

LEGAL UPDATE APRIL 2010 - TAKE IT TO THE (CALDER)BANK

A "Calderbank" (or "without prejudice save as to costs") offer is an offer to settle a case made by an employer (less frequently by an employee) that can later result in an increased award of legal costs against the party to whom it is made.

As you may be aware, these offers, while being "without prejudice" like any other, can be produced after the outcome of a case is known to point out that because the other party was awarded less than or about the same in remedies as the amount of the offer, that party should have accepted it over putting everyone to further cost. Where the Authority or Court agrees, a higher order for costs can (but won't always) be made against the person to whom the offer was made.

The production of a Calderbank offer in applying for legal costs may therefore change the landscape considerably, as evidenced in Tian v Hollywood Bakery (Holdings) Ltd [2010] NZEmpC 24.

Here, the Bakery won the substantive case but had spent \$35,086 on legal costs. On costs, Judge Travis found two barriers stood in the way of the Bakery's claim for indemnity (or an award of full) costs, or even of the more usual award of two thirds of those costs: the modesty of the claim, and the case being largely a "re-run" of the Authority's process.

Judge Travis therefore held that \$6,400 was an appropriate starting point. However, he then considered the two modest Calderbank offers which the Bakery had made, both in the sum of \$500, at a time when actual defence costs were in the order of \$6,356. On the basis of these offers, and then taking into account the subsequent antics of the Plaintiff and her advocate, the Judge ordered payment "*towards indemnity costs*", of \$15,000. The Calderbank offers were therefore well worth the time they would have taken to draft and present.

For a further and very recent example, also see Gates v Air New Zealand [2010] NZEMPC 26.

If you wish to use a Calderbank offer as part of defending or advancing a claim, it needs to be carefully drafted and timed to reflect the circumstances of the particular case.

Also of note: the minimum wage is now \$12.75 per hour, while the new entrants' minimum wage and training minimum wage is now \$10.20.

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