

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 120  
5404945

BETWEEN

GRAEME PIPER  
Applicant

A N D

SINCLAIR PRIOR MOTORS  
LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Stan Austin, Advocate for Applicant  
Gary Tayler, Advocate for Respondent

Submissions Received: 6 February 2014 from Applicant  
14 January 2014 from Respondent

Date of Determination: 2 April 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1] In my substantive determination on this matter issued as [2013] NZERA Auckland 524 on 15 November 2013, I found that the applicant, Mr Piper had not suffered a personal grievance by unjustified dismissal but had suffered an unjustified disadvantage grievance for which he was entitled to remedies.

[2] Costs were reserved.

**The claim for costs**

[3] In this case, the respondent employer (Sinclair Prior) seeks an award of costs at the daily tariff rate of \$3,500.

[4] This claim is based on three factors, the partial success of Sinclair Prior in resisting Mr Piper's contention that he was unjustifiably dismissed (while having to concede a finding of unjustified disadvantage because of the flawed redundancy process) and two *Calderbank* offers made by Sinclair Prior to Mr Piper in the months prior to the Authority's investigation meeting.

[5] The first of those *Calderbank* offers was open for acceptance until 30 April 2013 and was in the sum of \$5,000 and the second was open for acceptance until 30 September 2013 and was in the sum of \$7,000 for compensation and \$3,000 as a contribution to legal costs.

### **The response**

[6] In the response filed on behalf of Mr Piper, his advocate first deals with the question of costs in the Authority when the matter has gone on challenge, as is the case here. The Authority's invariable practice is to deal with costs in respect to its investigation even where the matters goes on challenge to the Court. That enables the parties to challenge the costs award as well, if they are minded to and that can be dealt with by the Court in accordance with its usual process.

[7] The burden of the balance of Mr Piper's submission is to agree that the application of the daily tariff approach to costs fixing in the Authority is appropriate and the \$3,500 sought by Sinclair Prior would be appropriate, so it is said, if the investigation meeting of the Authority had taken a full day. However, as it took much less than a full day, it is suggested that the figure payable to Sinclair Prior by Mr Piper be reduced commensurately.

[8] However, I observe that those submissions from Mr Piper ignore the two *Calderbank* letters which were furnished by Sinclair Prior to Mr Piper, both of which were more generous than the eventual determination of the Authority, one markedly so.

### **Discussion**

[9] The principles relating to costs fixing in the Authority are well settled and need not be recited again here. However, what is important is for the Authority to again restate the importance of the place of *Calderbank* offers in this jurisdiction. The purpose of a *Calderbank* offer is to enable the parties to settle a matter on their own

terms, thus avoiding the cost and risk of litigation and also avoiding the necessity to use the scarce resources of the Courts and Tribunals provided by society for dispute resolution, where the parties are unable to agree matters on their own terms.

[10] Superior Courts to the Authority have made it abundantly clear that operative *Calderbank* offers (that is *Calderbank* offers where the offer is greater than the amount awarded by the Court or Tribunal) are to be taken into account when put before the Court or Tribunal in the costs fixing environment. There are a number of well-known judicial observations on the point of which perhaps the most graphic is the injunction from the Court of Appeal that a *steely* approach is to be applied to operative *Calderbank* offers in the jurisdiction.

[11] The whole point of a *Calderbank* offer is to provide a resolution without the necessity to engage in litigation with its attendant costs and risks. In the present case, Mr Piper would have been materially better off to have accepted either of the *Calderbank* offers made.

[12] Plainly the *Calderbank* offers are relevant to the fixing of costs and the very point of a party making a *Calderbank* offer is to try to avoid the necessity of defending its position. I would be failing in my duty if I did not take those offers into account in fixing costs.

### **Determination**

[13] In reliance on the two *Calderbank* offers made to Mr Piper by Sinclair Prior, I am satisfied the proper course is to award to Sinclair Prior the sum of \$3,500 which is the amount they seek, as a contribution to their costs in successfully resisting the central portion of Mr Piper's claim.

[14] That decision reflects my view that the central claim by Mr Piper was successfully resisted by Sinclair Prior although they were found to have failed to adopt the proper process and therefore suffered an award of compensation against them for that error.

James Crichton  
Member of the Employment Relations Authority