IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 6
5363624

	BETWEEN	TERRY WATSON Applicant
	A N D	OCEANA GOLD (NEW ZEALAND) LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Jeff Goldstein, Counsel for Applicant Leslie Brook, Counsel for Respondent
Submissions Received	10 December 2012 from the Applicant 7 January 2013 from the Respondent
Date of Determination:	10 January 2013

COSTS DETERMINATION OF THE AUTHORITY

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[1] By way of the Authority's determination dated 6 November 2012, I found that Mr Watson's personal grievance was successful, and awarded him remedies which were reduced in accordance with the extent to which I believed he contributed to the situation giving rise to the personal grievance. Mr Watson accordingly seeks a contribution to his legal costs in the sum of $7,000, plus disbursements of $378.22.

[2] The respondent argues that the applicant's costs and disbursements were unnecessarily incurred because a valid Calderbank offer had been made prior to the lodging of the Statement of Problem and, having rejected that offer, the applicant failed to recover more in the proceedings than had been offered. The respondent seeks recovery of its costs in accordance with Calderbank offer principles, in the sum of $7,000 costs and GST exclusive disbursements of $5,915.84, comprising travel and accommodation costs.

The principles relating to the recovery of costs in the Authority

[3] The leading case relating to the recovery of costs in the Authority is *PBO Ltd v Da Cruz*, [2005] 1 ERNZ 808. The principles governing the setting of costs awards in the Authority as promulgated in *Da Cruz* include:

a. There is a discretion as to whether costs will 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 is to be considered on a case by case basis.

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.

The Calderbank offer

[4] The use of *without prejudice save as to costs*, or *Calderbank* offers by respondents is an accepted practice in the Authority. The principle behind these offers is that, if the recipient of the offer either loses his or her claim in the Authority, or wins but fails to recover the same or more than the sums offered, then he or she is

put at risk of paying the respondent's legal costs incurred after the date that the offer was rejected.

[5] As such offers inevitably put pressure on an applicant, they must comply with certain basic safeguards so as not to unfairly prejudice the recipient of the offer. These safeguards have been identified in *Ogilvy & Mather (NZ) Limited v Darroch* [1993] 2 ERNZ 943 as including:

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;

b. The offer must be transparent if the offeror is later to be given the protection that a Calderbank offer furnishes.

[6] The making of a successful Calderbank offer is not wholly determinative of how costs will be dealt with by the parties but is an important factor which the Authority should bear in mind.

[7] The Calderbank offer made by Anderson Lloyd on behalf of the respondent was dated 21 February 2012 and was left open for acceptance until 9 March 2012. It was marked *without prejudice except as to* costs, and also contained the following terms:

a. Withdrawal of the letter of dismissal and an agreement to record the termination as a resignation;

b. The issuing of a certificate of service;

c. Facilitation by the respondent company of Mr Watson's First Line Management Certificate, at the company's expense;

d. The sum of $13,000 compensation pursuant to s. 123(1)(c)(i) of the Employment Relations Act 2000;

e. $5,000 plus GST towards Mr Watson's legal costs.

[8] The letter did not spell out the consequences of rejecting the offer. If it had been addressed to an applicant who had been unrepresented, I would say that it failed to explain clearly the consequences of rejecting the offer and so could not be relied upon. However, it was addressed to Mr Goldstein's firm, and Mr Goldstein and his

fellow partners are very experienced and eminently capable employment law specialists who are perfectly aware of the significance of such an offer. I feel sure, therefore, that Mr Goldstein or his fellow partners would have discussed with his client the meaning of the offer, and the risks involved in rejecting it. I believe, therefore, that the requirements of a valid Calderbank offer have been satisfied by the letter.

[9] Having heard evidence over two days, it is my view that the offer contained in the Calderbank letter was a reasonable one. However, the offer was rejected by Mr Watson. Once contribution had been taken into account, which I had assessed as significant, justifying a reduction of 75% in the remedies, Mr Watson failed to beat the offer contained in the Calderbank letter by $5,773.17, ignoring the offer to pay legal costs. In accordance with the usual Calderbank principles, therefore, I believe that it is just for the applicant to bear his own costs, and to make a contribution to the respondent's costs.

[10] Ms Brook states in her written submissions that the legal costs incurred by the respondent since the Calderbank offer was made amount to $27,158, including GST, but seeks a contribution of only $7,000. In light of this, I believe that this is a reasonable sum.

[11] Turning to the disbursements sought, they breakdown as follows;

a. Flights for the witness Mr O'Connor from the Philippines, plus three nights' accommodation, totalling $4,314.00 excluding GST;

b. Travel to Christchurch from Dunedin of Ms Brook and the witness Ms Sutton, totalling $454.00 excluding GST; and

c. Accommodation in Christchurch for two nights for Ms Brook, Ms Sutton and the witnesses Mr Brewerton and Mr Jones, totalling $1,147.84 excluding GST.

[12] I believe that it is reasonable to order Mr Watson to pay the respondent the sums at (b) and (c) above, but note that no supporting documentation has been provided showing the disbursements incurred. Copies of such supporting documentation should be provided to Mr Watson, via his representative, before Mr Watson is required to pay these sums to the respondent.

[13] I do not believe that the cost of Mr O'Connor travelling from the Philippines should be Mr Watson's responsibility. Whilst Mr O'Connor was an important witness, he was not a key witness, and his evidence could have been heard by telephone. If the respondent had explained the situation and sought permission for him to give evidence by telephone, the Authority would no doubt have agreed. I therefore decline to order Mr Watson to pay the disbursement at paragraph 11(a) above.

Orders

[14] I order Mr Watson to pay the following sums to the respondent:

a. The sum of $7,000 in respect of costs; and

b. The sum of $1,601.84 in respect of disbursements, subject to supporting documentation being first provided.

[15] In the case of any difficulty in respect of the order at paragraph 14(b) above, the parties may apply to the Authority.

David Appleton
Member of the Employment Relations Authority