IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 167
5434418

	BETWEEN	SAM COULTHARD Applicant
	A N D	TONY'S TYRE SERVICE LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Linda Ryder and Jeff Goldstein, Counsel for Applicant Richard Harrison, Counsel for Respondent
Submissions Received:	10 October 2014 from the Applicant 23 October 2014 from the Respondent.
Date of Determination:	24 October 2014

COSTS DETERMINATION OF THE AUTHORITY

The respondent is ordered to pay a contribution towards the applicant's costs in the sum of $12,378.22.

[1] By way of a determination dated 10 September 2014[1], the Authority found that Mr Coulthard was unjustifiably dismissed and was awarded remedies which amounted to a total of $13,542.38, together with interest on the lost wages and holiday pay elements of this sum (which amounted to $8,292.38), such interest to run from 11 October 2013.

[2] Costs were reserved and the parties were invited to agree how costs should be dealt with. They have been unable to do so, and this determination therefore addresses the issue of costs.

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[3] Counsel for Mr Coulthard seeks an award of costs in the sum of $19,316 (excluding GST), plus disbursements in the sum of $378.22. These costs are all costs incurred by Mr Coulthard since 10 December 2013 until the conclusion of the Authority's investigation meeting, together with a further $1,000 (excluding GST) incurred in the preparation of submissions on costs. The basis for Mr Coulthard seeking costs on an indemnity basis is that his counsel sent a letter to the respondent on 26 November 2013 which was marked *without prejudice save as to costs* (a Calderbank letter) and which offered to settle all matters in return for the payment of $16,750, including $3,000 costs (excluding GST).

[4] Counsel for the respondent submits that costs should be awarded on the basis of the Authority's daily tariff of $3,500, without uplift. He points out that no invoices have been submitted by counsel for Mr Coulthard (so that there is no evidence of actual costs incurred). He also submits that the offer contained in the Calderbank letter was not beaten by Mr Coulthard, when holiday pay and interest are excluded, and that there has to be a significant difference to warrant any uplift on public policy grounds.

The legal principles to apply when determining costs in the Authority

[5] The Authority's power to award costs derives from 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.*

[6] Although very well known, it is worth setting out the principles which the Authority takes into account when determining how legal costs and expenses should be dealt with. These were promulgated in *PBO Ltd v Da Cruz*, [2005] 1 ERNZ 808, and 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.

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] *Ogilvy & Mather (NZ) Limited v Darroch* [1993] 2 ERNZ 943 sets out the two principal criteria that Calderbank offers must satisfy so as not to unfairly prejudice the recipient of the offer by exerting undue pressure. These safeguards have been identified 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.

[8] Whilst the Court of Appeal has advocated that a *steely approach* be adopted when determining costs in circumstances where a valid Calderbank offer has been made,[2] the Employment Court has expressed doubts about such an approach in relation to costs awards in the Authority in *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15, *Harvey Norman Stores (NZ) Pty Ltd v Boult* [2014] NZEmpC 28 and, most recently, *Booth v Big Kahuna Holdings Limited* [2014] NZEmpC 43, ARC1/14.

Determination

[9] First, applying *Da Cruz*, I am satisfied that it is appropriate that costs should follow the event. The respondent does not dispute this, and there is no reason in this matter to depart from that principle.

[10] I am also satisfied that the Calderbank letter sent by Ms Ryder to the respondent satisfied the two *Darroch* principles cited above. It gave the respondent 14 days to respond to the offer contained in it, and spelled out in clear terms what the offer was, including how costs to date were to be dealt with, and the consequences of a failure to accept the offer. This was important, as the respondent appeared not to have a representative at that point.

[11] Although the letter sent by Ms Ryder was not a Calderbank letter in literal terms, as it was made on behalf of an applicant, not a respondent, it is generally accepted by the Authority that such offers can be taken into account when made by an applicant. This is in accordance with the Da Cruz principle that without prejudice offers can be taken into account.

[12] The issues remaining to be determined, therefore, are whether Mr Coulthard *beat* the offer made on his behalf, and if so, what effect that has on the costs he should be awarded.

Did Mr Coulthard beat the Calderbank offer?

[13] This question requires, in effect, examining whether the amount of Mr Coulthard's offer to settle was the same as or less than the amount he was

[2] *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385, citing *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA)

eventually awarded by the Authority. How to determine this depends on what elements are to be taken into account.

[14] I agree with Mr Harrison that costs should be put aside in assessing this question. This is because costs did not form part of the award of the Authority. This means that the offer to settle that forms the basis of comparison is $13,750. Mr Coulthard was awarded $7,678.13 in lost wages, together with $614.25 holiday pay, and compensation under s123(1)(c)(i) of the Act of $5,250. This amounts to 13,542.38. This figure does not take into account interest.

[15] Should holiday pay be excluded from the comparison exercise as asserted by Mr Harrison? In my view it should not, as, although that element was not specified by counsel for Mr Coulthard in the Calderbank offer, it was a legal entitlement which he was willing to forego in exchange for a global payment. It is not necessary to spell out in a Calderbank letter each and every element that may be awarded by the Authority. The principle that additional costs are open to be recovered by the applicant if his or her Calderbank offer were successful is predicated upon the fact that the offer contemplates extinguishing all of the applicant's claims against the respondent without the need for an investigation meeting.

[16] Should interest be excluded from the comparison exercise as is also asserted by Mr Harrison? Again, I believe it should not be, on the basis that, had the Calderbank offer been accepted by 10 December 2013, Mr Coulthard would have shortly thereafter received a sum of money that would have been satisfactory to him and there would have been no principal sum outstanding upon which interest could have run. The refusal to accept the offer meant that Mr Coulthard had to wait considerably longer to receive the sums due to him.

[17] I do not take into account Mr Harrison's argument that the unavailability of Mr Coulthard's counsel for an early investigation meeting meant that interest ran for longer, because that is an issue that was relevant to submissions at the substantive stage.

[18] Taking these matters into account, I am satisfied that, when interest is included in the equation, Mr Coulthard succeeded in beating the amount of the Calderbank offer. I do not accept Mr Harrison's submission that the difference has to be significant to warrant any uplift, on public policy grounds. Mr Harrison does not cite

any authority for this proposition. In contrast, there is authority that an uplift can be applied by the Authority where an offer comes close to (but does not meet or exceed) the amount awarded in the Authority[3].

What effect does beating the Calderbank have on costs?

[19] The Authority will rarely award costs on an indemnity basis. This is partly because of the *Da Cruz* principle that costs awards will be modest. That approach is strengthened by the Employment Court casting doubt on the appropriateness of indemnity costs in the Authority.

[20] Accordingly, I do not accept that costs on an indemnity basis should be awarded in this matter. I do, however, accept that the failure to accept the offer in the Calderbank letter did cause further costs to be incurred, and that that should be taken into account in fixing the costs award. I will do this by applying an uplift to the daily tariff.

[21] Counsel for Mr Coulthard has not submitted a breakdown of the costs incurred to enable the Authority to scrutinise whether they have been incurred reasonably. Having said that, given the somewhat fine-grained scrutiny that some of the evidence was subjected to by both parties before and at the investigation meeting, the costs that counsel for Mr Coulthard claim were incurred do not seem unreasonable, in light of the charge out rate used.

[22] The investigation meeting lasted a full day on the first day, and between 9.30 and 2.30 on the second day. Adopting the daily tariff as a starting point, the tariff for day one therefore amounts to $3,500 and the tariff for day two should be set at $2,500, on the basis that the investigation on that day lasted only five hours. I believe that it would be just to double the tariff applying to the two days in recognition of the successful Calderbank offer that was made on behalf of Mr Coulthard. That amounts to a total of $12,000.

[23] Turning to disbursements, I accept that the lodgement fee should be reimbursed to Mr Coulthard, in the GST inclusive sum of $71.56, as should the GST inclusive fee of $306.66 charged by the Authority for the second day of investigation. That amounts to $378.22.

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[3] *Watson v New Zealand Electrical Traders Ltd t/a Bray Switchgear* [2006] 4 NZELR 59 (EmpC)

Orders

[24] I order that the respondent make the following payments to Mr Coulthard in respect of the costs incurred by him in pursuing his personal grievance in the Authority:

a. The sum of $12,000, together with the further sum of

b. $378.22.

David Appleton
Member of the Employment Relations Authority