IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 7
5545060

	BETWEEN	MATTHEW RIORDAN Applicant
	A N D	SRS NEW ZEALAND LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Rachelle Boulton, Counsel for the Applicant Paul Rogers, Counsel for the Respondent
Submissions Received:	22 December 2015 & 2 January 2016 on behalf of the Applicant 19 January 2016 on behalf of the Respondent
Date of Determination:	27 January 2016

COSTS DETERMINATION OF
THE AUTHORITY

I make no order as to costs, as they should lie where they fall.

[1] By way of a determination dated 4 December 2015[1] the Authority found that Mr Riordan's dismissal had been procedurally unjustified but substantially justified, and that he had been unjustifiably disadvantaged in his employment. He was awarded $5,000 by way of remedies. Costs had been reserved, and the parties invited to agree how they be disposed of. However, the parties have been unable to do so. Accordingly, this determination addresses the issue of costs.

[1] [2015] NZERA Christchurch 190

[2] Ms Boulton, on behalf of Mr Riordan, states that her client has incurred costs in the total of $7,989.54 including GST.[2] She says that costs should be awarded to Mr Riordan and that, although the Authority's investigation lasted two days, three days should be allowed at the usual daily tariff (of $3,500 per day) because the parties put their submissions in writing afterwards.

[3] Ms Boulton asserts that the respondent was not forthcoming in addressing issues raised by Mr Riordan and all attempts to resolve matters were rejected. She says the respondent did not fully disclose information and withheld information requested until the second day of the investigation meeting.

[4] Ms Boulton also asserts that the case was complex, with a complexity of evidence. Ms Boulton refers to her client winning in part and also justifies the rejection of a Calderbank offer from the respondent on the basis that it did not adhere to the principles by which Calderbank offers are adjudicated valid. She says it also did not provide redress for the issues at the heart of the matter (namely, vindication), nor take into account costs already incurred by Mr Riordan.

[5] Mr Rogers, on behalf of the respondent, submits that costs should lie where they fall. This is because he

a. Considers that the respondent was successful, and would be pursuing costs against the applicant but for the fact that he was in receipt of legal aid; and

b. Relies on a Calderbank offer made to the applicant on 10 April 2015 in the sum of $5,000, which was rejected by the applicant.

[6] In arguing that the applicant was not the successful party, Mr Rogers submits that the Authority found that dismissal was substantively justified, which was the key issue in contention, and that Mr Riordan was only successful on peripheral issues.

[7] Mr Rogers also argues that the Calderbank offer was valid, being clear and certain, and being made well before the investigation meeting. Mr Rogers says that no response was received by the respondent to the Calderbank offer and no reference to a desire for vindication was made by Mr Riordan.

[2] A letter to Ms Boulton's firm sent on behalf of the Legal Services Commissioner dated 24 December stated that the total claims paid for the case were $7,916.54 including GST.

[8] Mr Rogers also rejects criticism of the respondent's conduct of negotiations and the proceedings.

[9] In her reply to Mr Roger's submissions, Ms Boulton refers to the Employment Court case of *Stevens v Hapag-Lloyd (NZ) Ltd*[3] in which Her Honour Judge Inglis stated [at 91] that there was support for an argument that Calderbank offers *are not intended* [in the Authority] *to have the same sort of impact (or "front and centre" focus) as applies in the Court*.

[10] Ms Boulton also refers to Mr Riordan's intention to seek vindication by his seeking reinstatement. She also points out that legal aid is a loan that has been secured over Mr Riordan's house which requires repayment from any award obtained, and that Mr Riordan was not legally aided when represented by previous counsel.

The law and principles of awarding costs in the Authority

[11] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

> ***15 Power to award costs***
> *(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*
> *(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[12] The Authority must follow the principles set out in *PBO Ltd v Da Cruz*, [2005] 1 ERNZ 808 when setting costs awards. These include:

a. There is discretion as to whether costs would 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.

[3] [2015] NZEmpC 28

d. Equity and good conscience are 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.

[13] *Ogilvie & Mather (NZ) Ltd v. Darroch* [4] sets out the two principal criteria that must be satisfied when a Calderbank offer is made so as to not prejudice unfairly the recipient of the offer by exerting undue pressure. These safeguards are as follows:

(a) A modicum of time for calm reflection and the taking of advice before a decision has to be made to accept the offer or reject it; and

(b) The offer must be transparent if the offeror is later to be given the protection the *Calderbank* offer furnishes.

Discussion

[14] The first issue to determine is who the successful party was, as the principle that costs follow the event is the normal starting point taken by the Authority in determining costs.

[4] [1993] 2 ERNZ 943

Who was the successful party?

[15] Whilst it is literally true that both parties were successful in part, the key remedies sought by Mr Riordan were reinstatement and reimbursement of his lost wages. However, I was unable to award those remedies because I had found that the dismissal was substantively justified. I must therefore agree with Mr Rogers that Mr Riordan failed in the key aspect of his claim and cannot be regarded as the successful party. Whilst I would not exactly characterise Mr Riordan's success as relating to *peripheral* matters, they were not the key issue about which Mr Riordan complained.

[16] On that basis, the starting point is that costs should follow the event and be awarded to the respondent. However, Mr Riordan was in receipt of legal aid. Section 45(2) of the Legal Services Act 2011 states that no order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.

[17] In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:

a. any conduct that causes the other party to incur unnecessary cost;

b. any failure to comply with the procedural rules and orders of the court;

c. any misleading or deceitful conduct;

d. any unreasonable pursuit of one or more issues on which the aided person fails;

e. any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution;

f. any other conduct that abuses the processes of the court.

[18] I do not consider that any of the above exceptional circumstances (or any other exceptional circumstance) apply to Mr Riordan's conduct in the Authority. Whilst he did decline to accept the terms of the respondent's Calderbank offer, that was not a refusal to *negotiate* a settlement. He did negotiate (via his lawyers) but did not reach an agreement as to a mutually satisfactory outcome.

[19] Having found that no exceptional circumstances apply that justify the award of costs against Mr Riordan, because of the effect of s.45 of the Legal Services Act 2011, I make no order for costs against Mr Riordan.

The Calderbank offer

[20] Having reached that conclusion, I do not need to address the issue of the validity of the Calderbank offer.

[21] I should, however, correct Ms Boulton in relying upon *Stevens v Hapag-Lloyd (NZ) Ltd* to suggest that Calderbank offers have limited application to the assessment of costs within the Authority. Any doubt on that point has now been dispelled by the full Employment Court in *Fagotti v Acme & Co Limited*[5], at [109], in which the Employment Court confirmed that the Court of Appeal's remarks in *Bluestar Print Group*[6] apply equally in the Authority as the Employment Court and higher. In other words, the Authority should also adopt a *steely approach* where appropriate when a valid Calderbank offer has been made and unreasonably rejected.

Conclusion

[22] I conclude that it is not appropriate for costs to be awarded in favour of Mr Riordan as I consider that he did not succeed in the principal claim before the Authority. I also conclude that I am precluded from making an order of costs against Mr Riordan due to the effect of s.45 of the Legal Services Act 2011.

[23] I therefore agree with Mr Rogers that the most appropriate outcome is for costs to lie where they fall and so I make no order as to costs.

David Appleton
Member of the Employment Relations Authority

[5] [2015] NZEmpC 135
[6] In which the Court of Appeal held that the *steely approach* it had earlier said was required when considering Calderbank offers applied equally to employment cases.