IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 164
5572105

	BETWEEN	JENNINE HAURAKI-TUMU Applicant
	A N D	NORTH CANTERBURY DISTRIBUTORS (2013) LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Chrissie Gordon, Advocate for Applicant Linda Penno, Advocate for Respondent
Submissions Received:	24 August 2016, from the Applicant 26 July 2016, from the Respondent
Date of Determination:	21 September 2016

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 27 June 2016[1], I determined that the applicant, Mrs Hauraki-Tumu, was not unjustifiably dismissed but she was unjustifiably disadvantaged in her employment.

[2] I assessed the compensation payable for the personal grievance of unjustified disadvantage to be $5,000 and ordered the respondent, North Canterbury Distributors (2013) Limited (NCD) to pay $5,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[3] Costs were reserved and a timetable set for submissions if the parties were unable to agree costs. The parties could not agree costs. NCD filed a memorandum

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seeking costs on the basis that Mrs Hauraki-Tumu had unreasonably refused two *Calderbank* offers dated 24 August 2015 and 14 December 2015, both offers exceeding the amount of my determination.

[4] The advocate for Mrs Hauraki-Tumu filed a memorandum in response claiming that the applicant was justified in declining the *Calderbank* offers made and, as Mrs Hauraki-Tumu had been successful, costs should be awarded in her favour based on the daily tariff. Mrs Hauraki-Tumu also seeks to be reimbursed for the filing fee of $71.56.

[5] The two *Calderbank* offers that are relevant to this matter are offers made by NCD to Mrs Hauraki-Tumu. The first was made on 24 August 2015. It was marked "without prejudice save as to costs" and contained an offer in terms that included payment of $5,000 pursuant to s 123(1)(c)(i) of the Act and a contribution towards costs in the sum of $850 plus GST.

[6] The second *Calderbank* offer was made in a letter dated 14 December 2015. It was also marked "without prejudice save as to costs" and included an offer to settle the matter by payment of the sum of $8,500 pursuant to s 123(1)(c)(i) of the Act. The offer was said to be on terms that included that it was to be certified by a mediator, it would be in full and final settlement, it would include confidentiality and non-disparagement terms and a certificate of service would be provided to Mrs Hauraki-Tumu.

[7] There is no evidence before me setting out why Mrs Hauraki-Tumu rejected the two *Calderbank* offers. In her submissions, Ms Gordon submits that Mrs Hauraki-Tumu justifiably declined the first *Calderbank* offer on the basis that:

(a) The costs offer did not cover the actual costs incurred at that time; and

(b) NCD had made an allegation that Mrs Hauraki-Tumu had made an offensive gesture to it which led to it cancelling the scheduled mediation.

[8] Further, Ms Gordon submits that the second *Calderbank* offer was justifiably declined by Mrs Hauraki-Tumu on the basis that:

(a) There was no contribution towards costs offered;

(b) Mrs Hauraki-Tumu was not afforded an opportunity to have a face-to-face meeting with NCD despite a number of attempts made from July 2015;

(c) It was important to Mrs Hauraki-Tumu to have an opportunity to let NCD know how upset its actions had made her feel and she wanted to seek some vindication.

[9] Ms Gordon submits that Mrs Hauraki-Tumu should be awarded costs on the basis that costs should follow the event, i.e. she was successful in a personal grievance and should be awarded on the basis of the daily tariff being $3,500.

Costs

Principles

[10] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Act. The well-known principles which I must take into account when determining how to exercise the discretion empowered upon me are set out in the case of *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*[2] as reaffirmed in the recent Employment Court decision of *Davide Fagotti v. Acme & Co Ltd* [3]. The principles that I should take into account include:

(a) There is a discretion as to whether costs should be awarded and in what amounts. This discretion is to be exercised in accordance with principle and not arbitrarily;

(b) The discretion to award costs is consistent with the equity and good conscience jurisdiction of the Authority. Equity and good conscience are to be considered on a case-by-case basis;

(c) Costs generally follow the event but in some cases it may be appropriate that costs lie where they fall because of the nature of the case or, in some cases, costs should be awarded on the basis of unreasonable rejection of a Calderbank offer;

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2 [2005] 1 ERNZ 808
3 [2015] NZEmpC 135

(d) Once I have determined that costs should be awarded against a party, the consideration of quantum of the amount of costs is to start with applying the daily tariff. I should consider whether it might be appropriate to award costs on some other basis such as indemnity costs. If I apply the daily tariff, I must then consider whether that should be increased or decreased. The factors to consider in the exercise of the discretion particularly in relation to increasing or decreasing the daily tariff include:

(i) Costs in the Authority should be modest[4];

(ii) I should consider whether all or any of the parties' costs were unnecessary, unreasonable or actually incurred in the quantum claimed;

(iii) Costs are not to be used as a punishment but the parties' conduct may be relevant to be taken into account when increasing or decreasing the daily tariff;

(iv) I can consider without prejudice offers;

(v) Overall I should consider the exercise of my discretion in accordance with principle and apply equity and good conscience on a case-by-case basis.

Calderbank offers

[11] The key consideration in this matter is the refusal by Mrs Hauraki-Tumu of two *Calderbank* offers.

[12] A valid *Calderbank* offer is an offer to settle a claim on a *"without prejudice save as to costs"* basis. It is well known that these words attached to an offer make it clear to the recipient of the offer that if the offer is unreasonably rejected and the recipient does not then recover the amount offered or more, the offer can be put before the Authority or a Court when seeking costs. The basic principle is that had the party accepted the offer then the further costs from that point involved in the

[4] *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28

continuation of the matter could have been avoided and therefore that party should be responsible for the other party's costs.

[13] *Ogilvie & Mather (NZ) Ltd v. Darroch*[5] sets out the two principal criteria that must be satisfied when a *Calderbank* offer is made. These are:

(a) There must be a modicum of time for calm reflection and taking advice before a decision has been made to accept the offer or reject the offer; and

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

[14] The other relevant matter in relation to *Calderbank* arises from the recent Employment Court decision in *Fagotti* in which the Court confirmed that a "steely" approach[6] should be applied to *Calderbank* offers in the Authority.

[15] It is my view that that steely approach should be applied to the question of whether costs should be awarded to an offeror of a *Calderbank* offer that has been unreasonably rejected and then not bettered in a determination. It does not apply to the approach in setting a quantum once a decision is made to award that party costs based on the *Calderbank*. There are other factors that influence quantum that I must turn my mind to.

[16] I am satisfied that the two *Calderbank* offers were valid *Calderbank* offers. I note that both written offers did not contain a clear explanation of the consequences of unreasonably rejecting the offer contained in the letter. That is, there was no statement to the effect advising Mrs Hauraki-Tumu that if she rejected the offer and then did not better it in my determination, that it would be brought before the Authority so that NCD could seek costs against her. However, the offer was expressed as being "without prejudice save as to costs" and was sent to Mrs Hauraki-Tumu's advocate. An experienced employment advocate will know the consequences of the term "without prejudice save as to costs". I am satisfied that Ms Gordon would have explained those consequences to Mrs Hauraki-Tumu. In the circumstances, therefore, the *Calderbank* offers are valid.

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5 [1993] 2 ERNZ 943

6 *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385

[17] I also accept that the offers were made with sufficient time for reflection and taking advice and the offers were transparent. I also note that the offers were both substantive in that they set out the basis for which the offer was made particularly setting out the deficiencies in Mrs Hauraki-Tumu's case and pointing out that if Mrs Hauraki-Tumu was successful then she would only likely get a modest award which was indeed the case.

[18] Ms Gordon on behalf of Mrs Hauraki-Tumu says, however, that the *Calderbank* offers were reasonably rejected by Mrs Hauraki-Tumu and therefore they should not apply. The problem I have with this submission is that there is no evidence before me to support it. There is no copy of any correspondence from Mrs Hauraki-Tumu to NCD setting out the basis on which the offers were rejected. Further there is no evidence of the legal costs incurred by Mrs Hauraki-Tumu at the point of the *Calderbank* offers exceeded the offer made. In addition, I have no evidence before me to support the suggestion that Mrs Hauraki-Tumu rejected the offer because she was seeking to have a meeting and some form of vindication from NCD as part of settlement. If this were the case then I would need to see this expressed in correspondence. Therefore, I am not persuaded by Ms Gordon's submissions.

[19] I also note that the second *Calderbank* offer on 14 December 2015 was for a sum of $8,500 (pursuant to s 123(1)(c)(i) of the Act). On the basis of my determination, that sum of $8,500 matches exactly what the applicant would have expected to receive from my determination (but for the *Calderbank* offers), that is $5,000 pursuant to s 123(1)(c) and a further $3,500 for costs on the basis of the daily tariff.

[20] Therefore, the offers were unreasonably rejected and adopting a "steely" approach, I determine that Mrs Hauraki-Tumu should contribute to NCD's costs.

[21] I turn to consider the quantum of that costs award. From the factors contained in *da Cruz* and other relevant cases I think the matters that are relevant to the question of quantum include:

(a) That costs awards in the Authority should be modest;

(b) Whether the actual costs incurred were reasonable and incurred by NCD;

(c) Whether there is any conduct by Mrs Hauraki-Tumu which warrants an uplift in the daily tariff;

(d) Whether the effect of the unreasonable rejection of the *Calderbank* offers means that the daily tariff should be increased.

[22] There is no basis on which I should move away from the use of the daily tariff in this case. As stated, costs awards in the Authority should be modest. I believe that the daily tariff is set to accommodate this very principle. The question is whether I should increase or decrease the daily tariff for some other reason.

[23] There is no evidence before me of the actual costs incurred by NCD in respect of this matter. However, in submissions Ms Penno on behalf of NCD seeks only the daily tariff with no uplift. That is she seeks costs in the sum of $3,500. Whilst there is no evidence of the actual costs incurred, I am satisfied that they are likely to exceed $3,500 and there is no reason for me to decrease the daily tariff in this instance.

[24] There is no behaviour by either party but in particular, Mrs Hauraki-Tumu, which caused any unnecessary cost or time to be expended in respect of this matter and therefore an increase in costs is not appropriate.

[25] The only matter on which I might consider the question of whether I should uplift the daily tariff is the unreasonable rejection of the *Calderbank* offers. Based on *Fagotti*, I could increase the daily tariff but as NCD has not requested anything further than $3,500 I am not minded to increase the daily tariff.

[26] The last consideration is whether as a matter of equity and good conscience I am satisfied that an award of $3,500 in favour of NCD is appropriate in this case. In my view, it is an appropriate amount and therefore I order Mrs Hauraki-Tumu to pay NCD the sum of $3,500 as a contribution to its costs in respect of this matter.

Peter van Keulen
Member of the Employment Relations Authority