Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 566
5420333

	BETWEEN	L Applicant
	A N D	M Respondent

Member of Authority:	James Crichton
Representatives:	Jeremy Browne, Counsel for Applicant Andrew Golightly, Counsel for Respondent
Submissions Received:	1 November 2013 from Applicant 17 October 2013 from Respondent
Date of Determination:	11 December 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] The substantive determination in this matter was issued as [2013] NZERA Auckland 430 on 23 September 2013.

[2] In that substantive determination, the Authority found exclusively for the respondent employer. Costs were reserved.

The claim for costs

[3] Submissions for the respondent employer seek full indemnity costs of $29,400 after the date of the first *Calderbank* offer made to the unsuccessful applicant party which was dated 18 July 2013.

[4] Those submissions also allege that the applicant introduced irrelevant evidence and proposed a case theory which was fanciful, that the damages sought by the applicant were extremely high, and the combined effect of all this was to increase the costs to the respondent.

The response

[5] The applicant resists the contention that costs be fixed immediately seeking a stay until a de novo challenge to the substantive determination of the Authority is dealt with by the Employment Court.

[6] In the alternative, if costs are to be dealt with now, the applicant proposes that costs be fixed strictly on the daily tariff approach and in particular, resists the contention that the respondent has any entitlement to full solicitor/client costs "as of right". The point is made that unlike the Employment Court, or indeed the High Court, the Authority has a wider discretion as clearly enunciated by the full bench of the Employment Court in the leading case of *PBO Limited v da Cruz* [2005] 1 ERNZ 808.

[7] Like the respondent, the applicant maintains that it was the other party who materially increased the costs of the litigation by introducing irrelevancies, by advancing evidence which the Authority ultimately determined was inadmissible and that it was counsel for the applicant that took the initiative in attempting to get some understanding with the other side so as to limit the irrelevant testimony.

[8] In the result, based exclusively on the daily tariff approach, the applicant suggests costs be fixed at $5,250.

Determination

[9] It will be self-evident there is a considerable gulf between the parties as to the appropriate figure for costs to be fixed at. That difference relates almost exclusively to the correct application of the law relating to the relevant *Calderbank* offers.

[10] As always, the starting point for appropriate consideration of the matter must be the daily tariff approach and on that footing, the Authority accepts the applicant's submission that the correct figure derived from an application of the daily tariff approach is $5,250.

[11] Of course, it is available to the Authority to either add to or take away from that figure depending on other factors in play such as the conduct of the parties, and the applicability or otherwise of *Calderbank* offers.

[12] Because the Authority is satisfied that the resolution of the applicability of the *Calderbank* offer is fundamental to the fixing of costs in the instant case, that matter is dealt with next.

[13] There were in fact three *Calderbank* offers, two from the successful respondent and one from the unsuccessful applicant. For obvious reasons (costs following the event) the *Calderbank* offer from the applicant must be rejected as not being in play.

[14] However, the position is otherwise with the first *Calderbank* offer tendered by the respondent and dated 18 July 2013. This date was after the parties had already engaged extensively but before detailed preparation for the Authority's investigation meeting had been undertaken. Because the applicant was completely unsuccessful in the Authority's investigation, he would have been materially better off to have accepted the *Calderbank* offer when it was proffered rather than rejecting it, which is what he did.

[15] Of course, the effect of the *Calderbank* offer is to entitle the author of such an offer to ask that it be considered in an application for costs where the recipient of the letter rejects the offer and the offeror is more successful in the proceeding than the net result of the *Calderbank* offer.

[16] The whole point of proffering a *Calderbank* letter is to have it considered in a cost setting environment if the author of the letter is more successful in the outcome than that postulated in the proposal. If the Authority were to base its costs fixing exclusively on the *Calderbank* letter, then the respondent would be entitled to its costs since the date of the *Calderbank* letter which the Authority is told would be in the sum of $29,400.

[17] Submissions for the applicant properly make the point that the Authority has not been provided with invoices to demonstrate the costs claimed. However, the Authority is entitled to accept counsel's word on the matter and in any event, the Authority notes that counsel's submissions are consistent with the letter counsel forwarded to counsel for the applicant dated 27 September 2013.

[18] Of more moment is the contention apparently advanced by both parties that full indemnity costs were sought. That cannot be the position; if it were, then counsel for the respondent would effectively have been providing its services for nothing up to the point at which the *Calderbank* offer was made on 18 July 2013. What is in prospect is that all of the costs from that date to the resolution of the matter in the Authority are claimed and that is consistent with the obligation the Authority has to give effect to an operative *Calderbank* offer.

[19] It is a truism that the Court of Appeal has urged on the Court "a more steely" approach to *Calderbank* offers in *Blue Star Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385. Submissions for the applicant suggest that those remarks relate exclusively or particularly to the Employment Court and not to the Authority.

[20] The Authority does not accept that submission. Like courts of record, the Authority is obliged to apply the law as it understands it and it would be wrong in principle to ignore clear and relevant dicta of superior courts.

[21] What is more, there are many examples of the Authority applying precisely the approach contemplated here: see for instance *Steadman v Canterbury Employers' Chamber of Commerce Inc.* [2013] NZERA Christchurch 182.

[22] In all the circumstances, the Authority is satisfied that the proper decision is to require that the applicant pay to the respondent the sum of $29,400 being the costs incurred by the successful respondent in defending itself against the applicant's unsuccessful claims since the date of the first *Calderbank* letter of 18 July 2013.

[23] It is the Authority's usual practice to deal with costs matters even where the substantive determination has gone on challenge, as in this case. No doubt the parties will use their good sense and not seek to enforce this order until the results of the challenge, and any impact that has on costs in the Authority, is known.

James Crichton
Member of the Employment Relations Authority