IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2013] NZERA Christchurch 43
5347544

	BETWEEN	BOB MCGOWAN Applicant
	AND	MINERVA FARMS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Paul Brown, Counsel for Applicant Jeff Goldstein, Counsel for Respondent
Submissions received:	15 February 2013 from Applicant 18 February 2013 from Respondent
Determination:	4 March 2013

COSTS DETERMINATION OF THE AUTHORITY

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[1] By way of a determination dated 21 December 2012 the Authority found that Mr McGowan had been unjustifiably dismissed. It also found that a number of his other claims were successful. It also awarded a penalty of $1,000 to be paid by the respondent to Mr McGowan.

[2] In addition, two of the respondent's three counterclaims against Mr McGowan were successful, although these two counterclaims were never contested by Mr McGowan.

Are costs due to the respondent?

[3] It is the respondent's contention that it made a valid *Calderbank* offer to Mr McGowan through their respective representatives, which was rejected by Mr McGowan and which exceeded the net total sum recovered by Mr McGowan when taking into account the value of the counterclaims. Accordingly, the respondent seeks costs from Mr McGowan in the sum of $8,000, being the costs that were incurred by the respondent after the expiry of the *Calderbank* offer.

[4] The Authority is entitled to take into accounts the effects of a *Calderbank* offer as part of the totality of the considerations that it must examine, pursuant to the Employment Court judgment in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz [2005] 1 ERNZ 808.*

[5] The terms of the *Calderbank* offer made by Mr Goldstein to Mr Brown, in an email dated 2 October 2012, were as follows:

> *Without prejudice except as to costs*
>
> *Our client remains firmly of the belief that it will succeed in defending your client's claims and succeed in its counterclaim. Our client is fully prepared to defend this matter in the Employment Relations Authority.*
>
> *However, our client recognises the benefit of avoiding the time and expense that will inevitably be incurred should the matter proceed to a hearing. Our client has therefore instructed us to put the following offer to your client:*
>
> *(a) $10,000 s123(1)(c)(i) compensation.*
> *(b) $3,500 plus gst as a contribution towards costs.*
>
> *This offer is made on a without prejudice except as to costs basis and as such, should be treated as a "calderbank offer". In other words, should your client persist with his claim, our client reserves the right to produce this letter in support of an application for costs.*
>
> *In the event that your client'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.*
>
> *This offer remains open until 4pm on Monday 8 October 2012 at which time it will lapse if not accepted.*
>
> *We look forward to hearing from you.*

[6] Mr Brown responded to Mr Goldstein's email stating that he would present the offer to his client but that he would recommend to him that he ignore it as completely inadequate. Mr Brown stated *a much more realistic offer will be needed to settle this matter before the Authority investigation. I place no weight on this being a Calderbank offer as the wages owing alone, far exceed the amount offered.*

[7] The *Calderbank* offer was not accepted by the deadline imposed by Mr Goldstein. It is the respondent's contention that, when one deducts the total sum that the Authority ordered Mr McGowan to pay to the respondent from the total sum

that the Authority ordered the respondent to pay to Mr McGowan, Mr McGowan ended up with a net award of $2,361.21, far below the value of the Calderbank offer.

[8] As *Calderbank* offers put pressure on an applicant, they should comply with certain basic safeguards so as to not unfairly prejudice the recipient of the offer. These safeguards have been identified in *Ogilvy & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943 as including:

(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;

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

[9] I am satisfied that *a modicum of time* was given by Mr Goldstein to Mr McGowan.

[10] However, I am not convinced that the offer was transparent. I say this because Mr Goldstein refers in his email of 2 October 2012 to the respondent's counterclaim, saying that the respondent firmly believes that it will succeed in that counterclaim. However, the offer does not state that it will be in full and final settlement and it does not state how the counterclaim is to be dealt with. Although, in his submissions, Mr Goldstein states that *importantly the offer was to resolve all matters between the parties including the respondent's counterclaim* this is not stated in the email of 2 October 2012.

[11] Whilst it might be argued that it should be inferred from the contents of that email that the offer was meant to be in full and final settlement and, further inferred that the counterclaims of the respondent were therefore to be dropped, given that Mr McGowan did not dispute that he owed the respondent the sum of $14,141.38 in respect of an unpaid grazing fee and a further sum approaching $1,000 in respect of unpaid telephone expenses, how the respondent intended to deal with those debts should have been spelled out for the Calderbank offer to be valid.

[12] If I am wrong in that, I am not satisfied that Mr McGowan did not beat the Calderbank offer in any event. Mr Brown, counsel for Mr McGowan, states in his submissions that, apart from the sums ordered by the Authority to be paid to Mr McGowan, during the course of the Authority's investigation meeting the

respondent also agreed to pay Mr McGowan further sums which total the gross sum of $12,388.25.

[13] Whilst I accept that the respondent was unable to pay some of these sums prior to the investigation meeting because receipts had not been provided, it was only at the investigation meeting that these sums were tendered.

[14] I accept the submission of Mr Brown that these sums should be taken into account when deciding whether a *Calderbank* offer was beaten or not. As the total amount recovered by Mr McGowan, taking into account both the payments voluntarily made by the respondent to Mr McGowan during the course of the investigation meeting, and the amounts ordered by the Authority to be paid by the respondent to Mr McGowan, Mr McGowan recovered a total sum in the region of $30,535. This, clearly, does beat the amount offered by the respondent in the *Calderbank* offer even when one deducts the sums ordered by the Authority to be paid by Mr McGowan. In fact, a balance of around $15,500 was recovered by Mr McGowan, which beats the $13,500 offered in the *Calderbank* offer.

[15] Therefore, in summary, I do not believe that the *Calderbank* offer satisfies the tests set out in *Ogilvy & Mather* but, if I am wrong in that, I accept Mr Brown's submissions that, in any event, the *Calderbank* offer was beaten and therefore should not be used as a basis upon which to award costs to the respondent.

[16] It then remains to decide whether costs should be awarded to Mr McGowan.

Are costs due to Mr McGowan?

[17] Mr Brown seeks a contribution of $3,000 towards Mr McGowan's costs on the basis that costs should follow the event. This is on the basis that Mr Brown submits that Mr McGowan effectively *won*.

[18] This is not a straightforward matter to analyse in terms of winners and losers, not only because both claims and counterclaims succeeded before the Authority, whereas other claims and a third counterclaim failed, but also because Mr McGowan did not contest that he owed the respondent money in respect of two of the counterclaims and because the respondent was always willing to make payment to Mr McGowan in respect of some of his claims, provided it was satisfied that the calculations could be justified.

[19] It is my view that, when one stands back, there is no clear *winner* in respect of the parties' claims and counterclaims. Accordingly, it would not be just to order either party to make a contribution towards the other party's costs and I therefore order that costs should lie where they fall.

David Appleton
Member of the Employment Relations Authority