IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 231
5346696

	BETWEEN	DAVID WAREING Applicant
	A N D	TYCO NEW ZEALAND LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Paul Brown, Counsel for Applicant Scott Wilson, Counsel for Respondent
Submissions Received:	3 July 2012 from Applicant 19 June 2012 from Respondent
Date of Determination:	24 October 2012

COSTS DETERMINATION OF THE AUTHORITY

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[1] By way of a determination dated 22 May 2012 the Authority found that Mr Wareing's dismissal was justified and, accordingly, rejected his personal grievance.

[2] The respondent seeks a contribution to costs in the sum of $9,000 and relies on two *Calderbank* offers sent to the applicant in December 2011 and January 2012, both of which were rejected by the applicant.

[3] The member who investigated the personal grievance, Mr Cheyne, is no longer with the Authority and so I make this costs determination on the basis of the submissions of the parties' respective counsel together with the contents of the file before me.

[4] The first *Calderbank* offer dated 7 December 2011 made an offer for the respondent to pay the applicant $4,000 together with a contribution towards his legal

costs of $1,500 plus GST. Seven days were given to accept the offer, the letter was headed *without prejudice save as to costs* and a right was reserved to place the letter before the Authority in relation to the issue of costs. This offer was rejected on 13 December 2011 and a counter offer made of a payment of $20,000 together with a contribution towards legal costs of $4,000 plus GST.

[5] The second *Calderbank* offer dated 18 January 2012, was that the respondent would pay the applicant the sum of $7,500 together with a contribution of $1,500 plus GST towards legal costs. Again, seven days were given to accept the offer and the same words as before were used signalling a *Calderbank* offer. That offer was rejected by the applicant's counsel on 20 January 2012 without any counter claim.

[6] The principles to be applied by the Authority in determining costs are well known and derive from *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. It is appropriate that costs follow the event and that the respondent receives a contribution to its costs having successfully defended the claim.

[7] It is also well established that the principles relating to *Calderbank* offers apply to proceedings brought under the Employment Relations Act. The precise ramification of rejection of the *Calderbank* offers were not spelled out in the letters, but as they were addressed to counsel, I do not regard that as a flaw and accept that these letters were expressed in clear terms and were unambiguous and did not put unfair pressure on the applicant.

[8] It appears that the second *Calderbank* offer was made by the respondent prior to the substantive work in preparing for the investigation meeting was carried out and, accordingly, I accept the respondent's assertion that, had the *Calderbank* offer been accepted, a significant amount of the respondent's costs in preparing for the investigation meeting would have been avoided.

[9] I am also satisfied that the amounts of the offers contained in the *Calderbank* letters were meaningful. This is not a case, for example, where the amounts offered were so low that they could not reasonably have been accepted. It appears that the amounts were carefully calculated so as to present a commercial solution so that they were high enough to attract reasonable consideration from the applicant whilst at the same time potentially saving further costs for the respondent.

[10] The respondent's costs in total amounted to $15,250.00 excluding GST. They seek the sum of $9,000 as a contribution, being less than two thirds of the actual costs.

[11] The applicant argues that it is appropriate that costs should be modest and discretionary and that consideration should be taken of the applicant's financial position. The applicant relies on a number of cases to support this principle. It is a principle that I accept as applicable. Although the Authority is referred to the applicant's brief of evidence with respect to his inability to find permanent employment, the brief of evidence says very little about Mr Wareing's actual financial position. In particular, no evidence whatsoever has been provided with respect to Mr Wareing's savings, if any. Indeed, there is also actually no unequivocal statement on behalf of Mr Wareing that he would be unable to pay the sum of $9,000 that is sought by the respondent.

[12] In the absence of such information, I am simply unable to conclude that it would be just to award $4,500 costs, as is suggested by counsel for Mr Wareing. Counsel for Mr Wareing does not seek to argue that it is inappropriate to apply the *Calderbank* principles and no clear reason is given for the *Calderbank* offers having been rejected, other than a need for *vindication.*

[13] However, taking into account Mr Wareing's age (around 64 years old), the nature of the job that he did at the respondent, and the fact that he had only gained temporary part time employment between the date of his dismissal and the date of the lodging of his brief of evidence, I infer from these facts that it is more likely than not that Mr Wareing would have difficulty in meeting a costs order in the sum of $9,000.

[14] Accordingly, I believe that it would be just for Mr Wareing to pay a contribution to the respondent's costs of 50%. Accordingly, I order that Mr Wareing pay the sum of $7,625.00 costs.

David Appleton
Member of the Employment Relations Authority