IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 4
5348771

	BETWEEN	ROBERT PATTERSON Applicant
	A N D	SUPERIOR MOTOR CYCLES LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Linda Ryder, Counsel for Applicant Jonathan Smith, Counsel for Respondent
Submissions Received	1 October 2012 and 23 October 2012 from the applicant; 23 October 2012 from the respondent
Date of Determination:	7 January 2013

COSTS DETERMINATION OF THE AUTHORITY

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[1] By way of a determination dated 14 September 2012, I found that Mr Patterson's personal grievance for unjustified dismissal and disadvantage was successful.

[2] Accordingly, Mr Patterson now seeks a contribution towards his legal costs. The respondent does not resist that application, but opposes the quantum of the costs claimed and their basis.

[3] Costs are awarded in the Authority in accordance with the provisions of *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808. The principles governing the setting of costs awards in the Authority as promulgated in *Da Cruz* include:

a. There is a discretion as to whether costs will be awarded and in what amount.

b. The discretion is to be exercised in accordance with principle and not arbitrarily.

c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

d. Equity and good conscience is to be considered on a case by case basis.

e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

g. That costs generally follow the event.

h. That without prejudice offers can be taken into account.

i. That awards will be modest.

j. That frequently costs are judged against a notional daily rate.

k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[4] I am satisfied, first, that costs should follow the event in this case, and so Mr Patterson is entitled to a contribution towards his costs.

[5] Ms Ryder submits that the Authority should be mindful of the following in determining how much the contribution should be;

a. The hearing *was equivalent to 2.5 to 3 hearing days*, comprising the investigation meeting on 30 and 31 May 2012 plus the exchange of written submissions and consideration of a computer forensic investigation report*;*

b. the applicant's actual costs were $21,832 plus GST and disbursements;

c. the manner in which the respondent conducted its case increased the costs that the applicant incurred;

d. the applicant made an offer to settle in a Calderbank letter served upon the respondent by way of its counsel on 3 February 2012. The applicant eventually achieved by way of a compensatory award and lost wages a sum well in excess of the sum offered in the Calderbank letter.

[6] The total sum sought by the applicant is $19,832 plus disbursements.

[7] Counsel for the respondent counters the claim as follows:

a. The total costs incurred by the applicant were unreasonable when compared to the respondent's costs of $12,760 including GST and disbursements;

b. Counsel for the applicant engaged in excessive cross examination;

c. Counsel for the applicant is seeking costs on a punitive basis, which is not permitted;

d. Counsel for the applicant has not broken down how the costs have been incurred;

e. The respondent's financial position is precarious and a large award of costs would cause extreme hardship to Mr Bellamy and the respondent's employees;

f. The respondent was entitled to reject the Calderbank offer

[8] Counsel for the applicant lodged a submission in response, which was not directed. Although Chief Judge Colgan declined to read a costs submission in response in *Ian McIntosh v Ag Research-NZ Pastoral Agriculture Research Institute Ltd* (WC 11A/02, 10 July 2002), as Ms Ryder's supplemental submission clarified that the costs sought by the applicant were for the services of one counsel only, which was an important item of information, and was otherwise very short, I have read it and taken it into account.

[9] The following issues need to be considered by the Authority:

a. Are the costs incurred and sought by the applicant reasonable?

b. Did the respondent's conduct of its defence add to the applicant's costs, and if so, to what extent?

c. What effect should the applicant's Calderbank offer have on the amount to be awarded?

d. What effect should the respondent's claimed impecuniosity have on the amount to be awarded?

Are the applicant's costs reasonable?

[10] Despite having seen the respondent's objection that counsel for the applicant did not provide a breakdown of the costs incurred, and that the costs were unreasonable, and despite having provided unsolicited submissions in response, counsel for the applicant has not provided any breakdown of the costs incurred save to say that the costs incurred prior to 3 February 2012 (when the Calderbank letter was sent) were $3,400. However, no indication has been given of what has been charged for the various stages of preparation necessary to be undertaken, nor what the fees were for the attendance at the investigation meeting. Furthermore, no detail of the hourly rate has been given.

[11] In light of this, it is hard to ascertain with any certainty whether the fees incurred by the applicant are reasonable or not. However, the matter under investigation was not an entirely simple one and, in my view, it would have required a reasonable amount of work in preparation. I do not accept the respondent's submission that the cross examination undertaken by counsel for the applicant was excessive. Indeed, I found it helpful, and would have stepped in to have curtailed it if I had believed it had been repetitive or unhelpful.

[12] All in all, in light of the issues that needed to be traversed in the matter, I cannot say that the costs incurred by the applicant's counsel are unreasonable.

Did the respondent's conduct of its defence add to the applicant's costs, and if so, to what extent?

[13] I am in agreement with the submission made by counsel for the applicant that the respondent did not co-operate fully in the preparation stage of the matter to be investigated. Whilst I do not take into account the fact that Mr Bellamy for the respondent was unable to take part in the investigation on the date that was originally set down, I am mindful that obtaining relevant documents from the respondent in a timely manner was difficult, causing counsel for the applicant to have to make applications for discovery and engage in work that, had the respondent co-operated, would have not been necessary.

[14] I agree with the submission for the respondent that the award of costs is not to be punitive. However, it is well established that *conduct in litigation tending to exacerbate it may properly sound in costs (Smith v Air New Zealand,* AC17/01, 19 March 2001, Judge Colgan) and I believe that it is just to take into account what extra costs would have been incurred by the applicant by his counsel having to deal with the respondent's conduct.

[15] Unfortunately, counsel for the applicant has not disclosed what the extra costs were. This should not prejudice the applicant, however, and I believe that a modest sum in recognition of the extra work caused by the uncooperative conduct of the respondent should be reflected in the overall costs award. I fix that modest sum at $500.

What effect should the applicant's Calderbank offer have on the amount to be awarded?

[16] The making of a Calderbank offer in the Authority has been likened to the making of a payment into court. (See Judge Travis' comments at [7] and [8] in *Quest Rapuara (The Career Development and Transition Education Service) v Rahui* unreported, CEC 41/94, in which His Honour states that it would be appropriate for a Calderbank letter to be treated as a substitute for a payment into Court where that procedure is not available). In *Olgilvy & Mather (NZ) Ltd v Darroch* [1993] 2 ERNZ 943 the Employment Court made clear that a Calderbank offer will not in every case mean that the party making the offer will be protected from all costs incurred subsequently.

[17] In the present case, it was not the respondent which made the Calderbank offer, but the applicant. This difference is an important one I believe. A plaintiff in the High Court cannot make a payment into court (unless he or she does so in defending a counterclaim) as, like an applicant, he or she is the one seeking the monetary relief. The analogy made in *Quest Rapuara* therefore does not apply, and what counsel for the applicant made in sending the Calderbank letter was effectively a request for money on the applicant's behalf supported by a threat of indemnity costs if the sum requested was not paid.

[18] This scenario is quite different from one in which a respondent, faced with a demand for money, makes a commercial decision to make an offer to pay part of the sum demanded, supported with a threat of indemnity costs if the offer is unreasonably declined, in order to make the claim go away. Indeed, it is debatable whether the offer made by the applicant was a Calderbank offer, in the traditional sense, at all.

[19] Given this fundamental difference in character between the two scenarios, I do not accept that it would be just to penalise the respondent for declining to pay the sum of $10,000 requested in the Calderbank letter of 3 February 2012. I believe that, whilst the applicant was successful in his personal grievance claim, and was awarded more than the sum requested, it was not unreasonable for the respondent to have sought to defend substantially and procedurally its decision to make Mr Patterson's position redundant. I therefore decline to treat the letter marked *without prejudice save as to costs* dated 3 February 2012 as justifying an order of costs on an indemnity basis.

What effect should the respondent's claimed impecuniosity have on the amount to be awarded?

[20] Although counsel for the respondent criticises the applicant's counsel for not breaking down the costs claimed, he does not himself provide any data at all to substantiate his claim that the respondent is in financial difficulties. Whilst I do not doubt that the respondent is having financial difficulties, I am unable to ascertain the extent of them and the possible impact of any costs award upon it.

[21] In such circumstances, I am unable to take the claimed financial difficulties into account.

Determination

[22] I am mindful that this case had an element of factual complexity which necessitated more work by counsel than is usual for an unjustified dismissal and disadvantage personal grievance. I refer, in particular, to the need to instruct an IT specialist, which required counsel for the applicant to play a part in drafting instructions, and then to analyse and comment upon the subsequent IT report.

[23] In accordance with the Employment Court case of *Carter Holt Harvey Ltd v Eastern Bays Independent Industrial Workers Union and others* [2011] NZEmpC 13, ARC95/10, I accept that that factual complexity should be reflected in the costs awarded. Counsel for the applicant submits that the hearing should be treated as having been equivalent to 2.5 to 3 days to take into account preparation. I accept that principle and believe that it is just to apply the Authority's daily tariff over a three day period in total.

[24] Applying the Authority's usual daily tariff of $3,500 a day results in a total of $10,500. To this is to be added the $500 costs referred to above in respect of the respondent's conduct prior to the investigation meeting. The applicant is also entitled to recovery of the Authority's fees which have been incurred in the sums of $71.56 and $153.33.

Order

[25] I order the respondent to pay to the applicant:

a. A contribution towards his legal costs in the sum of $11,000;

b. The sum of $71.56 in relation to the filing fee; and

c. The sum of $153.33 in relation to the fee for the second half day of the investigation meeting.

David Appleton
Member of the Employment Relations Authority