IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA21/09
5085705

	BETWEEN	MAURICE ROBERTSON Applicant
	AND	NEW ZEALAND FIRE SERVICE COMMISSION Respondent

Member of Authority:	Helen Doyle
Representatives:	Mary-Jane Thomas, Counsel for Applicant Paul McBride, Counsel for Respondent
Submissions received:	22 January 2009 from Applicant 17 December 2008 from Respondent
Determination:	26 February 2009

COSTS DETERMINATION OF THE AUTHORITY

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[1] In my determination dated 28 October 2008 I found that the applicant had a personal grievance that he had been disadvantaged by an unjustified action of the respondent. I awarded him compensation in the sum of $3,000 under s.123(1)(c)(i) of the Employment Relations Act 2000. I dismissed all of the applicant's other personal grievance claims under s.103(1)(a) and (b) of the Employment Relations Act 2000 and reserved the issue of costs.

[2] The applicant has challenged the determination of the Authority and asked initially that costs not be dealt with until the challenge had been heard. I advised the parties that I considered it was appropriate to determine and finalise costs for the investigation meeting in the Authority. Submissions were then received from Mr McBride on behalf of the respondent and Ms Thomas on behalf of the applicant.

[3] Both submissions refer to an investigation meeting taking place over three days. I have checked my notes taken during the investigation meeting in which I set out the dates and times each day. I find that counsel are mistaken about the length of

the investigation meeting. The matter was originally set down for three days as recorded in the notice of investigation meeting from 6 August 2008 and continuing until Friday 8 August 2008 which is no doubt where the confusion arose from. The third day was not required and the investigation meeting concluded on 7 August 2008 at the end of the second day. The duration of the investigation was two days.

[4] Mr McBride sets out in his submissions that the respondent has incurred actual solicitor/client costs of $28,932.00 inclusive of GST and $3,780.71 disbursements, of which the largest component is that of air fares and accommodation. Mr McBride submits that notwithstanding Mr Robertson was partially successful with his claims, costs should not follow the event but that there should be an order in the respondent's favour for costs.

[5] In support Mr McBride has attached to his cost submissions a letter dated 16 November 2007 written on behalf of the respondent which is headed *Without prejudice save as to costs*. Reference is made in the letter to the two separate statements of problem that the applicant had lodged in the Authority of unjustified disadvantage and alleged constructive dismissal. The respondent, denying legal liability, made an offer of $17,425.58 in full and final settlement of the applicant's claims. The offer was expressed in the letter to be open to acceptance until 5pm 30 November 2007 on the basis that a fundamental element of the offer was to mitigate the respondent's legal costs and could only remain open for that period.

[6] Mr McBride refers to the principles outlined by the Court of Appeal in *Health Waikato Ltd v Van der Sluis* [1997] 1 ERNZ 236 with respect to *Calderbank* letters. Mr McBride submits that the offer made by the respondent was timely and that it was $14,425.00 more than what was eventually awarded to the applicant. Mr McBride says that the difference between the amount offered and the amount awarded more than properly took account of the contribution to the modest costs incurred by the applicant up to the point of the offer.

[7] Mr McBride seeks a contribution to the costs of the respondent. He seeks $5,000 for costs incurred prior to the *Calderbank* letter, an award of solicitor/client costs for the period following the *Calderbank* letter of at least $16,500 together with full disbursements and $500 for preparation of the cost submission.

[8] Ms Thomas in her submission sets out that the applicant was seeking a significant remedy well in excess of what was offered. Ms Thomas submits that it would not be appropriate for a figure to be awarded to the respondent for solicitor/client costs prior to the *Calderbank* offer but acknowledges that the respondent can, and has made a claim for costs post the *Calderbank* offer. Ms Thomas submits that the matter was not one of complexity and she refers to the Employment Court judgment of *Ogilvy & Mather v. Darroch* [1993] 2 ERNZ 943 as authority that the effect of *Calderbank* offers on an award of costs is fully discretionary. Ms Thomas submits that the sum claimed for costs and disbursements on behalf of the respondent is excessive when the circumstances of the case are considered.

Determination

[9] The Court in *Ogilvy* described the effect of the *Calderbank* offer as below:

> *As is well known, it is an offer, invariably in writing, made by one party to the other and expressed to be without prejudice except as to costs. It is an offer to compromise the action by some payment. Unless the offer is accepted, the letter is intended to be produced after the Court has dealt with the merits of the case but before it has dealt with costs. It is intended to induce the Court by this means to exercise its discretion against granting the plaintiff any costs if it has recovered less by proceeding with the case than it could have by accepting the offer.*

[10] The Judge observed in *Ogilvy* that *Calderbank* offers do not grant automatic protection in the event of lesser recovery but are a discretionary factor which can be taken into account in determining costs.

[11] The *Calderbank* offer to the applicant was made at an early stage in the proceedings before the applicant was required to commence preparation for an investigation meeting. It was a clear and unambiguous offer of $17,425.58 in full and final settlement. The offer remained open for a period of two weeks which was adequate time for the applicant to reflect on the strength of the case and likely outcome and the cost of proceeding further. The applicant ultimately recovered considerably less than was offered and had he accepted the offer further preparation costs and the cost of attendance at the investigation meeting would have been avoided.

[12] I conclude that the *Calderbank* offer was a valid offer and I take it into account in exercising my discretion as to costs. I find that the usual principle that costs follow the event does not apply because of the valid *Calderbank* offer and the respondent should therefore be entitled to a contribution towards its costs.

[13] The leading Employment Court case on costs is *PBO Limited (formerly Rush Security Limited) v. de Cruz* [2005] 1 ERNZ 808. The Employment Court in *PBO* sets out in para.[44] of the judgment the costs principles that are appropriate for the Authority to apply recognising that the Authority is able to set its own procedures and that the principles are not as comprehensive or as prescriptive as set out in earlier Employment Court judgments. The Employment Court in PBO set out that the Employment Relations Authority is unique.

[14] The principles set out in *PBO* recognise that costs are not be used as a punishment or an expression of disapproval, although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award. The principles further recognise that it is open to the Authority to consider whether the parties costs were unreasonable, that the Authority can take into account without prejudice offers, that awards will be modest and frequently costs are judged against a notional daily rate.

[15] I find it is appropriate to use a notional daily rate approach with regard to the particular characteristics of this case. I do not find in exercising my discretion that this is the sort of case where there should be an award of full solicitor/client costs as submitted by Mr McBride. Mr McBride has referred to the Employment Court judgment in *The Chief Executive of the Department of Corrections v. Tawhiwhirangi* WC 4A/08 where the Court noted that were a tariff to be used, the figure of $3,000 per day seemed to be a starting point in the Authority rather than an upper figure.

[16] The Employment Court in *Sefo v. Sealord Shellfish Limited* CC 4B/08 (Chief Judge Colgan) referred to the tariff being affirmed in *PBO* of $2,000 per day but referring in the judgment to *Tawhiwhirangi* noted the tariff subsequently being approved up to a range of $3,000 per day.

[17] I accept Ms Thomas's submission that the fact that a *Calderbank* offer was made can be considered in terms of the conduct of the case but that this was not a particularly factually or legally complex case. The matters in issue spanned a fairly

short timeframe and the investigation was assisted by the existence of correspondence and other documents for much of that time span which reduced the time required for investigation. The many criticisms of the respondent's actions during that time span did require I find more detailed statements of evidence to be prepared on behalf of the respondent's witnesses.

[18] There was nothing in the conduct of the parties during the meeting itself that in my view increased the time required. Both counsel assisted the Authority in dealing with the matter appropriately and comfortably within the two days. There was some criticism of the applicant made in Mr McBride's submission for not agreeing to a change in venue from Invercargill, given that he no longer lived in that town and other witnesses were from all around New Zealand. This submission may be more appropriately directed to air fares and accommodation but I am not satisfied that this increased the time taken for the meeting and Invercargill was where the employment relationship problem arose. To the extent that there was a suggestion of an ulterior motive in holding the meeting in Invercargill on the applicant's part, I simply record that investigation meetings are public and employment relationships unique. Mr Robertson was entitled to be supported at the meeting.

[19] Ms Thomas agreed to take the statements of evidence of two respondent witnesses as read before the investigation meeting commenced. Mr McBride was still required to undertake briefing of witnesses for those statements but Ms Thomas's approach avoided travel costs for those witnesses and additional time for investigation.

[20] I find that an appropriate starting tariff for costs taking all matters into account is $3,000 per day. For the two days, that is the sum of $6,000. I make an adjustment to that amount to reflect written submissions provided after the investigation meeting by the respondent. There was a request for time in that regard by Ms Thomas although Mr McBride had been prepared to make submissions at the end of the investigation meeting. I accept that he would have then been required to have added to those already prepared submissions and I also make some allowance for his preparation of costs submissions. I make an adjustment to reflect both of those matters of $1,000.

[21] I now turn to disbursements. Ms Thomas submits that the applicant should not be responsible for meeting all of the disbursements of which, as already stated, a large

component was air fares for counsel and accommodation for counsel and witnesses. Mr McBride is Wellington based. He has institutional knowledge of the Fire Service and this has the effect of reducing time and costs incurred.

[22] On the other hand the main witness for the respondent was Dunedin based. I do not conclude that this matter was one which only involved, as some do, Head Office witnesses. Instructing Dunedin or Invercargill counsel would have reduced some of the costs, if only at the briefing stage.

[23] Balancing those matters I intend to deal the claims for air fares and accommodation in this way. I do not consider it fair to visit upon the applicant the full costs of air fares and accommodation for both briefing and the investigation meeting. I consider it fair to make a deduction to the amounts claimed of 25%. I allow the disbursement claim of $44.45 for taxis and photocopying of $324.00 in full. Applying the deduction to air fares and accommodation claimed, the following figures are arrived at:

Air fares	$1,292.25
Accommodation	$1,266.95

[24] I order Maurice Robertson to pay to the New Zealand Fire Service Commission costs in the sum of $7,000 together with disbursements in the sum of $2,927.65.

Helen Doyle
Member of the Employment Relations Authority