IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 167A/07
5071214

	BETWEEN	SIMONE RILLSTONE Applicant
	AND	PRODUCT SOURCING INTERNATIONAL 2000 LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	John Hannan for Applicant David France for Respondent
Determination:	25 October 2007

COSTS DETERMINATION OF THE AUTHORITY

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[1] By determination AA 167/07 (7 June 2007) the Applicant was found to have a personal grievance for unjustified disadvantage and dismissal arising from termination of her employment on the grounds of redundancy. She was awarded remedies of $32,307.69 for lost wages, $1346.15 for a lost allowance and a further $5000 in compensation for hurt and humiliation.

[2] The parties were encouraged to resolve any matter of costs between themselves but have been unable to do so. The Applicant seeks costs. Both parties have lodged submissions on the issue.

[3] The Applicant submits that the Authority's usual tariff-based approach to costs is not appropriate because it would result in a significant loss of benefit of award. She seeks an award for two-thirds of her actual legal costs. She says this would recognise her success and a "Calderbank offer" she made three months before the investigation meeting to settle for less than the total amount ultimately awarded by the Authority.

[4] Following failure to resolve the matter in mediation, the Applicant had offered to settle her claim for $32,000. This offer was made in a "without prejudice save as to costs" letter on 6 March 2007. She demanded an answer by 9 March but agreed to a request from the Respondent's solicitors to extend that deadline to 16 March.

[5] She seeks an award of $24,585 as a reasonable contribution towards total actual legal costs of $37,251 (including GST). The total excluding GST is $33,112.31. This comprises $26,216 for what are said to have been 69 hours at a rate of $380 spent on preparing and lodging a statement of problem, considering statement of reply, and preparing for the investigation meeting, including briefing witnesses, assembling a bundle of documents, preparing cross-examination, dealing with a waiver of privilege issue and drafting submissions. Of this amount, $21,570 is said to have been incurred after the 6 March Calderbank offer.

[6] A further $3840 is sought for counsel's attendance at the investigation meeting at a rate of $480 an hour, along with $2362 for junior counsel's attendance for 7.5 hours at a rate of $315 an hour. Disbursements of $694.31 are sought for the filing fee and office service charges for copying and faxes.

[7] Alternatively, if the Authority adopts what is described as the 'tariff based approach' approved by the Employment Court in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, the Applicant submits that this matter was complex and warrants "the higher tariff of $3000" a day for the one-day investigation meeting.

[8] In reply the Respondent acknowledges the statutory discretion for the order of such costs and expenses as the Authority thinks reasonable and the principles guiding exercise of that discretion non-exhaustively set out in *Da Cruz*. It accepts a Calderbank offer may be one of many relevant factors that the Authority should take into consideration in exercising its overall discretion to award reasonable costs.

[9] The Respondent complains that the Calderbank offer was initially made by the Applicant with barely a 48 hour deadline which, although subsequently extended a further seven days, was an "unreasonable and unnecessary pressure".

[10] It also notes that the $32,307 awarded to the Applicant was subject to tax on the lost wage and allowance components. Assuming a 33 per cent tax rate, the Respondent calculates the total actual benefit to the Applicant was $27,548. This was less than the Applicant's Calderbank offer, which sought $32,000 in settlement as a tax-free payment of compensation for distress under s123(1)(c)(i) of the Employment Relations Act 2000 ("the Act"). On that basis it submits the Calderbank offer should not be taken into account.

[11] The Respondent also disputes the Applicant's suggestion that the matter was complex, rather saying it involved standard legal issues and a factual dispute able to be investigated in one day.

[12] It also submits that preparation costs should not be allowed for two witness statements for the Applicant lodged outside the agreed investigation timetable as the Authority ultimately declined to take those statements into account.

[13] It attacks the level of costs claimed as "excessive" and a "Rolls Royce" approach that should not be visited on the Respondent.

[14] It suggests a notional sum of reasonably incurred costs should be assessed on the basis of a multiplier of 2 applied to 8 hours for the one-day investigation meeting. Multiplying the 16 hours of professional time by the notional hourly rate of $250 frequently applied by the Authority gives a total of $4000. Despite this total, balancing other relevant factors, the Respondent submits that an award of $3000 would be a reasonable contribution to the Applicant's costs.

[15] Having considered the parties' submissions, I am satisfied that costs may properly be determined in this case on the basis of the approach and principles identified in the *Da Cruz* case. As the Court stated at [46]:

> *… [T]here is nothing wrong in principle with the Authority's tariff based approach so long as it is not applied in a rigid manner without regard to the particular characteristics of the case. For example, even an award of costs based on a low daily rate may not be feasible where the liable party does not have the means to pay or, on the other hand, the daily rate may not adequately reflect the conduct of the parties or the preparation required in a particularly complex matter. The danger that tariffs may be unduly rigid can be avoided by*

> *adjustments either up or down in a principled way without compromising the Authority's modest approach to costs.*

[16] Importantly, in a case which also included weighing the effect of Calderbank offers on costs, the Court in *Da Cruz*, at [47], made the following observation:

> *Finally, in accord with the Court of Appeal in* Binnie *and this Court in* Harwood *we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.*

[17] In a flexible application of the tariff-based approach, I take into account the following factors to made adjustments up or down to what is ultimately a relatively modest award of costs:

(i) the without prejudice offer; and

(ii) unnecessary costs incurred by the Applicant – including late additional witness statements that were not necessary to the investigation, attendance of second counsel at the investigation meeting, and 69 hours of preparation time claimed at an average hourly rate of $380; and

(iii) the procedural issue of waiver of privilege which arose from statements made in one of the respondent's witness statements.

[18] As a starting point I accept the Respondent's submission that this was not a particularly complex case. Although there were important conflicts of evidence to resolve about the facts, the legal issues regarding redundancy were not novel or difficult. In a usual range of $1500 to $3000 for costs in a one-day investigation, I consider the appropriate 'base' or starting rate for this particular case to be $2500.

[19] The Applicant's without prejudice offer to settle in March 2007 was not too wide of the mark given the eventually determined outcome – whether the taxed or untaxed total of the awards made is given. It cannot be dismissed as an unreasonable offer to compromise the claim. Some account must be made for the legal costs subsequently incurred – however that is for reasonably incurred costs, not all actual costs.

[20] Here I take into consideration the important caution made by the full bench of the Court in *Da Cruz*. Representatives, advising their clients, need to be conscious of the need to take an economic approach likely to leave a successful party with a satisfactory outcome. The extent of preparation needed by counsel is limited by the Authority's investigative approach and likely costs awards can be predicted due to the usual tariff approach.

[21] In this case the Applicant's offer to settle shows some assessment – in the phrase used by the Court in *Da Cruz* – of "*the amount that is likely to be recovered as remedies and costs from the Authority*". Her solicitor's letter of 6 March spoke of confidence of success in the Authority resulting in "*an absolute minimum*" of three months lost earnings and "*substantially more*" if distress compensation and legal costs were included. That suggests an assessment of a likely benefit in excess of $30,000 and the Applicant, whom I have no reason to doubt would have been properly advised by her solicitors, must be taken to have accumulated legal costs in that light. In short she must have known that if costs accumulated past a certain level that could limit or negate any "net benefit".

[22] Accordingly I do not accept that her full legal costs should be allowed or that more than $21,000 of preparation costs were reasonably incurred following the Respondent's rejection of the settlement offer. In the absence of invoices allowing a more detailed analysis, I adopt the formula of a multiplier of two for preparation time based on a one-day investigation meeting. For 16 hours at a notional hourly rate of $250, the total allowance for reasonably incurred costs would be $4000 – that is $1500 more than the 'starting point' of the tariff identified earlier and can be taken as the additional amount awarded for costs incurred after the refusal of the Calderbank offer.

[23] To that a further $500 is allowed for additional costs relating to the waiver of privilege issue which was resolved in the Applicant's favour. The documents made available because of the waiver were integral to the resolution of the issues of genuineness and fairness of the redundancy.

[24] The Respondent takes issue with the level of disbursements claimed and the absence of invoices verifying the details. However I assume these disbursements

include the cost of copying the bundle of documents that usefully assisted the investigation. It also includes the claim for reimbursement of the Applicant's filing fee, to which she is entitled. Total disbursements – or expenses as they are referred to in the Act – are allowed in the amount of $370.

[25] In summary, the Respondent is ordered to pay to the Applicant the sum of $4500 as a reasonable contribution to her costs and a further $370 in reimbursement of expenses including the $70 filing fee.

Robin Arthur
Member of the Employment Relations Authority