

[3] The submissions for Ward acknowledge the notional daily tariff approach of the Authority on the basis of a two day hearing. Ward accepts that the hearing was in fact 2½ days, but the extra half day was due to its own oversight in not attaching all documents to its statement in reply. Therefore, Ward is not seeking costs in respect of that half day. On the basis of the Authority’s notional daily tariff, Ward seeks \$7,000 for the two day hearing.

[4] Mr Mensah opposes the costs sought on the basis that he disagrees with the Authority’s determination and because he is “poor”. Mr Mensah provided no information or evidence to the Authority in respect of his current financial circumstances.

[5] The Authority’s power to award costs arises from Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act). This confers a wide discretion on the Authority to award costs, on a principled basis.

[6] The principles guiding the Authority’s approach to costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*². Those principles are so well recognised I do not need to restate them. Mr Molloy in his submissions referred to this decision.

[7] The Employment Court in *Carter Holt Harvey v. Eastern Bays Independent Industrial Workers Union & Ors*³ observed that a notional daily tariff approach, which was to be adjusted in a principled way, was best suited to the Authority’s unique jurisdiction. I adopt that approach.

[8] The normal starting point for costs in the Authority is \$3,500 per day⁴. As mentioned above, this matter involved an investigation meeting of 2½ days. Mr Molloy seeks \$7,000 in respect of the respondent’s costs for two days.

[9] Mr Molloy referred to a *Calderbank* offer⁵ made to Mr Mensah on 27 February 2014, which was a significant time before the investigation meeting held on 15, 16 April and 9 May 2014. Mr Molloy also refers to numerous other settlement offers, all refused by Mr Mensah.

² [2005] 1 ERNZ 808

³ [2011] NZEmpC 13

⁴ *Fifita (aka Bloomfield) v. Dunedin Casinos Ltd* [2012] NZERA Christchurch 219

⁵ *Calderbank v. Calderbank* [1975] 2 All ER 333

The *Calderbank* offer

[10] By a letter dated 27 February 2014, Ward made a “without prejudice except as to costs” offer to Mr Mensah. The terms of this offer included a payment of \$8,000 in full and final settlement of the dispute.

[11] In addressing Mr Mensah’s claim, Ward said that given the decision to resign was his alone, the best he could achieve would be to secure an award for unjustified disadvantage. If this were to occur it was most unlikely to exceed \$5,000.

[12] The *Calderbank* offer was open for acceptance until 7 March 2014. Despite the *Calderbank* offer, Ward does not seek more than the notional daily rate of \$3,500, in total \$7,000.

[13] Given the success of Ward in regard to the outcome of the substantive matter, costs must follow the event.

[14] The reference to “without prejudice save as costs” offer in *Da Cruz* is recognition by the Employment Court that a *Calderbank* offer is a matter that can reasonably be taken into account by the Authority in exercising its discretion in determining costs. The general principles pertaining to *Calderbank* offers have been considered (and are now well established) by the Court of Appeal.

[15] In *Blue Star Print Group (NZ) Ltd v. Mitchell*⁶, the Court of Appeal re-emphasised that a “steely” approach was 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 and then fail to achieve any more than was previously offered.

[16] On the weight of the evidence before the Authority, the assessment made by Ward as set out in the *Calderbank* letter, was in my view a reasonable one. It follows that the *Calderbank* offer made by Ward on 27 February 2014 must be seen as being quite reasonable.

⁶ [2010] ERNZ 446 (CA)

[17] In a costs setting, it would have been prudent for Mr Mensah to have accepted the *Calderbank* offer made by Ward which was a significant offer and also, as it turns out, the previous offers made by Ward in order to settle the matter.

[18] Of course, Mr Mensah was entitled to reject the offers that were made. But in doing so, he was on notice from Ward that it would rely on the existence of the *Calderbank* offer in regard to claiming costs, in the event that it was successful in the defence of Mr Mensah's claims.

[19] Even so, Ward is not requesting an increase in the normal award of costs that could be awarded by the Authority because of the *Calderbank* offer. Ward is seeking the notional daily tariff of \$3,500 per day as a contribution towards its costs in defending Mr Mensah's claims.

[20] I order Mr Mensah to pay Ward the sum of \$7,000 as a contribution towards its costs. This sum is to be paid by Mr Mensah to Ward within 21 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority