



[2] On 15 May 2008 Mr Batistich filed a new statement of problem seeking a compliance order requiring the Board to pay the compensation awarded. In this statement Mr Batistich said that the NDHB refused to acknowledge the compensation awarded or to acknowledge that they were unable to withhold payment unless a stay is lodged and granted.

[3] In a statement in reply filed on 28 May 2008 Mr Pool, for the NDHB, denied that they had refused to acknowledge the remedies awarded but said they were considering appealing the Authority's determination and applying for a stay of payment. And in any event, Mr Pool said, the Board had filed an application for costs.

[4] On 20 May 2008 the Board, as advised by Mr Pool, had filed an application for a contribution of \$3500.00 towards its costs. This application was based on a *Calderbank* offer made to Mr Batistich on 2 October 2007 i.e. prior to the Authority's investigation meeting.

### **The *Calderbank* offer**

[5] Mr Batistich's statement of problem was filed with the Authority on 15 August 2007. During a conference call on the 14 September 2007 the parties agreed a timetable for the Authority's investigation, including an agreement to hold an investigation meeting on 16 November 2007. On 2 October 2007 Mr Pool wrote to the PSA organiser who had been representing Mr Batistich in the following terms:

*Dear Mark*

***Without prejudice save as to costs***

*I am instructed to offer Jan Batistich \$7,500 (less tax) in full and final settlement of all matters. If accepted this will be recorded in the record of settlement that I have provided.*

*This offer remains open and capable of acceptance by Jan until noon on Wednesday 10 October 2007. In the event that the offer is not accepted within that period, the offer will lapse and will not be capable of acceptance.*

*You should treat this offer as a *Calderbank* offer. In the event that this matter proceeds to the Employment Relations Authority, my client reserves the right*

*to place this e-mail in front of the Authority member as relevant to the issue of costs.*

[6] Mr Batistich says that he had instructed the PSA organiser *to cease all negotiations* with the DHB before this offer was made. However there is no doubt that the offer was forwarded to Mr Batistich and that he forcefully rejected it.

### **The submissions**

[7] For the Board Mr Pool argues that had Mr Batistich accepted the Board's Calderbank offer Mr Batistich would have been substantially better off. He points out that Mr Batistich was awarded \$3000 (without tax) and that the award of lost wages, when discounted by redundancy payment and other earnings, amounted to a net payment of less than \$100. Mr Pool seeks \$3500 as a contribution towards his client's costs which he says were significantly higher than that amount.

[8] Mr Batistich argues that the PSA organiser had clearly been instructed to cease negotiations before the Calderbank offer was made and therefore challenges the legality and validity of that offer. He also argues that the recovery of wages, although prepaid by way of redundancy, plus the \$3000 awarded for hurt and humiliation, were well in excess of the \$7,500 Calderbank offer made by the Board. In his submission Mr Batistich says:

*Principle was the prime motivating factor I held and felt. Had (the Board) settled my personal grievance as requested, the significantly higher costs avoiding responsibilities and rectifying a mistake, would not have been incurred by (the Board) therefore I the applicant believe any costs incurred should be held to (the Board's) own accountability and responsibility.*

### **Discussion**

[9] I accept that Mr Batistich's decision to pursue his case was, for him, a matter of principle. However he continued to pursue his case knowing that, if he did not succeed, or did not succeed to such an extent that he received financial benefit in

addition to the \$7,500 offered by the Board, he may be liable to make a contribution to the NDHB's costs. I do not accept his argument that the total amount awarded was in excess of the Calderbank offer made. It is clear that the Calderbank offer was for \$7,500 in addition to the redundancy payments already made. It is important to note however that the offer was expressed as a taxable amount and in net terms therefore mounted to approximately \$5,000 (dependent on what other taxable income Mr Batistich received.) The \$3000 awarded by the Authority in terms of section. 123(1)(c)(i) is of course non-taxable.

[10] The principles upon which the Authority uses its discretion in awarding costs are now well established and were set out by the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* (2005) 1 ERNZ 808. In *Da Cruz* the Court, having set out the principles to be applied, went on to say:

*We hold that these principles are appropriate to the Authority and consistent with its functions and powers. They do not limit its discretion and proper application of them should ensure that each case is considered in the light of its own circumstances.*

[11] In the light of the Calderbank offer this case is one where it is appropriate to vary the usual principle that costs follow the event. i.e. that the "winner" is entitled to a contribution towards their costs. In this case Mr Batistich was the "winner". However had he accepted the Boards offer to settle he would have received some \$2000 more than the Authority awarded him. The Board, for its part, was required to spend an unspecified amount (in Mr Pools submission *well in excess of* \$3500) more than would have been the case had their offer had been accepted. Had Mr Batistich not been successful he could have expected to have been required to pay in the order of \$1500 towards the Board's legal costs. Under all the circumstances it seems equitable that this be the amount he should now contribute towards the Boards costs.

**Determination**

[12] **Mr Batistich is ordered to pay Northland District Health Board \$1500 as a contribution towards their costs.** This amount is to be offset against the amount previously awarded to Mr Batistich in terms of section 123(1)(c)(i) (if not already paid), leaving a net sum to be paid by the Board to Mr Batistich of \$1500, without deduction of tax.

**Recovery of wages.**

[13] I note from Mr Batistich's submissions that there is some dispute between the parties as to the amount to be paid to Mr Batistich under the head *recovery of wages*. This dispute appears to centre around the payment of time in lieu of notice. If the parties are unable to settle this question they should file submissions setting out their respective positions and I will determine the matter. Any submissions should be filed within 28 days of the date of this determination

James Wilson

Member of the Employment Relations Authority