

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 567
5399608

BETWEEN DONALD PHILLIPS
Applicant

A N D CROFT POLE
DISTRIBUTORS LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Gregory Bennett, Advocate for Applicant
Murray Broadbelt, Advocate for Respondent

Submissions Received: 21 October 2013 from Applicant
27 September 2013 from Respondent

Date of Determination: 11 December 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive decision

[1] The Authority dealt with Mr Phillips's personal grievance application by concluding that he was not unjustifiably dismissed and therefore did not have a personal grievance. That decision issued on 18 September 2013 as [2013] NZERA Auckland 423.

[2] Costs were reserved.

The application for costs

[3] As the successful party, the respondent employer seeks full indemnity costs of \$5,407.76 inclusive of GST in reliance on a *Calderbank* offer made on 30 November 2012 in the sum of \$3,000. That *Calderbank* offer was made after mediation but

some eight months before the investigation meeting. In effect, all of the costs claimed by the employer were incurred after the *Calderbank* offer was proffered, and declined.

The response

[4] Submissions for Mr Phillips proceed exclusively on the basis that full indemnity costs are not justified notwithstanding the *Calderbank* offer which is acknowledged.

[5] Mr Phillips contends that costs on a normal daily tariff approach the equivalent to a half days hearing (\$1,750) would be appropriate but the extent of the costs claimed by Croft Pole is resisted.

Determination

[6] The law relating to costs setting the Authority is well settled. The only issue in dispute here is the quantum of the costs to be awarded. Mr Phillips accepts that he must pay a contribution to Croft Pole's costs but resists their submission that he should pay full indemnity costs.

[7] The purpose of a *Calderbank* offer is plain enough. It is a device use by a party to litigation to propose to settle matters on a financial basis to the other party such that, if the offeror is more successful in the proceeding than it would have been under the terms of the *Calderbank* offer, then the offer itself is able to be put before the Court or Tribunal as a material factor to be taken into account in costs fixing.

[8] In the leading case of *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808, the full bench of the Employment Court enunciated the principles that ought to apply in the Authority in a costs setting environment. In particular, the Court identified *Calderbank* offers as an element to be taken into account when costs were set by the Authority.

[9] A party drafts and makes a *Calderbank* offer precisely because it seeks to avoid the cost of litigation and its inherent uncertainties and it seeks to engage the other side in committing to a resolution on the basis of the offer made.

[10] In the presence case, the offer was dated 30 November 2012 and was open for acceptance for a period of seven days thereafter. As the Authority has already noted,

the work undertaken for Croft Pole by its advocate was undertaken well after the *Calderbank* offer had been proffered, and rejected.

[11] In those circumstances, the Authority is satisfied it is entirely proper for the full indemnity costs to be recovered from Mr Phillips. The whole point of Croft Pole making the offer it did was to seek to avoid the costs of litigation. All those costs were incurred after the *Calderbank* offer was made and rejected. It is a common place that the Authority will regularly fix costs for a successful party relying on a *Calderbank* letter to the extent of the costs incurred after the *Calderbank* offer was rejected by the unsuccessful party.

[12] The present case is just such an example. The whole point of Croft Pole making the *Calderbank* offer was to avoid the costs which it subsequently had to incur. The risks of litigation include the fact that the unsuccessful party must make a contribution to the costs of the successful party. What is more, an unsuccessful party who also fails to accept a *Calderbank* offer might be asked to meet all of the costs incurred by the successful party after the *Calderbank* offer is rejected.

[13] That being the position, the Authority directs that Mr Phillips is to pay to Croft Pole Distributors Limited the sum of \$4,702.40 being the costs incurred by Croft Pole Distributors Limited in successfully resisting Mr Phillips' claim, exclusive of the GST component which is not typically allowed in costs fixing in the Authority.

James Crichton
Member of the Employment Relations Authority