**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2016] NZERA Christchurch 225
5587805

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| | BETWEEN | RAYMOND COTTON<br>Applicant |
| | A N D | ROGERS MOTORS LIMITED t/a INTERFREIGHT CARRIERS<br>Respondent |

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| Member of Authority: | David Appleton |
| Representatives: | No response from the Applicant<br>Tony Shaw, Counsel for Respondent |
| Investigation Meeting: | Determined on the papers |
| Submissions Received: | None from the Applicant<br>30 November 2016 from the Respondent |
| Date of Determination: | 21 December 2016 |

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## COSTS DETERMINATION OF THE AUTHORITY

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**Mr Cotton is to pay the sum of $1,000 towards the respondent's costs.**

[1] By way of a determination dated 30 November 2016[1] the Authority dismissed the applicant's claim against the respondent in its entirety due to the applicant not appearing at the investigation meeting at the appointed time, nor within a further 30 minutes granted to him.

[2] In the Authority's determination, costs were reserved after Mr Shaw made an application for costs on behalf of the respondent at the investigation meeting. The Authority directed that memoranda of costs be served and lodged, and the Authority has received a copy of a memorandum of counsel dated 30 November 2016 from

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Mr Shaw. Whilst this was served on Mr Cotton at his home address by the Authority, no reply has been received from him.

[3] In his memorandum, Mr Shaw seeks a contribution towards the respondent's costs in the sum of $2,500. Whilst the investigation meeting lasted 40 minutes (30 of which were spent waiting for Mr Cotton to arrive) I accept that Mr Shaw's firm had to prepare for the investigation meeting, which would have incurred costs for the respondent. The total costs that will be invoiced to the respondent will be $3,000 plus GST, according to Mr Shaw.

[4] With his submissions, Mr Shaw sent to the Authority a copy of a letter that had been sent to Mr Cotton on 11 November 2016 by Mr Shaw's colleague, Mr Nation, on behalf of the respondent. This letter was marked "without prejudice save as to costs" and so was a "Calderbank offer". This letter may be shown to the Authority at the conclusion of an investigation meeting to seek to persuade the Authority that higher costs than usual should be awarded against the losing party because an opportunity was given to that party to settle the matter (or withdraw) prior to greater costs being incurred. If a valid Calderbank offer is unreasonably rejected by the recipient who then loses or fails to be awarded as much as was offered, the Authority may increase the losing party's contribution to the winning party's costs.

**Discussion**

[5] The Authority's power to award costs against a party to another is set out in clause 15 of Schedule 2 of 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.*

[6] The Authority is bound by the principles set out in *PBO Ltd v. Da Cruz*[2] when setting costs awards. These include:

a. There is discretion as to whether costs would be awarded and in what amount.

[2] [2005] 1 ERNZ 808

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.

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.

[7] *Ogilvie & 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 ensure the recipient is not prejudiced unfairly by the offer by undue pressure being exerted. 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.

[3] [1993] 2 ERNZ 943

[8] First, I accept that it is appropriate for Mr Cotton to make a contribution towards the respondent's costs given that it had a right to defend the claim against it, and Mr Cotton did not succeed in his claim. Whilst he was apparently legally aided for the purposes of the mediation that I understood took place, he was no longer in receipt of legal aid, it is understood, by the time of the investigation meeting. Indeed, he was no longer represented by that time. An award of costs against him is not precluded therefore.

[9] This is not a usual case where the Authority's daily tariff will provide a ready guide as to the starting point, as a conventional investigation meeting did not take place, given Mr Cotton's non-appearance. The starting point will, therefore, be the costs that Mr Shaw says will be billed to the respondent. I accept that $3,000 for preparing to defend an unjustified dismissal claim, including preparing two witness statements, is a reasonable sum.

[10] Whilst it is not clear what account Mr Shaw wishes me to take of the Calderbank offer, I shall address it briefly, as it is defective in my opinion. It was addressed to Mr Cotton in person, as he was no longer represented by the time the offer was made. However, despite Mr Cotton not being legally represented, the letter did not spell out that it could be shown to the Authority, and an uplift in costs sought, if the offer were unreasonably rejected and Mr Cotton went on to be unsuccessful. It cannot be expected that Mr Cotton would have known what the term "without prejudice save as to costs" meant, and what its full ramifications would be.

[11] In addition, it could have misled Mr Cotton into thinking that the Authority's daily tariff was $4,500. However, this is not the case for applications lodged prior to 1 August 2016, as Mr Cotton's was[4]. I suspect that this was an error on Mr Nation's part, rather than deliberate, but it still had the potential effect of misleading Mr Cotton. Therefore, I decline to take the Calderbank letter into account.

[12] Whilst Mr Cotton was no longer in receipt of legal aid by the time of the investigation meeting, he had been at the time of the mediation, and it is reasonable to infer that he may have difficulty being able to pay a costs award of $2,500. Furthermore, and for this reason, I do not believe it is just to expect Mr Cotton to pay nearly 85% of the respondent's costs.

[4] See paragraph 4 of Practice Note 2 of the Authority dated 30 June 2016.

[13] I believe that a just award would be for Mr Cotton to contribute the sum of $1,000 towards the respondent's costs.

**Order**

[14] I order Mr Cotton to pay $1,000 towards the respondent's costs.

David Appleton
Member of the Employment Relations Authority