IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 50
5393952

	BETWEEN	CHRISTOPHER IAN TRISCOTT Applicant
	A N D	CALLPLUS SERVICES LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	S Barter, Counsel for Applicant B Edwards, Counsel for Respondent
Submissions Received:	10 December 2013 from Respondent Nil from Applicant
Date of Determination:	13 February 2014

COSTS DETERMINATION OF THE AUTHORITY

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[1] Via a determination issued on 13 November 2013[1], the Authority found that the dismissal of Mr Triscott was unjustified. However, pursuant to s.124 of the Employment Relations Act 2000, it was found that Mr Triscott's conduct was blameworthy to such degree that no remedies were awarded. Mr Triscott was successful in regard to his claim for unpaid commission payments, albeit the Authority was not required to make any order, as the closing submissions for the respondent acknowledged that commission payments were due to Mr Triscott[2] and these were subsequently paid shortly after the determination was issued. The parties were requested to resolve the matter of costs but this has not been possible. The Authority has now received the costs submissions from the respondent. Making the

[1] [2013] NZERA Auckland 513
[2] Notwithstanding that there was a difference of $202.30 (less) in regard to what was claimed and what was accepted by the respondent to be owing.

usual allowance for the period 25 December 2013 to 5 January 2014 (inclusive), submissions were due from the applicant by not later than 20 January 2014 but none have been received; nor has any extension been sought, hence the Authority now determines the matter.

[2] The submissions for the respondent (CallPlus) inform that costs of $27,365.07 (exclusive of GST) were incurred in defending the claims advanced by Mr Triscott. CallPlus acknowledges the notional tariff based approach of the Authority but then refers to a *Calderbank*[3] offer made to Triscott on 26 November 2012, a significant time before the investigation meeting held on 18 June 2013. Hence preparation for the investigation meeting would not have been at an advanced stage.

The *Calderbank* offer

[3] By a letter dated 26 November 2013, CallPlus made a "without prejudice save as to costs" offer (the offer) to Mr Triscott. The terms of the offer were:

(a) A payment of $750 pursuant to s.123(1)(c)(1) of the Employment Relations Act 2000 (the Act); and

(b) A contribution towards Triscott's costs in the sum of $250 (plus GST).

[4] The offer ($1,000) remained open for acceptance by Mr Triscott until 17 December 2012. While there is no evidence before the Authority of the offer being formally rejected, obviously it was, possibly by the mere arrival of the expiry date.

[5] It is submitted for CallPlus that given the outcome of the investigation of Mr Triscott's claims, in that no remedies were awarded to him, if Mr Triscott had accepted the offer of $1,000, that would have been a more beneficial outcome for him. Therefore, it is urged that the Authority should make an award of costs exceeding what would normally awarded for a one day hearing, i.e. $3,500. It is submitted that the Authority should award to CallPlus the costs that it incurred from the date of the offer to the date of the determination; that is, the sum of $23,490.00 (exclusive of GST).

[3] *Calderbank v. Calderbank* [1975] 2 All ER 333

Analysis and conclusions

[6] Given the substantial success for CallPlus in regard to the outcome of the substantive matter, costs must follow the event and in the absence of any *Calderbank* offer, there would be no good reason to award the company more than $3,500.

[7] The reference to "without prejudice save as to costs offers" in *PBO (formerly Rush Security Ltd) v Da Cruz*[4] is recognition by the Employment Court that a *Calderbank* offer is a matter that can reasonably be taken into account by the Authority in exercising its discretion in determining costs. The general principles pertaining to *Calderbank* offers have been considered (and are now well established) by the Court of Appeal. In *Health Waikato v. Elmsly*[5], the Court espoused the view that:

> … we think that a more sensible approach by the defendants to the making of Calderbank offers and steely responses by the Courts where plaintiffs do not beat Calderbank offers would be in the broader public interest.

[8] Further, in *Blue Star Print Group (NZ) Ltd v. Mitchell*[6], the Court of Appeal re-emphasised that a "steely" approach was required whereby it was stated that:

> It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered.

[9] But the offer of $1,000 made to Mr Triscott cannot be seen to be a "reasonable settlement offer" as envisaged by the Court of Appeal in *Mitchell;* when the overall outcome is taken into account. While Mr Triscott was not awarded any remedies, his dismissal was found to be unjustified and at the time that the offer was made, before the overall evidence had been compiled, and then subjected to close scrutiny via the investigation process, it was reasonable for him to make an assessment that he had, at least, an arguable case. And while there are no submissions for Mr Triscott, one can reasonably assume that he would have incurred costs to such an extent that the extremely low sum offered would have had little appeal at all.

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[4] [2005] ERNZ 808
[5] [2004] 1 ERNZ 172
[6] [2010] ERNZ 446 (CA)

[10] Then there is the other aspect of Mr Triscott's claims in regard to the commission payments. While it has been submitted for CallPlus that the company made payment of $1,037.50 without an order from the Authority, it is questionable whether this would have been so if Mr Triscott had not seen fit to pursue the matter as he did.

Determination

[11] The Authority concludes that the nature of the *Calderbank* offer made to Mr Triscott was such that it should not be taken into account in regard to determining the costs that should be awarded to CallPlus. While it is accepted that the respondent was substantially successful in regard to the overall outcome of the substantive matter, the Authority finds that there is no valid reason to award more than the usual daily amount for a one day investigation meeting.

[12] Pursuant to clause 15 of Schedule 2 of the Act, Mr Triscott is ordered to pay to CallPlus Services Limited the sum of $3,500.00 as a contribution to the costs incurred by the company.

K J Anderson
Member of the Employment Relations Authority