IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 28A/07
5038162

	BETWEEN	SOIFUA TUFUGA Applicant
	AND	SLEEPYHEAD MANUFACTURING COMPANY LIMITED Respondent

Member of Authority:	Paul Montgomery
Representatives:	David Goldwater, Advocate for Applicant Richard Upton, Counsel for Respondent
Submissions received:	27 April 2007 from Respondent 23 May 2007 from Applicant
Determination:	30 July 2007

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a Determination (CA28/07) issued on 23 May 2007 the Authority dismissed the applicant's personal grievance claim in its entirety and the issue of costs was reserved.

[2] Mr Upton submits that this is a case in a which departure from the tariff based approach set out in *PBO Ltd v. Da Cauz* [2005] 1 ERNZ 808 because the respondent sent a *Calderbank* letter on 8 September 2006 and provided the applicant a period through until 4 October 2006 for acceptance of that offer. Further, counsel submits the investigation meeting was unnecessarily prolonged by the applicant calling witnesses whose evidence was unnecessary for the purpose of the hearing.

[3] Counsel also refers the Authority to relevant precedents in a cost setting and urges that I award the respondent full indemnity costs of $13,246.87 and

disbursements of $901.00 for travel and accommodation expenses. Mr Upton submits that the respondent's total legal costs are in the vicinity of some $22,000.

[4] Attached to his submissions Mr Goldwater placed an affidavit from Onolina Tufuga setting out the family's financial situation. Attached to the affidavit is a medical certificate issued by the applicant's General Practitioner, a pay slip verifying the deponent's weekly pay and family outgoings and a copy of a letter from Professor Morton relating to Mrs Tufuga's ongoing assessment as a kidney donor.

[5] In summary, Mrs Tufuga says the applicant is unable to work due to this chronic kidney disease and that she is the sole breadwinner available to support herself, her husband and their three children. Mrs Tufuga also sets out the family's regular outgoings and says that *due to my low income and the applicant's inability to work, I am often unable to meet the above financial commitments and have to regularly negotiate with creditors of the applicant and myself to avoid the repossession of our vehicle or to avoid court action in respect of the consolidation loan repayment.* She finishes her affidavit by stating that if any award of costs were made against the applicant it would *fall to me to bear the burden of meeting it*.

[6] In the light of this information and relying on a number of precedent cases, Mr Goldwater's baseline submission is that I should rule that costs lie where they fall.

Discussion and analysis

[7] The respondent's *Calderbank* letter referred to above was for a compensatory payment of $4,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act. The offer was contingent upon the applicant withdrawing his proceedings against the company and that, if that opportunity was taken, costs would lie where they fell. The further condition was that the terms of settlement were signed as being full and final relating to all matters of Mr Tufaga's employment including his termination and subject to the normal rules of confidentiality. The respondent indicated that it would require these terms to be signed off by a mediator from the Department of Labour's Mediation Service. The offer was available for acceptance until 5pm, 4 October 2006 and if the offer was not accepted by that time it would lapse.

[8] It is clear from a letter attached to Mr Goldwater's submissions that the applicant declined, for a range of reasons, to accept the offer as proposed and counter-

offered at a higher figure. The counteroffer was not acceptable to the company and the respondent's *Calderbank* offer duly lapsed on the stated date.

[9] The Employment Relations Act 2000 places emphasis on the importance of parties resolving their employment relationship problems without recourse to the intervention of the Authority or the Employment Court. It is clear that reducing the need for this type of intervention is an object of the Act and in keeping with the statutory provisions there is a public interest in encouraging parties to resolve disputes at a lower level than that offered by the Authority. In this setting, the *Calderbank* letter sent by the respondent accords with those principles. The respondent is commended for its realistic efforts in making its offer

[10] The acceptance or declining of a *Calderbank* offer lies entirely in the hands of the applicant party. While the offer as tabled may fall well short of what the applicant and his advisers perceive as a reasonable settlement, such offers need to be taken seriously and analysed in the cool light of the risks involved.

[11] Seeking the Authority's consideration of full indemnity costs is rarely successful and I am not persuaded that this is a case which warrants such close consideration. While there is an element of truth in counsel for the respondent's submission that the hearing of the matter was unduly prolonged due to the applicant calling witnesses whose input had little influence on the matters at the heart of the issue, it also needs to be borne in mind that because of the language difficulties, the involvement of a translator in itself slows the pace at which the investigation meeting can proceed.

[12] I must also consider the accepted dictum that costs are not to be punitive on an unsuccessful party. An award even approaching full indemnity costs would, in this case, undoubtedly fall into that category.

[13] I have considered Mrs Tufuga's affidavit and its attachments with very considerable care. But for that information, which I regard as accurate and truthful, I would have awarded the respondent costs of $4,500 plus disbursements.

[14] However, the Authority is a jurisdiction of equity and good conscience and I find the imposition of even token costs would inflict a hardship on the family and it would fall to Mrs Tufuga to fund the respondent's costs. That would be manifestly unjust.

[15] I order that costs shall lie where they fall.

Paul Montgomery
Member of the Employment Relations Authority