IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 79
5417006

	BETWEEN	LOLA TOPIA Applicant
	AND	COMMUNIO LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Allen Goldstone, Advocate for Applicant Simon Blackwell, Counsel for Respondent
Submissions received:	5 March 2014 from Applicant 21 February 2014 from Respondent
Determination:	6 March 2014

COSTS DETERMINATION OF THE AUTHORITY

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[1] By determination [2014] NZERA Auckland 44 the Authority found that the Applicant, Ms Lola Topia, had not been unjustifiably dismissed or unjustifiably disadvantaged by the Respondent, Communio Limited (Communio).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and the parties have filed submissions in respect of costs.

[3] This matter involved 1 day of Investigation Meeting, with written submissions being submitted subsequent to that. Mr Blackwell on behalf of Communio, citing actual costs of $8,361.08 (including GST), is seeking that full amount as being a fair and reasonable award of costs.

Costs

Submissions of the Respondent

[4] Mr Blackwell, in support of the level of the claim by the Respondent, submitted for the consideration of the Authority that account should be taken of the fact that the Respondent

made a Calderbank[1] offer, that is a without prejudice save as to costs offer, to Ms Topia. This offer was made in a letter dated 11 July 2013 (the Offer), which is before the Authority.

[5] Mr Goldstone, on behalf of Ms Topia, submits that at the time of her rejecting the Offer, it was reasonable for Ms Topia to reject the Offer on the basis that while attempts to reach a settlement to that point had been unsuccessful, the Respondent had by virtue of the Offer recognised the risk it ran of being unsuccessful before the Authority.

Principles

[6] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

> ***15 Power to award costs***
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> *(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.*

[7] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*[2].

[8] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[3].

[9] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[4] that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*[5] at para [48] "*As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred."*

[10] It is also a principle that costs are not to be used to punish the unsuccessful party.

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[1] *Calderbank v Calderbank* [1976] Fam 93 (CA)
[2] [1996] 2 ERNZ 622
[3] [2005] 1 ERNZ 808
[4] [2005] 1 ERNZ 808
[5] [2001] ERNZ 305

Determination

[11] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a 1 day investigation meeting this would normally equate to $3,500.00.

The Calderbank offers

[12] It is necessary for me to consider the effect the Offer should have on costs. The Court of Appeal in *Health Waikato Limited v Van Der Sluis*[6] observed that: "*the Calderbank letter field is fully discretionary".* The nature of this wide discretion is that if the Authority awarded a lesser amount than the amount offered in the Calderbank letter, there would be no absolute protection to the party which had made the offer in terms of costs. Equally, the Authority may take into consideration a Calderbank letter when more has been awarded than was offered.

[13] As noted by Chief Judge Goddard in a passage from *Oglivy & Mather v Darroch*[7] *I the purpose of a Calderbank offer is:*

> *… to induce the Court by this means to exercise its discretion against granting the plaintiff any costs if it has recovered less by proceeding with the case than it could have by accepting the offer …It is intended to put pressure on plaintiffs and discourage them from proceeding with litigation that may turn out to be unproductive simply for the sake of a cathartic day in court.*

[14] The Court of Appeal in *Aoraki Corporation Ltd v McGavin*[8] in commenting on the exercise of this discretion in respect of costs, noted that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore these Calderbank offers without costs being impacted:

> *The discretion as to costs is a judicial one to be exercised according to what is reasonable and just to both parties and the public interest in the fair and expeditious resolution of disputes requires that full weight be given to the extent to which costs were properly incurred subsequent to the non-acceptance of an offer of settlement at a figure above the amount eventually awarded in the litigation.*

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[6] [1997] 10 PRNZ 514
[7] [1993] 2 ERNZ 943
[8] [1998] 1 ERNZ 601

[15] The need for a "*more steely*" approach to costs where reasonable settlement proposals have been rejected was noted by the Court of Appeal in *Health Waikato Limited v Elmsley*.[9]

[16] The Offer was made on in a letter dated 11 July 2013. The Investigation Meeting took place on 21 January 2014. There was therefore ample time for Ms Topia to consider the Offer prior to the Investigation Meeting.

[17] The Offer was a genuine attempt to resolve the matter without further expenditure on litigation made at an early stage in the proceedings. As noted in the Offer it had been made: "*for purely pragmatic reasons".* I have concluded that taking all these circumstances into account, the Offer should be given full weight.

[18] However I note the submissions made by Mr Goldstone regarding his client's financial circumstances. It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings and I accordingly exercise my discretion in respect of the level of costs awarded to the Respondent as the successful party in this matter.

[19] In the circumstances of this case I believe that a reasonable contribution towards the Respondent's costs is $5,500.00. Accordingly Ms Topia is ordered to pay Communio $5,500.00 pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority

[9] [2004] 1 ERNZ 172 (CA) at [53]