IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 144
5554725

	BETWEEN	BARRY NEAL Applicant
	AND	NORTH SHORE SWIMMING POOL CENTRE LIMITED t/a POOL DOCTOR Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Eddie Bluegum, Counsel for Applicant Stephen Tee, Counsel for Respondent
Costs Submissions	4 May 2016 from Applicant 18 April 2016 from Respondent
Determination:	13 May 2016

COSTS DETERMINATION OF THE AUTHORITY

---

[1] In a determination dated 24 March 2016 ([2016] NZERA Auckland 95), I found that the Applicant, Mr Barry Neal, had not been unjustifiably dismissed from his employment by the Respondent, North Shore Swimming Pool Centre Limited t/a Pool Doctor (Pool Doctor).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and the parties have filed submissions in respect of costs.

[3] The matter involved 1 day of meeting time. Mr Tee submits that Pool Doctor made a Calderbank[1] offer in the sum of $1,000.00 to Mr Neal by letter dated 9 September 2015 headed: "*Without Prejudice Save as to Costs"* (the Calderbank Offer*).*

[4] In that letter Mr Neal was advised of the Respondent's view that his claim had no prospect of success, and it advised him of the Respondent's estimated costs for hearing.

[1] *Calderbank v Calderbank* [1976] Fam 93 (CA)

[5] Mr Tee submits that the Respondent's actual costs incurred from the date of the Calderbank offer are $10,832.00.

[6] Mr Tee further submits that the Investigation Meeting did not finish until 6.00 p.m. on 8 March 2016, and this should therefore be considered as a day and a quarter of meeting time.

[7] Mr Tee is seeking a contribution to costs in the sum of $7,576.10, which sum includes GST, which is 70% of the actual costs.

[8] The offer to settle contained in the letter dated 9 September 2015 was not accepted by the Applicant.

[9] Mr Bluegum on behalf of the Applicant submits that consideration should be taken of the fact that the Applicant was not in receipt of all the information necessary to consider the Calderbank Offer a fair settlement, specifically the Employment Agreement.

[10] Mr Bluegum also submits that the Applicant's financial circumstances preclude his being able to meet a costs award other than at a very low level. On that basis Mr Bluegum submits that I should consider making a determination that costs should lie where they fall.

Determination

[11] I have carefully considered the submissions of the parties. It is incumbent upon me that I approach the question of costs in a principled manner and not arbitrarily.

[12] The usual principle is that costs follow the event, and Pool Doctor was the successful party in this proceeding and is therefore entitled to a contribution to its costs.

[13] I have considered the application for uplift in the normal daily tariff in the Authority on the basis that the Investigation Meeting did not conclude until 6.00 p.m. on 8 March 2016.

[14] I consider that the time allocated for a day of investigation meeting should be reasonable in length and observe that is not unreasonable for an investigation meeting which did not commence until 10.00 a.m. to conclude at 6.00 p.m. I make no uplift in costs on this basis.

[15] I am however minded to give weight to the matter of the Calderbank Offer..

[16] Whilst taking note of the comments made by Judge Inglis as regards the ameliorating of the '*steely*' approach noted in the judgment in *Stevens v Hapag-Lloyd (NZ) Ltd*[2] which referred to '*significant costs awards'*, I consider that Calderbank Offers may still be taken into consideration in the matter of costs in the Authority on the basis that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted[3].

[17] The Calderbank Offer was made well in advance of the Investigation Meeting and there was therefore due time for the Applicant to consider it fully prior to taking any part in that proceeding.

[18] Whilst the Applicant may not have been in receipt of a copy of the Employment Agreement at 9 September 2015, I noted at paragraph [7] of determination [2016] NZERA Auckland 95 that the Applicant acknowledged he had read the Employment Agreement which had been signed and was dated 19 September 2013.

[19] The Calderbank offer offered more to the Applicant than was awarded to him in determination [2016] NZERA Auckland, in which he was wholly unsuccessful.

[20] Mr Neal has submitted information to the Authority in support of his claim to the effect that he is in receipt of a superannuation payment, has only a part-time employment which is on a contract basis and seasonal in nature, and has no savings. Consequently he would find it very difficult to meet any costs award, and if one is awarded, it would need to be paid off by minimal instalments.

[21] As stated in the Employment Court case *Bishop v Bennet*[4] at [30]: "*Assessment of the ability to pay requires consideration of the total financial position of the party concerned including both assets and liabilities and income and necessary expenditure."*

[22] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However I note the observation of Judge Inglis in *Tomo v Chekmate Precision Cutting Tools Ltd*[5] *at [22]* that:

> *… the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations*

[2] [2015] NZEmpC 137 at para [95]
[3] *Aoraki Corporation Ltd v McGavin*[3] [2004] 1 ERNZ 172 (CA) at [53]

[4] [2012] NZEmpC 5
[5] [2015] NZEmpC 2

> *it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account.*

[23] Having weighed all these considerations, I find that whilst Pool Doctor as the successful party is entitled to some award, this is a case in which it is appropriate for the Authority to use its discretion when considering a costs award.

[24] Mr Neal is ordered to pay Pool Doctor the sum of $2,000.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[25] It may be that Pool Doctor is willing for Mr Neal to make payment by instalments. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

Eleanor Robinson
Member of the Employment Relations Authority