IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 100
5309068

	BETWEEN	TANIA MERCER-BLACK Applicant
	AND	ZAIBATSU 2006 LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	John Farrow, Counsel for the Applicant Diccon Sim, Counsel for the Respondent
Submissions Received:	19 March 2012 from the Respondent 4 April 2012 from the Applicant
Determination:	22 May 2012

COSTS DETERMINATION OF THE AUTHORITY

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[1] On 16 February 2012 I issued a determination dismissing a claim of unjustified dismissal Ms Mercer-Black had brought against Zaibatsu 2006 Limited.

[2] The issue of costs was reserved with the successful party, Zaibatsu, being advised that if it wished to seek a contribution toward its costs it should do so via a written application. It does.

[3] Normally the Authority will assess costs on a daily tariff basis: refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. In assessing that tariff $3,500 per day is now considered a common starting point: refer *Chief Executive of the Department of Corrections v Tawhiwhirangi (No 2)* [2008] ERNZ 73 adjusted for the fact that decision is now dated and costs have, in the intervening period, increased.

[4] From that point adjustment may be made depending on the circumstances.

[5] The matter was initially set for one day but due to various factors including a travel delay incurred by myself and the initial absence of the applicant, it had to be

continued on a second day. Noting the parties disagree about how long the matter took, I rely on my notes. They indicate a total hearing time of approximately one and a half days. Application of the above formula would therefore see a contribution toward costs in the order of $5,250.

[6] Zaibatsu, however, seeks a greater contribution and in doing so cite the applicants conduct during the hearing and a Calderbank offer. Zaibatsu's costs total $21,920.18. Of that, $14,158,80 was incurred after mediation and that amount is sought. $8,450.50 was incurred after rejection of the Calderbank.

[7] In respect to conduct it is submitted that a number of the factors considered by the Court of Appeal as justifying an increase in *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 were witnessed here.

[8] The Calderbank was in the form of an e-mail entitled 'Without Prejudice except as to costs'. Appended thereto was a draft record of settlement prepared for a mediation which was proffered as potential terms of settlement along with advice the fact of offer would, if rejected, form the basis of a claim for the reimbursement of all costs incurred by Zaibatsu. The offer was for $4,000 and the destruction of security camera footage. It was rejected within an hour and a half on the grounds that Zaibatsu had not addressed the destruction of Ms Mercer-Black's reputation. Reputational repair could, it was suggested, be commenced through the agreement of a joint statement in which Zaibatsu conceded fault in respect to the use of Ms Mercer-Black's credit card and the process it used.

[9] Ms Mercer-Black's response refers to the delay on the first morning before:

a. Rejecting the proposition that the manner in which she presented her case contributed to an extended hearing;

b. Submitting that she had to give evidence about her relationship with Zaibatsu given the company's unsuccessful defence that she as a contractor;

c. Submitting that her conduct did not amount to the type of *flagrant misconduct* discussed in *Bradbury v Westpac*;

d. Submitting that the Calderbank should be disregarded as insufficient time was allowed for its consideration (reference being made to *Ogilvy and Mather (NZ) Ltd v Darroch* [1993] 2 ERNZ 943) and that it did not cover the joint statement; and

e. Costs related to the mediation can not be recognised.

[10] I take the issue of mediation and its attendant costs no further – they are not being sought. Similarly I take the issue of conduct no further. Mr Black was Ms Mercer-Black's partner and not an experienced advocate. Some leeway should be allowed but, in any event, I agree with the submission that the conduct did not amount to the type of flagrant misconduct detailed by the Court of Appeal in *Bradbury v Westpac*. Having heard Ms Mercer-Black's evidence and witnessed her demeanour I am satisfied the claim was driven by a misguided attempt to address reputational damage and was not an attempt to exhort money from Zaibatsu.

[11] The real issue here is the Calderbank.

[12] Whilst costs should not be used to punish a party, it is well accepted that an increased award should be considered where costs are incurred unnecessarily or unreasonably (see *NZ Air Line Pilots Assn IUOW v Registrar of Unions* (1989) ERNZ Sel Cas 304; [1989] 2 NZILR 550). Rejection of a reasonable offer which was delivered in a timely manner and addresses the issues does, in my view, put the parties to unnecessary costs and is a factor warranting an increased award. Furthermore the Courts have urged a more steely approach in this respect (refer *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 CA).

[13] The argument about timeliness is not, in my view, valid. Mr Black responded with alacrity and in a manner that indicates the answer would be the same irrespective of how long he and Ms Mercer-Black had to consider the matter. I am similarly dissuaded by the argument that not all issues were addressed. Apart from the fact a mediator was involved and it is clear the contentious factors had been discussed the offer does canvass the possibility of Zaibatsu admitting liability – it says that will not occur.

[14] Turning now to the underlying principle of a Calderbank. That is that the offer would have led to a more beneficial outcome for the party against whom costs are now sought thus putting the other party to costs that (albeit with the benefit of hindsight) could have been avoided.

[15] There is, in my view, no doubt that acceptance would have left Ms Mercer-Black in a more beneficial position. There were three key components discussed in the documentation – money, a joint statement and Ms Mercer-Black's reputation.

[16] Obviously any monetary amount would have been better than the nil award ultimately attained. Turning to the joint statement through which Mr Black sought an admission of fault on Zaibatsu's part regarding the use of Ms Mercer-Black's credit card. I can not agree with the submission that I found in favour of Ms Mercer-Black on this issue – I actually found that the witnesses (including her own) had not supported Ms Mercer-Black's contention that monies charged to the card should have been Zaibatsu's responsibility. Finally there is the issue of reputation. I have no doubt that Ms Mercer-Black's reputation would have been better served by a confidential settlement as opposed to a public decision announcing she had stolen from her employer.

[17] Having considered the issues and the submissions I conclude that Ms Mercer-Black's rejection of the offer put Zaibatsu to unnecessary expense. That should be recognised by an award that exceeds the normal tariff. The evidence would suggest the additional costs amounted to approximately $8,000 and I consider that an appropriate award.

Conclusion

[18] Ms Mercer-Black is to pay Zaibatsu the sum of $8,000 (eight thousand dollars) as a contribution toward costs.

M B Loftus
Member of the Employment Relations Authority