IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 314A/09
5141047

	BETWEEN	DARRELL TAYLOR Applicant
	AND	PRYSMIAN POWER CABLES AND SYSTEMS NEW ZEALAND LIMITED Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Mr Taylor in person Kate Ashcroft for Respondent
Submissions received:	30 September 2009 from Respondent, 5 October 2009 from Applicant
Determination:	19 October 2009

COSTS DETERMINATION OF THE AUTHORITY

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[1] This employment relationship problem concerned an alleged constructive dismissal. As set out in my determination dated 3 September 2009, Mr Taylor's claim failed. I concluded that determination by reserving the issue of costs and directing that any application for costs must be made within 28 days of the date of the determination.

[2] The respondent now seeks costs on the basis that it was the successful party. It noted in costs submissions that the respondent made a Calderbank offer ($3,000.00 plus the filing fee of $70.00) to the applicant on 19 March 2009, well before the investigation meeting on 13 May 2009. The offer was by letter marked "*without prejudice save as to costs*" and included the following explanation of the impact of the offer:

"*If this offer is not accepted and you are awarded the same or less than this offer, we reserve the right to …produce this letter on the issues of costs; and …Seek full solicitor-client costs against you.*"

[3] The respondent now says that it has incurred legal costs of approximately $17,500.00 (excluding GST) since the Calderbank offer was made. It says that these costs were reasonably incurred, and could have been avoided if the applicant accepted the Calderbank offer. It therefore seeks full solicitor-client costs, together with interest, from the date of the Authority's determination.

[4] In response, Mr Taylor noted that it was accepted in paragraphs [21] and [22] of the determination that the respondent made some errors in its treatment of him. Therefore, he said: "*Prysmian are not completely absolved of all wrongdoing in this case and should accordingly accept a degree of responsibility.*" He also advised that he has recently faced a tragic bereavement with the death of his baby daughter shortly after the Authority's investigation meeting. He concluded his submission by suggesting that each party should be responsible for its own costs.

Determination

[5] The respondent in this case made a timely offer to settle and was, (notwithstanding what Mr Taylor has called "wrongdoing") entirely successful in defending his claim. I also note that in recognition of the fact that Mr Taylor was representing himself, the letter containing the offer included a clearly worded explanation of its significance and potential consequences. The offer made is therefore effective as a "Calderbank" offer.

[6] However, the rejection of a "Calderbank" letter does not automatically lead to an award of solicitor-client costs against the unsuccessful party. Rather that rejection must be weighed in the exercise of the Authority's discretion to make an order for contribution to costs.[1] The question of costs must be decided in each case according to its circumstances, [2] and "*full weight*" must be given to the extent to which costs were

[1] *Diver v Geo Boyes & Co Ltd* 20/5/98, Penlington J, HC Hamilton CP58/93.
[2] *GWD Russells (Gore) Ltd v Muir* [1993] 2 ERNZ 955

properly incurred subsequent to the non-acceptance of an offer to settle at a figure above the amount awarded. [3]

[7] This case was relatively straightforward. The applicant was not represented and furnished only one short witness statement (his own.) The respondent tabled two witness statements in response. Consistently with there being little factual dispute between the parties, these statements were not extensive. For the same reason, the Authority's further investigation was relatively confined and the meeting took less than a day. In these circumstances it is not obvious how over $17,000.00 costs were incurred. Although invoices were supplied, these were not broken down in any way which served to clarify this point.

[8] Weighing all the circumstances, including the fact that the respondent was wholly successful and the fact that it has not been shown how the relatively high level of costs came to be incurred, I have concluded that while full solicitor-client costs cannot be awarded, Mr Taylor should make a higher than usual contribution to the costs of the successful respondent. After considering awards in other cases of comparable complexity I conclude that an award of $6,000.00 will do justice between the parties.

[9] **The applicant, Mr Taylor, is therefore ordered to pay the sum of $6,000.00 as contribution to the costs of the respondent.**

Yvonne Oldfield
Member of the Employment Relations Authority

[3] *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601; [1998] 3 NZLR 276 (CA), at p 625; p 300.