

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 12A/10
5159378

BETWEEN DAVID LLOYD-BARKER
 Applicant

AND THE SOCIETY FOR THE
 PREVENTION OF CRUELTY
 TO ANIMALS AUCKLAND
 INCORPORATED
 Respondent

Member of Authority: K J Anderson

Representatives: M Ryan, Counsel for Applicant
 P Wicks, Counsel for Respondent

Submissions Received: 24 February 2010 for Respondent
 8 March 2010 for Applicant

Determination: 26 May 2010

DETERMINATION OF THE AUTHORITY ON COSTS

[1] The substantive matter was determined on 18th January 2010 with the parties being invited to resolve the matter of costs, but without resolution. The respondent (“the SPCA”) was largely successful in defending the claims advanced by Mr Lloyd-Barker but he was partially successful, in that one unjustified disadvantage grievance was upheld, albeit the remedy granted was minimal.

[2] The SPCA says that it has incurred costs of \$15,000 (excluding GST) and seeks an award of \$10,000, being two thirds of the amount expended. The SPCA acknowledges the tariff based approach derived from *PBO Limited v Da Cruz* [2005] ERNZ 808, but in support of a higher award than would normally be available, the SPCA points to a *Calderbank* offer made to Mr Lloyd-Barker via a letter dated 7th August 2009, a month or so before the investigation meeting.

[3] The submissions for Mr Lloyd-Barker also acknowledge the tariff based approach from *Da Cruz* and say that there is nothing about this case that warrants an award above \$3,000. The submissions include an inference that the SPCA, being a charitable organisation, normally has its legal work done on pro bono basis and allude to the fact that the SPCA has not provided any documents in support of the costs it says have been incurred. Mr Wicks has responded to this, submitting that documentary evidence of his costs to the SPCA have not been provided because of Mr Lloyd-Barker's earlier propensity to place certain information on his Facebook web site. While one could reasonably assume that both parties have now moved on, nonetheless I can understand the reluctance of the SPCA to provide sensitive details of its expenses. Normally, the Authority would wish to see evidence of costs incurred but given Mr Wicks is an experienced and credible practitioner, I accept his undertaking that the expenses incurred can be proven and in these circumstances, given the experience of the Authority in regard to the costs incurred for cases such as this, I am prepared to accept that the sum of the expenses submitted is reasonable.

The Calderbank offer

[4] In a very recent judgment¹, the Employment Court (Couch J.) held that:

Following the decision in *Calderbank v Calderbank*,² "written offers without prejudice save as to costs" have played an important role in litigation. They encourage claimants to accept reasonable offers of settlement and thereby avoid the offeror incurring the costs of an unnecessary trial.

[5] The Employment Court went on further to refer to the Court of Appeal in *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601 at 625, where the latter Court stated that:

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 litigation.

And, Couch J. observes that the above view was:

... amplified in *Health Waikato Ltd v Elmsley*³ where the Court of Appeal referred to; "steely responses by the Courts where plaintiffs do not beat Calderbank offers" being "in the broader public interest."

¹ *T & L Harvey Limited v Leanne Duncan* [2010] NZEMPC CRC 5/09.

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

³ [2004] 1 ERNZ 172 at 183

[6] Of course, as stated in *Da Cruz*, the Authority is not a Court and must exercise its discretion as an investigatory body and:

The unique nature of the Authority and its proceedings means that parties to investigation meetings should not have the same expectations about procedure and costs as they have of the Court.

[7] Nonetheless, the Court in *Da Cruz* also identified that a “*basic tenet*” of the Authority when considering costs is that:

It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable.

Determination

[8] I conclude that in the circumstances of this case, it is open to the Authority to consider whether “all or any” of the costs incurred by the SPCA were unnecessary or unreasonable. Given the outcome of the substantive matters, in that Mr Lloyd-Barker was only moderately successful with a compensation award of \$500, and that the weight of the evidence was clearly and substantially against him, I conclude that it was unreasonable of him to reject the *Calderbank* offer of \$10,000 made approximately one month before the investigation meeting. The result of the rejection of the offer was that the SPCA, more probably than not, incurred preparation costs that were unnecessary and this must be factored into an award of costs. On the other side of the scale, but not of great weight, given the remedy awarded, is the fact that Mr Lloyd-Barker was found to have been unjustifiably disadvantaged in his employment.

[9] Had it not been for the *Calderbank* offer, consistent with the tariff based approach of the Authority when awarding costs, given a substantial one day hearing, including the consideration of a non-publication application, due to the propensity of Mr Lloyd-Barker to access a variety of media to air his grievances, I would have awarded the sum of \$4,000. The *Calderbank* offer must also be factored in but any further award should not be seen as punitive against Mr Lloyd-Barker. Also, while there is some mention of Mr Lloyd-Barker’s financial circumstances, there is no evidence of such. In all the circumstances, I conclude that an appropriate award of costs is \$7,000.

[10] Mr Lloyd-Barker is ordered to pay to the SPCA the sum of \$7,000 as a contribution to its costs.

K J Anderson
Member of the Employment Relations Authority