IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 146
5575619

	BETWEEN	LISA ROBINSON Applicant
	A N D	GILLON & MAHER PLUMBING LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Robert Thompson, Advocate for Applicant Tim Twomey, Counsel for Respondent
Submissions Received:	9 August 2016, from the Respondent 24 August 2016, from the Applicant
Date of Determination:	31 August 2016

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] By way of a determination dated 26 July 2016[1], the Authority declined to enforce the terms of a bonus clause as sought by Ms Robinson. However, Ms Robinson succeeded in an unjustified disadvantage personal grievance and was awarded the sum of $5,000 compensation for humiliation, loss of dignity and injury to her feelings. I declined to impose penalties upon the respondent and the Authority had no jurisdiction to investigate the respondent's counterclaim against Ms Robinson.

The applications for costs

[2] Costs were reserved in the determination and the parties were to seek to agree costs between them. Evidently they have been unable to do so and so this

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determination addresses the respective applications for an award of costs made by both Ms Robinson and the respondent.

[3] Mr Twomey objected to the submissions of Mr Thompson on the basis that they were lodged late, outside of the 14 day timeframe that I stipulated in the determination. However, as they were lodged only one day late, I am prepared to accept them. It was not necessary to give Mr Twomey an opportunity to reply to them, however, as, with respect, I was not persuaded by Mr Thompson's submissions to award costs to Ms Robinson.

[4] Mr Twomey submits that the respondent was the most successful party in the proceeding and that a contribution to its costs should be made by the applicant. Mr Twomey says that the importance of the case to the respondent was *"immense"*. He points out that, in Ms Robinson's statement of problem, she claimed a bonus of approximately $90,000, in addition to compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Ms Robinson also sought a penalty against the respondent.

[5] Mr Twomey says that, one day prior to the commencement of the investigation meeting, Ms Robinson revised her bonus entitlement down from $90,000 to $33,961.65.

[6] Mr Twomey submits that there was extensive preparation required for the respondent to defend Ms Robinson's claim for the bonus, including the engagement of two accountants to assist the Authority in the contractual interpretation of the clause relied on by her.

[7] Mr Twomey submits that it would be unfair and unjust for the Authority to award the notional daily rate without any uplift. He says that the amount of time, expertise and skill required takes the case out of the usual *run of the mill* cases and, by virtue of the complicated and complex issues, it was submitted that the award of costs should *properly reflect the costs incurred*.

[8] Mr Twomey refers to a *Calderbank* offer that was made to Ms Robinson on 18 March 2016. This letter, marked *without prejudice save as to costs* offered to pay the sum of $20,000 in full and final settlement of Ms Robinson's claim for a bonus, of which $12,000 was to be paid under s.123(1)(i)(c) of the Act. The respondent also offered not to pursue its claim for payment of its counterclaim invoice (for drainage

work carried out on Ms Robinson's home by the respondent) in the sum of $6,859.22. Therefore, the offer can be said to have amounted to a value of $26,859.22. The offer was stated to be open until Friday, 8 April 2016.

[9] Mr Twomey states that the respondent's actual legal costs, after Ms Robinson's rejection of the respondent's initial *Calderbank* offer on 2 February 2016 was $20,360.75 including GST. On this basis, the respondent submits that there should be a significant uplift from the notional daily rate.

[10] In response to this submission, Mr Thompson replies by stating that Ms Robinson was successful in her claim in relation to having shown to have been unjustifiably disadvantaged and *that the parties had agreed on a bonus.*

[11] Mr Thompson also submits that the *Calderbank* offer referred to by Mr Twomey was unclear, and presented late in the proceedings. He also states that, whilst the offer claimed $20,000 in full and final settlement, it only referred to $12,000 under s.123 of the Act. It also made no offer of costs within it.

[12] Mr Thompson also says that the daily tariff should not be increased because:

(a) The respondent failed to disclose all the business records until 15 July 2016;

(b) That made it very difficult for Ms Robinson to fully consider her possible remedies;

(c) Ms Robinson proposed a further offer and outlined the ambiguity of the offer; and

(d) Ms Robinson had already purchased flights and had prepared for the investigation meeting, so that the lateness of the offer and the costs already incurred impacted on her ability to accept it.

[13] Mr Thompson submits that the Authority should award costs to Ms Robinson as she was successful. He says that the respondent's actions, and how it behaved, increased Ms Robinson's costs by providing information late and by one of the respondent's witnesses not providing written evidence, and by calling expert witnesses, both of which increased the time of the investigation meeting.

Mr Thompson seeks an uplift in the daily tariff to $5,500 to reflect the increased costs and complexity of the issues.

[14] Attached to Mr Thompson's submissions was a without prejudice letter dated 20 July 2016 which was an offer to settle the matter on the basis of a payment to Ms Robinson of $32,000 under s.123(1)(c)(i) of the Act, and a contribution to costs of $6,000 plus GST.

[15] That offer, which was made the day before the investigation meeting, remained open for acceptance until 21 August 2016, or until the Authority's determination was released, whichever was the earlier.

The legal principles

[16] The Authority's power to award costs is set out in paragraph 15 of Schedule 2 of the Employment Relations Act 2000 (the Act), which provides as follows:

> **15 Power to award costs**
> (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
> (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[17] When determining how legal costs and expenses should be dealt with, the Authority must take into account the principles set out in *PBO Ltd v. Da Cruz*[2]. These principles include the following:

a. There is discretion as to whether costs would be awarded and in 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 are to be considered on a case by case basis.

[2] [2005] 1 ERNZ 808

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.

[18] *Ogilvy & Mather (NZ) Ltd v. Darroch*[3] sets out the two principal criteria that must be satisfied when a *Calderbank* offer is made so as to not prejudice unfairly the recipient of the offer by exerting undue pressure. These safeguards are as follows:

(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; and

(b) The offer must be transparent if the offeror is later to be given the protection the *Calderbank* offer furnishes.

[19] In *Bluestar Print Group (NZ) Ltd v Mitchell*[4] the Court of Appeal stated, at paragraph [18]:

> In the employment context it has also recognised … that the public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.

[20] It was in *Bluestar Print Group* that the Court of Appeal advocated its well-known *steely approach* in respect of Calderbank offers. The Employment Court

[3] [1993] 2 ERNZ 943
[4] [2010] NZCA 385, [2010] ERNZ 446

confirmed in *Davide Fagotti v Acme & Co Limited*[5] that the "steely approach" applies equally to the Authority as it does to the Employment Court[6].

Discussion

[21] It is necessary to discuss the following issues to decide to whom a costs award should be made, if at all, and, if so, in what amount:

(a) Which party was successful;

(b) If the respondent is deemed to have been successful, whether the without prejudice save as to costs letter was valid;

(c) If it was, how much the daily tariff should be uplifted by, if at all?

Which party was successful?

[22] I do not agree with Mr Thompson that Ms Robinson was successful. The main thrust of her claim was in respect of non-payment of a bonus that she says she was entitled to. Most of the evidence that was called related to that issue. Although the Authority found that there had been an agreement that she would be paid a bonus, it also found that its terms were not certain enough to be enforceable. Therefore, Ms Robinson failed in her main claim.

[23] Although Ms Robinson did succeed in her unjustified disadvantage claim, it was by no means a significant part of her claim nor of the Authority's investigation meeting.

[24] Although the Authority found that the respondent could not bring a counterclaim in respect of the drainage work carried out by it on Ms Robinson's property, again that was by no means a significant part of the Authority's investigation meeting. Indeed, Ms Robinson did not deny that the drainage work had been done, or that the invoice remained unpaid.

[25] Therefore, following the principle that costs follow the event, I find that a contribution should be made towards the respondent's costs by Ms Robinson.

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[5] [2015] NZEmpC 135
[6] At [109]

Was the *Calderbank* offer made by the respondent valid?

[26] In *Jackson v. Moyes Motor Group Ltd*[7], the Employment Court stated the following:

> A defendant who makes a *Calderbank* offer which is silent as to pre-offer costs bears the burden of persuading the Court that the offer is adequate to disentitle a successful plaintiff from recovering costs. The closer an offer is made to trial the more pre-trial costs are likely to have been incurred.

[27] In other words, the successful *Calderbank* will expressly take into account costs incurred to date.

[28] The *Calderbank* offer made by the respondent on 18 March 2016 does not make any mention of how Ms Robinson's costs were to be dealt with in the offer. One might infer that, in the absence of any reference to her costs, Ms Robinson was supposed to bear her own costs. However, Ms Robinson was entitled to know that, if that was the case, in order for her to be able to judge the offer accurately. The failure to refer to costs offends against the *transparency* requirement referred to in *Ogilvy & Mather*.

[29] Therefore, I am not satisfied that the respondent's *Calderbank* offer was a valid one and so cannot be relied upon.

What contribution towards the respondent's costs should be made by Ms Robinson?

[30] The other argument made by Mr Twomey is that the matter was complex. On this basis, he advocates for an uplift in the daily tariff applicable in respect of this matter; namely $3,500.

[31] I must respectfully disagree with Mr Twomey. I do not believe that the matter which the Authority had to consider was either legally or factually complicated. The Authority had to essentially carry out an interpretation exercise as to the meaning of the bonus clause relied upon by Ms Robinson. This is an exercise that is carried out in accordance with very well-known legal principles and is an exercise which the Authority regularly carries out.

[7] [2005] ERNZ 504 (EmpC)

[32] Mr Twomey refers to the respondent calling two accountants to give evidence to assist the Authority in interpreting the clause. However, whilst the evidence of these two accountants had some limited value in helping the Authority to understand what bonus clause they might typically encounter, the contractual interpretation exercise that the Authority had to carry out was not assisted by the opinions of the accountants. Certainly, the accountants did not give evidence as a result of any direction from the Authority.

[33] Whilst it is correct that Ms Robinson apparently changed the quantum of the bonus she was seeking very shortly before the investigation meeting took place, this was, I understand, because the respondent did not make available all of the information that she required until shortly before. That aside, I agree with Mr Twomey when he submits that the Authority cannot have any issue about the way in which the case was conducted or the conduct of the parties at the investigation meeting.

[34] Whilst I understand that the respondent's costs are reasonably significant, there must be a principled reason for the Authority considering an uplift in the daily tariff. Having rejected the efficacy of the *Calderbank* offer and the notion that the case was particularly complex, I cannot find any other cogent reason to justify an uplift in the daily tariff.

[35] Therefore, I find that an appropriate contribution towards the respondent's costs by Ms Robinson is the sum of $3,500.

Order

[36] I order Ms Robinson to make a contribution towards the respondent's legal costs in the sum of $3,500.

David Appleton
Member of the Employment Relations Authority