IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 218
5607673

	BETWEEN	ROBERT SLOTEMAKER Applicant
	A N D	THE NEW ZEALAND KING SALMON CO LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Luke Acland, Counsel for Applicant Karen Radich, Counsel for Respondent
Submissions Received:	20 October 2016, from the Applicant 1 November 2016, from the Respondent
Date of Determination:	9 December 2016

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 26 September 2016[1] I determined that the applicant, Mr Slotemaker was entitled to receive a redundancy payment from the respondent, The New Zealand King Salmon Co Limited (NZKS).

[2] In my determination I reserved costs in the hope that the parties would be able to settle the issue between them. They have been unable to do so and Mr Acland on behalf of Mr Slotemaker has filed submissions seeking costs. Ms Radich, on behalf of NZKS, has responded to the application for costs.

[3] Mr Slotemaker seeks costs from NZKS and submits that an order of costs should be $7,000 plus disbursements. Mr Acland's primary submission in this respect

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is that NZKS unreasonably refused a Calderbank offer made by Mr Slotemaker and this justifies an uplift in the applicable daily tariff. He says Mr Slotemaker's actual costs were $9,511.71 including GST.

[4] Ms Radich says that costs should lie where they fall or in the alternative, if costs are to be awarded against NZKS then the I should adopt a reduced daily tariff when calculating the amount. Her submissions include:

(a) NZKS accepts that a small contribution to Mr Slotemaker's costs will be awarded (as costs should follow the event).

(b) The investigation meeting took less than one day and little evidence was required so the full daily tariff rate should not apply.

(c) There is insufficient detail in Mr Acland's submissions for the Authority to be satisfied that Mr Slotemaker's costs were reasonably incurred.

(d) There is no basis for the Authority to double the daily tariff. The only applicable basis might be the Calderbank offer but that offer did not meet the necessary criteria to be an effective Calderbank and therefore the Authority should not consider it. And, in any event NZKS's rejection of that Calderbank offer was reasonable.

(e) Given the nature of the case it is arguable that costs could validly "lie where they fall" and this at least justifies applying a reduced daily tariff.

(f) NZKS's cooperative and constructive conduct in preparing for the investigation meeting warrants a reduction in the daily tariff.

Costs

[5] The power of the Authority to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*[2]. The principles and the approach to be

[2] [2005] 1 ERNZ 808

adopted by the Authority have been reaffirmed recently by the Full Court in *Davide Fagotti v. Acme & Co Ltd* [3].

[6] Based on clause 15 and *Da Cruz*, *Fagotti* and other relevant Employment Court and Court of Appeal decisions[4], the approach to be adopted by the Authority includes:

(a) An award of costs is discretionary and the exercise of that discretion should be made in accordance with principle and not arbitrarily.

(b) The decision to award costs is consistent with the equity and good conscience jurisdiction of the Authority but equity and good conscience should be considered on a case-by-case basis in terms of the award of costs.

(c) Costs will generally follow the event but in some instances this will not be the case where, for example, the nature of the case is such that costs should lie where they fall or alternatively where an applicant has not bettered the terms of a *Calderbank* offer which he or she unreasonably rejected prior to the investigation meeting.

(d) Once a decision has been made by the Authority to award costs in favour of one party then the starting point for quantum is the daily tariff. It is open to the Authority to depart from applying the daily tariff in appropriate circumstances where, for example, indemnity costs may be appropriate or actual costs incurred since the rejection of a *Calderbank* offer are more appropriate. However, the standard approach is to start with the daily tariff and then consider whether that tariff should be increased or reduced dependent on a number of factors.

(e) The factors relevant to the consideration of the increase or decrease of the daily tariff include:

(i) Costs awards in the Authority will be modest;

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[3] [2015] NZEmpC 135

[4] *Victoria University of Wellington v. Alton-Lee* [2001] ERNZ 305, *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28

(ii) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;

(iii) Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;

(iv) Without prejudice offers can be considered;

(v) Impecuniosity of the other party may be relevant;

(vi) A decision on quantum should be also in line with principle and not determined arbitrarily bearing in mind the equity and good conscience jurisdiction of the Authority.

Discussion

The Calderbank offer

[7] On 18 May 2016, Mr Acland sent a Calderbank offer to Ms Radich. That offer was to settle Mr Slotemaker's claim for payment of 80% of his claimed contractual redundancy entitlement plus a contribution to costs of $3,500.00 (plus GST). The offer was stated to expire at 4:00 pm on 20 May 2016.

[8] Ms Radich says the Calderbank offer does not meet the criteria set out in *Ogilvie & Mather (NZ) Ltd v. Darroch*[5]. *Ogilvie* establishes the two principal criteria that must be satisfied when a *Calderbank* offer is made. These are:

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

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

[9] Ms Radich's complaint is that the offer was not left open for a sufficient period of time, being just over 48 hours. There are two problems with this argument:

(a) First, *Ogilvie* refers to a "modicum of time"; modicum means a small quantity of something. Given that the offer was expressed at a time

5 [1993] 2 ERNZ 943

when each party's position in respect of the underlying claim had been considered, advised on and articulated to the other side I think two days provided enough time for the offer to be considered and in the circumstances is a "modicum of time"[6].

(b) Second, it was always open to NZKS to seek an extension of time to consider the offer or simply protest that the period was unreasonable and reject it on that basis. Rather than do either of those things NZKS responded to the offer rejecting it and proposing a counter offer. Thus, it appears that NZKS in fact had sufficient time to consider the offer.

[10] I am satisfied that the Calderbank offer made on Mr Slotemaker's behalf meets the criteria set out in *Ogilvie*.

[11] The next issue for the analysis of a Calderbank offer is whether the refusal was unreasonable. The relevant circumstances here are:

(a) This was a claim involving contractual interpretation and an issue of whether a factual situation, which was mostly agreed, was correctly treated as termination or leave without pay.

(b) There was limited factual dispute and the matter largely turned on application of case law pertaining to the meaning of redundancy and the interpretation of agreed events around the ending of Mr Slotemaker's role with NZKS.

(c) NZKS had advice, based on case law, to support its purported interpretation of the contractual clause.

(d) The amount at stake was significant thus rendering a commercial or pragmatic approach to settlement unlikely.

[12] In the circumstances, I accept that it was reasonable for NZKS to reject the offer. Therefore, the Calderbank offer has no effect on my determination of costs in this matter.

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[6] See also *Argosy Imports v Lineham* [1998] 3 ERNZ 976 where the Employment Court held that in the context of ongoing negotiations two days was sufficient to meet the modicum of time standard.

Costs in favour of Mr Slotemaker

[13] Mr Slotemaker was successful in his claim and costs should follow the event. I do not consider this case to be one where costs should lie where they fall. There was not an equal or even partial division of success between the parties. Nor was this case a test case, it was a case that turned on the interpretation of a contractual term and was in many respects unique given the contractual term and the circumstances giving rise to the claim. I do not believe that this case would necessarily affect others with claims to a contractual redundancy payment[7].

Applying the daily tariff

[14] The applicable daily tariff for this matter is $3,500.00. The investigation meeting for this matter lasted less than one full day; it commenced just after 10:00 am and concluded at 4:00 pm with an extended break at lunchtime. I assess the time taken to be such that $3,000.00 represents the amount of the daily tariff that should be applied.

Increasing or decreasing the daily tariff

[15] Costs awards should be modest. I keep this in mind when considering whether to modify the daily tariff.

[16] Whilst Ms Radich was critical of the lack of information to verify the actual costs incurred by Mr Slotemaker I am satisfied that his costs would have exceeded $3,000.00.

[17] There is no other behaviour by NZKS to justify an increase in the daily tariff and conversely no behaviour by either party that warrants decreasing the daily tariff.

Equity and good conscience

[18] Finally, when considering quantum, I turn my mind to equity and good conscience and consider whether, in all the circumstances, an award of $3,000 for Mr Slotemaker is appropriate.

[19] Standing back and weighing all relevant matters, I consider that an award of $3,000.00 as a contribution to costs in favour of Mr Slotemaker is appropriate.

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[7] *Maritime Union of New Zealand Inc v TLNZ Ltd* [2008] ERNZ 91

Disbursements

[20] Mr Slotemaker also seeks disbursements of $71.56 being the filing fee in this matter. This is an appropriate disbursement for NZKS to pay.

Payment

[21] There is one other matter raised by Ms Radich. NZKS has challenged the determination in this matter in the Employment Court and as such, Ms Radich submits that any award of costs should be made subject to an order imposing a timeframe that would accommodate this challenge and avoid the necessity of NZKS applying for or agreeing a stay.

[22] I am not prepared to make my order for costs subject to a long timeframe as requested. This is effectively granting a stay at the Authority level and that is not the accepted practice[8].

[23] In the alternative, Ms Radich submits that NZKS would be content for an order requiring it to pay any costs award into an interest bearing solicitor's trust account until further order of the Employment Court or agreement of the parties. Whilst this is a sensible option and one that I would recommend in the circumstances I do not believe I have the power to make such an order based on clause 15 of schedule 2 of the Act. I will not make this order as requested.

Determination

[24] NZKS is to pay Mr Slotemaker $3,000.00 as a contribution to his costs and $71.56 for his disbursements, in this matter.

Peter van Keulen
Member of the Employment Relations Authority

[8] See *Sandilands v. Chief Executive of the Department of Corrections* 10 September 2009 WA 67A/09