

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 49A/07
5070026

BETWEEN DAMON PETER HEATH
Applicant
AND AUCKLAND CITY COUNCIL
Respondent

Member of Authority: Leon Robinson
Representatives: Richard Harrison for Applicant
Shan Wilson for Respondent
Determination: 30 March 2007

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] By a Determination dated 26 February 2007, I determined that Mr Damon Heath ("Mr Heath") did not have a personal grievance for unjustifiable dismissal. The respondent Auckland City Council ("the Council") now seeks costs together with damages from Mr Heath.

[2] The Authority dealt with Mr Heath's application for interim reinstatement at an investigation meeting held from 2.00 pm on 21 November 2006. The substantive matter was dealt with at an investigation meeting held on 19 & 20 December 2006.

[3] The Council made two settlement offers to Mr Heath on 16 November and 29 November 2006 which are said to be Calderbank offers. Since the first offer made on 16 November 2006 expired, the Council advises it incurred costs thereafter in this amount:-

Fees	37,484.50
GST	4,685.56
Disbursements	
Couriers	8.40
Photocopying/binding	293.60
Telephone	36.82
Total	\$42,508.88

[4] Mr Harrison says these costs are exorbitant and disproportionate to both the forum and the nature of the claim.

[5] Because both Calderbank offers were rejected by Mr Heath, the Council now seeks full costs on an indemnity basis from him. Alternatively, it asks the Authority to make an award of \$9,000.00, calculated at \$3,000.00 per day over three days of investigation meeting time.

[6] On the basis of the undertaking as to damages given by Mr Heath, the Council also seeks damages against him as follows:-

Gross salary paid to the applicant from 26 October 2006 to 26 February 2007	\$29,399.47
Accrued annual leave paid out on 26 February 2007	\$2,351.95
Total	\$31,751.42

[7] The total sum now sought by the Council from Mr Heath is \$74,260.30, together with interest.

[8] Mr Harrison reminds the Authority that for the year ended 31 December 2005, the majority of awards for two day investigation meetings where the employer succeeds fall in the range of \$2,000 to \$2,500.

[9] Both Counsel refer to the Employment Court's endorsement of the Authority's approach to the award of costs in its investigations in *PBO Limited v Da Cruz*¹.

The claim for indemnity costs

[10] The Council seeks indemnity costs from Mr Heath. It advances that claim on the basis of what it says are two Calderbank letters sent to Mr Heath through his lawyer.

[11] Calderbank letters take their name from an English case *Calderbank v Calderbank*². They were first recognised by the New Zealand Court of Appeal in *Health Waikato Ltd v Van Der Sluis*³.

¹ [2005] 1 ERNZ 808

² [1975] 3 All ER 333

³ [1997] ERNZ 236

They were first considered by the New Zealand Employment Court in *Ogilvy & Mather (NZ) Ltd v Darroch*⁴. There the then Chief Judge described them this way:-

*As is well known, it is an offer, invariably in writing, made by one party to the other and expressed to be without prejudice except as to costs. It is an offer to compromise the action by some payment. Unless the offer is accepted, the letter is intended to be produced after the Court has dealt with the merits of the case but before it has dealt with costs. **It is intended to induce the Court by this means to exercise its discretion against granting the plaintiff any costs if it has recovered less by proceeding with the case than it could have by accepting the offer.** As with a payment into Court, costs down to the date of the offer would be additional to the amount offered unless otherwise stated but, subject to that, acceptance of the offer would be in final settlement unless the offer or any subsequent agreement provide otherwise. That is the philosophy behind the Calderbank offer. It is intended to put pressure on plaintiffs and discourage them from proceeding with litigation that may turn out to be unproductive simply for the sake of the cathartic day in Court. It is particularly suitable in situations in which it is not clear whether the payment into Court with denial of liability procedure is available or how it would operate. That is obviously the position where the case in the context of which the offer is made is concerned not only with a money claim but also with specific, prohibitive, or declaratory remedies.*

(emphasis added)

[12] In the Courts, the effect of Calderbank offers is prescribed, although the issue of costs always remains a matter of discretion. In the District Court, Rules 47G & 47H deal with Calderbank offers and their effect on costs. The Court always retains discretion but there is a presumption that a Calderbank offer can found indemnity costs after an offer is made.

[13] In the High Court, Rule 48GA gives rise to indemnity costs from the point of a Calderbank offer where the judgment is less than the offer. Where the offer is less than the judgment, the fact of the offer is relevant. At all times, the issue is a matter of the Court's discretion.

[14] In the employment law jurisdiction, both institutions have an identical discretion on Costs as prescribed by Schedules 2 & 3 to the Employment Relations Act 2000. However, the Employment Court has Regulation 68 which permits it to "*have regard to any conduct of the parties tending to increase or contain costs, including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties*".

⁴ [1993] 2 ERNZ 943

[15] Both the Authority and the Employment Court have a statutory equity and good conscience jurisdiction. Although not prescribed, the Authority has adopted the principles established by the Courts when dealing with Calderbank offers.

[16] The first Calderbank letter from the Council's lawyers to Mr Heath's Counsel was dated 16 November 2006. It stated:-

4. *This offer is made on a without prejudice basis save as to costs and, as such, should be treated as a "Calderbank" offer. In other words, should Mr Heath persist with his claim, our client reserves the right to produce this letter in support of an application for costs. In the event that Mr Heath's claim is unsuccessful or he receives an award of the same as, or less than the sum offered above, **our client would seek a full indemnity for its costs from the date of the expiry of this offer.** We anticipate that for the interim and substantive hearings combined, costs from hereon would be approximately \$25,000 plus GST and disbursements.*

5. *This offer remains open until 4pm today, Thursday, 16 November. If it is not accepted, our instructions are to prepare for hearing, with no further offers of settlement to be made.*

(emphasis added)

[17] The second letter from the Council's lawyers to Mr Heath's counsel was dated 29 November 2006. It stated:-

6. *This offer is open for acceptance until 4.00pm on Friday, 1 December 2006 at which time, if not accepted by Mr Heath, it will lapse. Our instructions, at that point, are to proceed to prepared for the substantive hearing, with no further offers to be made.*

[18] It has recently been held that the public interest in fair and expeditious resolution of disputes requires full weight be given to the extent to which costs were properly incurred following non-acceptance of offers of settlement at figures above any amount eventually awarded in litigation⁵.

[19] Mr Harrison resists the Council's claim for indemnity costs on a number of grounds. Firstly, he submits that awards of full solicitor/client costs are reserved for those cases where the claim (or defence was without merit and pursued in a way that could be described as reprehensible and refers to *Counties Manukau Health Limited v Pack*⁶ as authority for that proposition. Although that

⁵ *Watson v New Zealand Electrical Traders Limited t/a Bray Switchgear* AC64/06, 24 November 2006, Colgan CJ

⁶ [2000] 1 ERNZ 518

submission is frequent, it is contrary to what the Court of Appeal has subsequently said in *Binnie v Pacific Health Limited*⁷ - that such an approach is too narrow⁸.

[20] Mr Harrison next submits Mr Heath's pursuit of the reinstatement remedy - the primary remedy under the *Employment Relations Act 2000* ("the Act"), distinguishes this case for costs from ordinary Calderbank offer cases. Mr Harrison draws a distinction between cases where monetary remedies are sought and the present case where reinstatement is sought. He submits to penalise Mr Heath for pursuing reinstatement will "*only serve to further undermine this remedy which, as it is, is something of a threatened species.*" The submission is refined further to suggest that the reinstatement remedy will become extinct if monetary offers by way of Calderbank offers are used against unsuccessful applicants for reinstatement⁹.

[21] It is not correct that rejected Calderbank letters have the effect of automatically reversing the conventional rule that costs follow the event or put another way, that they alter the incidence of costs. Goddard CJ in *Ogilvy & Mather*¹⁰ very helpfully clarifies the issue when His Honour there said:-

I should not like to be understood as suggesting that a Calderbank offer in every case means that the party making it at a realistic level will be protected from all costs incurred subsequently if the amount recovered is less or the remedies recovered are less valuable or extensive. All I am saying is that in this Court, as in the ordinary Courts, an offer made without prejudice except as to costs is admissible on an application for costs unlike other letters written without prejudice that should not be received by the Court. Once the Court has received evidence of the Calderbank offer, it can take into account the fact of its making and non-acceptance in the course of the exercise of its discretion on costs. Obviously, the Court will give greater weight to the making of such an offer if the plaintiff has in the Court's view unreasonably proceeded with a claim that could have been readily settled and has then recovered less or not significantly more.

(emphasis added)

⁷ [2002] 1 ERNZ 438

⁸ at para 21

⁹ Interestingly, Mr Harrison argued the converse position in *Richardson v Board of Governors of Wesley College* (below)

¹⁰ above

[22] And even more clearer is this statement by the High Court in *McDonald v FAI (NZ General Insurance Co Ltd*¹¹, where Hansen J stated¹²:-

... the effect of Calderbank offers on an award of costs is fully discretionary. They do not grant automatic protection in the event of lesser recovery or result in full exposure to costs if a greater sum is recovered. A Calderbank offer does not stand alone. All surrounding circumstances must be considered.

[23] Calderbank letters are not in themselves any interference with the Court's or this Authority's discretion and principled approach on costs. The fact of Calderbank letters do not of themselves establish a rebuttable case for indemnity costs. They are a factor in the mix in the exercise of the discretion. A discretion which in this jurisdiction is fashioned significantly by an equity and good conscience jurisdiction.

[24] Mr Harrison submits that Calderbank settlement offers can only be measured against like applications. He suggests offers of financial settlement can only be measured against an application seeking monetary compensation. He submits that in a case for reinstatement, it can only be measured against an offer that involves some form of alternative employment. He says Mr Heath desired reinstatement not only for financial reasons but also for factors often overlooked - dignity of labour, love of occupation and reputation.

[25] Mr Harrison may be right. The cases in the Courts do suggest there is a distinction to be made between monetary and non-monetary aspects of litigation. In *Richardson v Board of Governors of Wesley College*¹³ the Employment Court did not accept that the desire for reinstatement entitled the appellant to disregard a Calderbank offer. The argument was rejected because the appellant had made counter-offers seeking financial sums. Travis J said:-

I do not accept Ms Hay-Mackenzie's submissions that the appellant's desire for reinstatement reasonably entitled her to disregard the Calderbank offer and therefore the Tribunal should have awarded costs in her favour. As Mr Harrison pointed out, there were counter offers to settle for a financial sum not including reinstatement. The Tribunal was properly entitled to take the Calderbank offer into account and reverse what would otherwise have been the incidence of costs.

¹¹ (2002) 16 PRNZ 298

¹² at para 17. *Diver v Geo Boyes & Co Ltd* 20/5/98, Penlington J, HC Hamilton CP58/93 is to the same effect

¹³ unreported, AC20/03, 19 March 2003, Travis J

[26] When the then Chief Judge had occasion to describe Calderbank offers again in *Wellington Racing Club Inc v Welch & Anor*¹⁴ His Honour did not refer to general "actions" but rather cases about money:-

[W]here the case is purely about money, such as a case solely for the recovery of arrears of wages, an offer that equals or exceeds what the claimant ultimately recovers by judgement (by definition a reasonable offer) should ordinarily have accepted and costs incurred following a refusal should ordinarily be laid at the door of the claimant unsuccessfully striving for a higher recovery that the circumstances merited. That is subject to the offer made having been transparent (free from hidden pitfalls), clear (readily understandable), and made in, and kept open for, sufficient time to enable the obtaining of advice and mature, unhurried consideration. In other cases, involving features of a personal nature, it may be unreasonable to expect a claimant to consider favourably an offer from a former employer especially if the dismissal has been attended by high-handed or arbitrary action or preceded by hurtful quarrels about the claimant's performance or conduct.

(emphasis added)

[27] In *Binnie v Pacific Health Limited*¹⁵ Colgan J stated:-

*[38] The defendant invites me to find that the compensation recovered by Dr Binnie was only marginally more than that offered to settle the proceeding before trial. That may be so, but the submission ignores the important non-monetary reputational aspect of the litigation. The defendant's Calderbank offers included conditions of confidentiality or, at best, the prospect of some negotiation about a degree of mutual but limited publicity concerning the settlement of the action. As Dr Binnie's solicitors' letters at the time illustrate, one of his major concerns was his professional rehabilitation either by an admission of liability by the defendant or in a judgment of the Court. **The Calderbank offers did not meet Dr Binnie's reasonable expectations of this aspect of his litigation and that point was made clear to the defendant when the offers were rejected.***

(emphasis added)

[28] Just as reputation was considered by the Employment Court as an important non-monetary factor in *Binnie*, so too I consider must a genuine desire for reinstatement or vindication as was Mr Heath's case. In this way, it can be said that the Calderbank offers did not meet Mr Heath's expectations of the proceedings made clear to the Council when the second offer was rejected with the accompanying advice from Mr Harrison to Ms Wilson as follows:-

¹⁴ [2002] 1 ERNZ 685

¹⁵ unreported, AC10/02, 5 March 2002, Colgan J

I refer to your letter of 29 November 2006, while I appreciate the timeframe has now lapsed I confirm that it is Mr Heath's wish to seek reinstatement and so the offer is declined. While I appreciate there is litigation risk, Mr Heath is entitled to seek what the Act refers to as the primary remedy, reinstatement.

[29] In *Burns v A-G in respect of Chief Executive of IRD*¹⁶ the Employment Court felt unable to give full effect to Calderbank letters because of a finding that vindication was an important part of the plaintiff's case.

[30] I find particularly persuasive the Court's comments in *Wellington Racing Club Inc*¹⁷. The statements therein I rely on as relevant legal principles that I must now have regard to. If Calderbank offers apply only in cases that are purely about money, then Mr Heath's case for interim and permanent reinstatement was not. Cases for reinstatement, or those principally prosecuted for vindication or reputational aspects cannot be said to be purely about money. It seems that legitimate Calderbank offers are not indefeasible. I think it right to say, Mr Heath's case always being about reinstatement particularly, was never susceptible to Calderbank offers.

[31] For these reasons I therefore conclude the letters of 16 and 29 November 2006 do not operate to influence my discretion against Mr Heath. They cannot found a claim for indemnity costs. While that is sufficient to deal with the issue, I note that the offer contained within the advice of 16 November 2006 was not left open sufficiently to permit unhurried and mature consideration and I would not accept that particular advice as a Calderbank offer.

[32] Accordingly, there is no claim for indemnity costs against Mr Heath. I will determine the matter on a contribution basis. The exercise remains one of properly exercised discretion and calls for a determination of what is a fair and reasonable contribution as between the parties. The Authority adopts a principled approach taking into account relevant matters and having no regard for irrelevant ones.

[33] Mr Heath succeeded in obtaining interim relief from the Authority. I do not award costs against him for that process. The investigation meeting of the substantive matter was held over two full days, the second day running well into the evening. In real terms I regard it as three and one half days meeting time. Mr Heath did not succeed in his substantive claim and therefore the

¹⁶ unreported, CC16B/02, 19 August 2002, Goddard CJ

¹⁷ at note 14

Council is to be regarded as the successful party. I see no reason to depart from the ordinary rule that costs follow the event and accordingly there shall be an order in the Council's favour that Mr Heath make a contribution to its costs. Costs awards in the Authority are typically modest.

[34] It is necessary to now determine what a reasonable contribution would be to the Council's reasonable costs. The Authority's substantive investigation meeting proceeded over effectively two and one half full days with a number of witnesses attending. I consider what reasonable costs would be on a notional basis. I apply a multiplier of 2 to total meeting time of 17.5 hours (7 meeting hours per day) to arrive at total professional time involved of 35. Allowing a reasonable hourly rate for professional counsel of \$250.00, I arrive at notional reasonable costs of \$8,750.00.

[35] I have regard for the relative of means of the parties when deciding whether to grant costs and when deciding the amount. Mr Heath is presently unemployed. He is the sole income earner for his young family. He supports his wife and his two young children. Mr Harrison also argues that Mr Heath relied on Labour Department publications which indicate the range of Authority costs awards typically between \$1,000 - \$3,000 per day. He submits too that Mr Heath is left in a financial predicament and that this is not a case which warrants an award over and above the well accepted Authority tariffs on costs, but instead, a deduction from the normally accepted tariff.

[36] This is an equity and good conscience jurisdiction. Taking into account the relative financial means of the parties, I consider a reasonable contribution to the Council's costs which I have notionally fixed as reasonable at \$8,750.00, would be \$5,000.00. Exercising my discretion on a principled basis, **I order Damon Peter Heath to pay to Auckland City Council the sum of \$5,000.00 as a contribution to costs. That sum is inclusive of disbursements.**

The claim for damages

[37] On the basis of the undertaking as to damages given by Mr Heath, the Council seeks damages from Mr Heath in the sum of \$31,751.42 as follows:-

Gross salary paid to the applicant from 26 October 2006 to 26 February 2007	\$29,399.47
Accrued annual leave paid out on 26 February 2007	\$2,351.95
Total	\$31,751.42

[38] Section 127(2) of the Act requires an applicant for interim reinstatement to provide at the time of filing, an undertaking as to damages. Subsection 3 provides that the undertaking must be referred to in the order for reinstatement and is part of it.

[39] Ms Wilson points out Mr Heath's affidavit sworn on 3 November 2006 where Mr Heath deposes he has "*significant equity*" in his house "*to satisfy any damages undertaking I gave for this application.*"

[40] The *Ogilvy* authority is helpful for the Authority in terms of the relevant legal principles to be adopted. Relying on an English authority¹⁸, the Employment Court held there were two steps for the Court to enforce an undertaking as to damages. These were:-

- (i) The defendant must show loss resulting from the injunction; and
- (ii) The loss must be of a character, or the circumstances be such, that the plaintiff should be required to make good that loss as a matter of equity.

[41] In *Ogilvy* the Court stated:-

In my judgment the Court has a discretion to award none, all, or part of the damages sustained, notwithstanding that some of these may not have been foreseeable from circumstances known at the time.

¹⁸ *Cheltenham & Gloucester Building Society v Ricketts* [1993] 4 All ER 276 (CA)

[42] The English case *Cheltenham* formulated rules relating to such undertakings including that:-

In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so.

[43] That is a discretion which I find the Authority retains as well. There is no clear rule that applicants granted interim reinstatement on a garden leave basis must repay the monies received by them. That is too absolute and contrary to the legal authorities. The obligation to repay is a likelihood but not a certainty¹⁹.

[44] It is accepted that the Council did suffer loss in the form of the wages it was required to continue paying to Mr Heath during the period of interim reinstatement.

[45] The Authority's interim order that Mr Heath be reinstated was on condition that he was not required to perform any work. That condition was so because of the reality that Mr Heath had been replaced. His position had been filled with a verbal offer accepted on Monday 30 October 2006. That was the reason why the Authority did not require the Council to require Mr Heath to perform any work. Had it not been for this fact, the Authority would have ordered Mr Heath's return to work. The Council would then have continued to pay for Mr Heath's actual labour. While it has paid, it did not have his labour. He certainly wished to provide his labour, but to accommodate the Council, the Authority did not require him to do so.

[46] I have described the conditional reinstatement a consequence of an accommodation for the Council. Had Mr Heath been required to perform his duties, the Council would not have suffered loss because its wages would have earned Mr Heath's labour.

[47] The Council and its witnesses were quite vehement that Mr Heath should not return to the workplace. That situation together with the fact that the Council had offered Mr Heath's position to another person, led the Authority to craft the particular pragmatic and practical solution it did.

¹⁹ See *Taylor & ECom New Zealand Limited*, unreported, AA29A/06, 10 October 2006, D King, and *Keating & New Zealand Bloodstock Limited*, unreported, AEA33A/01, 11 May 2001, D King and the reference therein to *Gratton v Wilder Transport*, unreported, WEC51/99, 27 May 1999, Goddard CJ.

[48] Thus the Authority's view now is that the Council has suffered loss as a consequence of the Authority's accommodation to it. In those circumstances, Mr Heath should not be required to repay his salary. It would be inequitable to require him to.

[49] There will be no orders by the Authority in relation to the damages sought by the Council.

Leon Robinson
Member of Employment Relations Authority