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[7] *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[2005] 1 ERNZ 808

for not making the costs award to Mr Nafissi as the successful party in the proceedings, however I also see no justification for increasing the notional daily rate of $3,000.00

[24] Accordingly, NZSE is ordered to pay Mr Nafissi $3,000.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority