IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 89
5629438

	BETWEEN	JAIME FLANNAGAN Applicant
	A N D	PMR HOLDINGS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Alex Kersjes, Advocate for Applicant Peter Richardson, Advocate for Respondent
Investigation Meeting:	Determined on the papers
Submissions Received:	24 May 2017, from the Applicant None from the Respondent
Date of Determination:	9 June 2017

COSTS DETERMINATION OF THE AUTHORITY

The respondent is to pay a contribution towards the applicant's costs in the sum of $7,571.56.

[1] By way of a determination dated 10 May 2017[1], the Authority found that Mr Flannagan was unjustifiably dismissed from his employment, and was unjustifiably disadvantaged. He was awarded remedies totalling $12,375, which included arrears of wages and holiday pay, lost wages, and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) in the sum of $8,400.

[2] In the determination I reserved costs and invited the parties to seek to agree how they would be dealt with. The parties have not been able to agree, and so, in accordance with directions, Mr Kersjes, on behalf of Mr Flannagan, has served and

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lodged submissions as to costs. Mr Richardson, on behalf of the respondent, has written to the Authority declining to serve and lodge costs submissions on the basis that the respondent has challenged the Authority's substantive determination in the Employment Court. The inference is that he wishes the Employment Court to deal with costs.

[3] Mr Richardson has not applied to stay the Authority's determination of costs and, in any event, the Authority does not normally stay the determination of costs following a challenge to the Employment Court of its substantive determination as it is more effective for the Court to be seized of the entire matter, including costs in the Authority. For this reason, I shall determine costs in this matter, and if either party wishes to, it may challenge that determination in the Court as well.

Mr Kersjes' submissions

[4] Mr Kersjes states that Mr Flannagan's total costs amount to $18,459.80 plus disbursements, and that post mediation costs amount to $14,996 (including GST) and $545 of disbursements, plus GST. In reliance of two Calderbank offers made on behalf of Mr Flannagan which Mr Kersjes says were unreasonably ignored by the respondent, he seeks an order for a contribution towards these costs in the sum of $10,497 (including GST) plus disbursements.

[5] Mr Kersjes has copied to the Authority two emails that he sent to Mr Richardson, on 20 September 2016 and 27 January 2017 respectively. In the first email, marked "without prejudice save as to costs", Mr Kersjes proposed a full and final settlement of the proceedings in return for a payment of $5,000 pursuant to s 123[2] of the Act and a contribution towards costs in the sum of $3,500 plus GST.

[6] The second email, also marked "without prejudice save as to costs", referred to the previous Calderbank offer, and revised it by proposing a full and final settlement of the proceedings in return for a payment of $5,000 pursuant to s 123 of the Act, a contribution towards costs in the sum of $4,000 (which I infer was plus GST, although only the "+" was stated) and a positive reference.

[2] Presumably, s 123(1)(c)(i) of the Act.

Discussion

[7] 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.

[8] The Authority is bound by the principles set out in *PBO Ltd v. Da Cruz*[3] when setting costs awards. These include:

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.

[3] [2005] 1 ERNZ 808

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.

[9] First, I accept that it is appropriate for the respondent to make a contribution towards Mr Flannagan's costs, on the basis that costs follow the event. Although Mr Flannagan was not wholly successful, he was successful in respect of his main claim of unjustified dismissal.

[10] The starting point in awarding costs in the Authority where an investigation meeting has taken place is the daily tariff, which stands at $3,500 per day for matters lodged prior to 1 August 2016 (which Mr Flannagan's statement of problem was). The investigation meeting lasted from 9.30 to 13.20, so that the starting point in this matter is half a day's tariff, of $1,750.

[11] Should this be uplifted as submitted by Mr Kersjes? He relies on two reasons to do so. The first is that the matter was complex. I accept that the matter was not wholly straightforward because of the uncertainty of the relationship between the parties, especially at the beginning. However, determining the status of relationships between parties is not uncommon, and so I do not agree that the matter fell outside of the normal range of matters which the Authority routinely deals with in terms of complexity. This is reflected in the fact that a half day meeting was enough to investigate the matter.

[12] The second reason Mr Kersjes seeks an uplift on behalf of Mr Flannagan is his reliance upon the two emails he sent marked "without prejudice save as to costs". *Ogilvie & Mather (NZ) Ltd v. Darroch*[4] 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

[4] [1993] 2 ERNZ 943

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

[13] When I analyse the two emails, I note the following:

a. Neither imposed a deadline within which to accept the offers contained in them. Therefore, they were open ended in terms of the time within which the respondent had to consider the offers, and so satisfy the first limb of the *Ogilvie & Mather* test.

b. The offer in the first email made clear that, if Mr Flannagan were to be successful, he would apply for an uplift in costs above the daily tariff. This was important given that Mr Kersjes was writing to a lay representative. Reliance on the formula "without prejudice save as to costs" alone would not have been sufficient under such circumstances.

c. The first email also referred to the Authority case of *Warren Skerrett Investments Ltd v Broad*[5] which examined in detail the effects of an offer marked "without prejudice save as to costs", so that Mr Richardson could have referred to this case to understand what the possible consequences of rejecting the offer would be. It is noted that Mr Kersjes did not spell the case name quite correctly in the email, and also did not give a full case citation, but he gave enough information for Mr Richardson to have easily found the case if he had wanted to.

d. The second email did not repeat the explanation of a Calderbank offer, but was again marked "without prejudice save as to costs" and referred to "the Calderbank offer in place". I am satisfied that it said enough for Mr Richardson to have understood the basis of the revised offer.

e. The emails also dealt with costs, so that Mr Richardson would have understood that the respondent could settle the entire proceedings by accepting the offer.

f. The offers contained in the first and second emails were reasonable, and explained why Mr Flannagan was making them (to avoid the

[5] [2014] NZERA Christchurch 3

emotional strain that may result from a hearing and to move on with his life).

[14] Whilst Calderbank offers were originally intended to be made by respondents, it is accepted that they may be sent and relied upon by applicants *Richard & Jennifer Adams T/A Untouchable Hair & Skin v Shannen Brown*[6].

[15] The Court of Appeal's injunction in *Bluestar Print Group (NZ) Ltd v Mitchell*[7], to adopt a "steely" approach in considering Calderbank offers, has been confirmed in *Davide Fagotti v Acme & Co Limited*[8] to apply to the Authority, despite previous judicial doubts.

[16] It is clear that Mr Flannagan was awarded much more than the $5,000 he was seeking in the Calderbank offers sent on his behalf. The respondent's ignoring of the offer was not reasonable in my estimation, given that Mr Richardson would have known that he effectively threw Mr Flannagan out of his hotel, and prevented him from working his notice without any investigation meeting. I am therefore satisfied that the Calderbank offers made by Mr Kersjes on behalf of Mr Flannagan were valid and justify applying an uplift to the daily tariff.

[17] Mr Kersjes argues that the uplift should result in an award of 70% of the total costs since the making of the first Calderbank offer, amounting to just under $10,500. This strikes me as too high, especially when I note that the invoice issued by Sacked Kiwi, Mr Kersjes' employer, includes a number of items such as "printing, collation, research, correspondence preparation, scheduling and general administration", the cost of which amounts to $720 excluding GST. These items, and the charge for them do not appear to be wholly reasonable.

[18] I am mindful that, although the Authority is to apply a steely approach, it must also still abide by the principles of *PBO Ltd v. Da Cruz*, including that costs should be reasonable, and awards modest. In light of this, I shall award 50% of the costs incurred since 20 September 2016 which, rounded up, amount to $7,500. This figure

[6] [2016] NZEmpC 13
[7] [2010] NZCA 385, [2010] ERNZ 446
[8] [2015] NZEmpC 135

takes into account GST, in accordance with *Banks v Hockey Manawatu Incorporated*[9].

[19] Turning to disbursements, the figure of $545.16 is not broken down, and although Mr Kersjes states in his submissions that they do not include "out of town" travel costs, I note that the invoice states that travel costs are included. The other disbursements are stated to include "ERA filing fee, printing, binding, stationery and general".

[20] I am not satisfied that all of these disbursements have been properly incurred, as, for example, no "binding" appears to have been done, and the term "general" is quite opaque in meaning. I therefore decline to award any contribution towards disbursements, apart from the lodgement fee of $71.56.

Order

[21] I order the respondent to make a contribution towards Mr Flannagan's costs in the sum of $7,571.56, such sum to be paid no later than 14 days from the date of this determination.

David Appleton
Member of the Employment Relations Authority

[9] [2016] NZEmpC 97