IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 198
5376834

	BETWEEN	ROBERT FORD Applicant
	AND	JOHN HOLLAND NEW ZEALAND LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	A Goldstone, advocate for applicant M Quigg, counsel for respondent
Memoranda received:	18 April 2013 from applicant 18 April 2013 from respondent
Determination:	16 May 2013

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination dated 21 March 2013 I found a genuine redundancy situation existed, but that certain breaches on JHNZL's part meant Mr Ford had been dismissed unjustifiably. He was to be paid compensation of $4,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.

[2] Costs were reserved, and the parties have filed memoranda on the matter.

[3] Mr Goldstone sought an order for costs in favour of Mr Ford, in the sum of $4,000. He relied on the fact that Mr Ford was the successful party, and said $4,000 was the notional daily rate for a one-day meeting in the Authority.

[4] Mr Quigg sought an order for costs in favour of JHNZL in the sum of $4,000. Although Mr Ford was the successful party, Mr Quigg said an order should be made in favour of JHNZL because of Mr Ford's rejection of an offer made without prejudice save as to costs (referred to here as a Calderbank offer).

The Calderbank offer

[5] The offer was set out in a letter dated 14 September 2012. It was for the payment of $5,000 under s 123(1)(c)(i) as a full and final settlement of any claims arising from the employment relationship or its termination. It was open for acceptance until 5 pm on 21 September 2012.

[6] Mr Goldstone replied on 21 September. By then the parties had attempted mediation, a statement of problem had been lodged in the Authority, and a statement in reply was due that day. Mr Goldstone advised that Mr Ford considered the offer woefully insufficient, and that Mr Ford had a very strong claim both procedurally and substantively. Mr Ford would pursue the full quantum of his claim in the Authority.

[7] According to the statement of problem Mr Ford's claim was for 5 weeks' lost remuneration in the sum of $20,192.31 plus holiday pay on that amount, compensation for injury to his feelings in the sum of $10,000, and costs. The gross total was approximately $35,000, and I infer that Mr Ford believed his chances of obtaining an order at least close to that amount were strong. His response to the Calderbank offer was in effect that the offer of $5,000 fell too far short of $35,000 to be worthy of consideration.

[8] Mr Quigg submitted that the offer was part of a reasonable and timely proposal, and pointed out that the amount awarded by the Authority was less than the amount offered. He said the costs JHNZL has incurred since the date of the offer are close to $10,000, but only $4,000 is sought.

[9] In support Mr Quigg emphasised the importance of a steely approach to costs where reasonable settlement offers have been rejected, citing in support decisions such as that of the Court of Appeal in *Bluestar Print Group (NZ) Limited v Mitchell.*[1] The relevant passage reads:

> *[20] … As this Court has previously said a "steely" approach is required. It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation, then fail to achieve any more than was previously offered. Where defendants have acted reasonably in such circumstances they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors. …*

[1] [2010] NZCA 385

[10] The reasonableness of the offer must be considered as at the time the offer was made. From JHNZL's perspective there was a genuine redundancy situation, but it was addressing in a timely way the prospect of a finding of unjustified dismissal. It did so before either party had incurred significant costs.

[11] Mr Goldstone submitted that it was reasonable to reject the offer.

[12] He submitted, first, that the rejection was justified because it fell far short of the amount being sought. He relied in support on a decision of the High Court in *Junior Farms Limited v Commissioner of Inland Revenue*,[2] where the successful plaintiff had offered to pay 5% of the amount of income tax assessed and the court had found no tax was payable at all.

[13] There, however, a formal assessment process had been conducted and the defendant already had a finding in its favour. Here neither party had the benefit of an existing favourable finding, rather Mr Ford had a view of the amount he could or should receive. The level was significantly affected by his claim for the reimbursement of lost remuneration. However that claim did not take into account the possibility that the redundancy situation was genuine - a possibility which, on the facts as I have found them, Mr Ford should have recognised. That matter in turn had significant implications for the remedies available.

[14] For that reason I do not accept that the mere existence of a significant difference in the parties' positions meant it was reasonable for Mr Ford to decline the offer.

[15] Mr Goldstone also submitted that vindication was important to Mr Ford, and the offer did not address that element. An employee's wish for vindication is often concerned with a wish to repair any damage to reputation, and sometimes with a wish to obtain a public statement of principle. There was no evidence Mr Ford had concerns of that nature, or otherwise that he acted on any more than a view that he should succeed and as a result should obtain the remedies available for his personal grievance. For that reason I do not accept the submission.

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[2] [2011] NZHC 1226; (2011) 25 NZTC 20-085 (5 October 2011)

Determination

[16] The applicable test concerns the reasonableness of the offer. Overall I find the offer was reasonable at the time it was made. In that the submissions for Mr Ford address why the offer was not reasonable, I have not accepted them. Mr Ford's rejection of the offer should therefore sound in costs.

[17] I refer to the principles in *PBO Limited (formerly Rush Security Limited)* v *da Cruz* and begin with the Authority's notional daily rate of $3,500. I apply a discount to recognise Mr Ford's success in achieving a finding that his dismissal was unjustified. There is no other factor indicating that either an increase or a decrease in the notional daily rate should be applied.

[18] Mr Ford is therefore ordered to contribute to JHNZL's costs in the sum of $2,500.

R A Monaghan
Member of the Employment Relations Authority