**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2012] NZERA Christchurch 173
5349085

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| | BETWEEN | KELVIN BOULT<br>Applicant |
| | A N D | HARVEY NORMAN STORES (NZ) PTY LIMITED<br>Respondent |

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| Member of Authority: | Christine Hickey |
| Representatives: | Kevin Murray, representative for Applicant<br>Blair Edwards, counsel for Respondent |
| Investigation Meeting: | 8 February 2012 at Ashburton |
| Submissions Received | 19 June 2012 from respondent's counsel<br>30 July 2012 from applicant's representative |
| Date of Determination: | 15 August 2012 |

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## COSTS DETERMINATION OF THE AUTHORITY

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**A. Kelvin Boult must pay Harvey Norman Stores (NZ) Pty Ltd $3,500.00 towards its legal costs**.

**B. Kelvin Boult must pay Harvey Norman Stores (NZ) Pty Ltd $1,556.00 for the cost of travel to the investigation meeting.**

[1] On 21 May 2012 Member Cheyne issued a determination dismissing Mr Boult's claim for a personal grievance of unjustified dismissal and reserving costs. The respondent has applied for costs. I have received submissions from Mr Edwards on its behalf. I have also received submissions from Mr Murray for Mr Boult.

**The respondent's application for costs**

[2] The respondent's costs were $16,257.50 plus GST from the date of the statement of problem being filed until the determination was issued. It seeks all of its costs plus airfares of $1,353.04 plus GST. Alternatively, if I do not accept that claim,

it seeks its costs incurred from the date it made Mr Boult a *Calderbank* offer until the date of the determination being $11,072.50 plus GST.

[3] Mr Edwards submits that all costs incurred were reasonable in the circumstances at a maximum hourly rate of $250.00. There are a number of factors that he submits suggest that the Authority should award a contribution to his client's costs *at the higher end of that which is normally awarded*. Those factors are:

- The *Calderbank* offer;
- The statement of problem raised a number of *frivolous* claims, including those that were out of time and some that were subject to a settlement agreement. Nonetheless the claims required formal response but were withdrawn after the respondent had prepared pleadings and evidence in response to the claims;
- The costs incurred are *commensurate with the quantum sought by the applicant ... (in excess of $45,000)*;
- That Mr Boult's case was essentially a *hopeless* one.

**The applicant's submissions in response**

[4] Mr Murray submitted that each party should bear its own costs. The main reason he gave was that the applicant had only incurred $6000.00 in costs compared to the respondent's $16,000.00.

**Determination**

[5] As I was not the member who determined the substantive matter, I have had careful regard to the statement of problem, the statement in reply, submissions and the determination alongside the costs submissions lodged by the parties.

[6] The Authority's jurisdiction to make costs orders is found in clause 15 of Schedule 2 of the Act. The principles the Authority follows in considering costs applications are as set out in *PBO Limited v Da Cruz* [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

[7] One of those principles is that costs generally follow the event; that is, the successful party can generally expect a modest contribution to its costs from the unsuccessful party.

[8] However, if an applicant rejects a reasonable offer to settle before the hearing (*Calderbank* offer) for an amount more than what the applicant receives after the decision is made the respondent can usually expect the unsuccessful applicant to contribute to its costs.

[9] The Employment Court has considered the effect of a *Calderbank* offer in *Ogilvy & Mather v Darroch* [1993] 2 ERNZ 943:

> *As is well known, it is an offer, invariably in writing made by one party to the other and expressed to be without prejudice except as to costs. It is an offer to compromise the action by some payment. Unless the offer is accepted, the letter is intended to be produced after the Court has dealt with the merits of the case but before it has dealt with costs. It is intended 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.*

[10] The Judge in *Ogilvy* observed that *Calderbank* offers do not grant automatic protection in the event of lesser recovery but are a discretionary factor which can be taken into account in determining costs.

[11] On 3 November 2011, three months before the investigation meeting, the respondent made a *Calderbank* offer to Mr Boult to pay him $750.00 for any hurt associated with his redundancy and $250.00 towards legal costs he had incurred to that date. Mr Boult was given until 24 November 2011 to consider the offer.

[12] The *Calderbank* offer to the applicant was made at an early stage in the proceedings before the applicant was required to commence preparation for an investigation meeting. It was a clear and unambiguous offer in full and final settlement. The offer remained open for three weeks which was adequate time for the applicant to reflect on the strength of the case and likely outcome and the cost of proceeding further. The applicant ultimately failed in his application. Had he accepted the offer further preparation for, and the cost of attendance at, the investigation meeting would have been avoided for both parties.

[13] I conclude that the *Calderbank* offer was a valid offer and I take it into account in exercising my discretion as to costs. I find that the usual principle that costs follow the event does not apply because of the valid *Calderbank* offer.

[14] In the Court of Appeal case of *Health Waikato v Elmsley* [2004] 1 ERNZ 172 the Court commented that:

> *....we think that…steely responses by the Courts where the plaintiffs do not beat* Calderbank *offers would be in the broader public interest*.

[15] I take the notional daily rate in the Authority, which is currently $3,500.00, as a starting point for costs which should be awarded to the respondent. The investigation meeting took one day.

[16] Counsel for the respondent also claims the cost of Auckland–Christchurch return airfares for himself and for Bronwyn Hall, the respondent's former human resources manager, and a witness for the respondent. I consider that it was reasonable that the respondent brought Ms Hall to the meeting to give evidence. Mr Edwards advised the respondent during the redundancy process and after Mr Boult filed his personal grievance. Mr Edwards also attended the mediation on behalf of the respondent. Due to his in depth knowledge of the facts of the matter I consider it reasonable that he represented the respondent, rather than local counsel.

**Conclusion**

[17] In exercising my discretion I have weighed all the above factors, as well as those set out in *PBO Limited v Da Cruz [2005] ERNZ 808*, including that the award of costs should not be used as a punishment or expression of disapproval of the unsuccessful party's conduct. I consider that Mr Boult should pay the respondent $3,500.00 as a contribution to its costs incurred in responding to his claim.

[18] I also find it reasonable that Mr Boult pay the airfares for Ms Hall and Mr Edwards to attend the investigation meeting. Mr Boult must pay $1,556.00 to the respondent.

Christine Hickey
Member of the Employment Relations Authority
(Pursuant to clause 16 of Schedule 2 of the Employment Relations Act 2000)