

[4] The reasons relied upon by Resene for the Authority to make an award above the daily notional tariff include:

- (a) The applicant pursued claims before the Authority (and incurred unnecessary cost for the successful party) when reasonable offers to settle had been made;
- (b) The likelihood of success for the applicant was risky given the existence of his employment agreement that would have made it reasonable to conclude that the provisions of that agreement would apply;
- (c) The extent of the applicant's claims was much wider than would reasonably have been expected for the type of employment relationship problem. There was no specific focus for the applicant's claims and the respondent was required to present a defence which covered the broad range of claims made against it during the course of the employment relationship problem;
- (d) The case was more time consuming than it ought to have been because of the nature of the claims;
- (e) The level of work undertaken to defend the claims made was also justified by the substantial remedies sought by Mr Christoforou. The claims Resene faced amounted to \$30,325.00 plus unspecified costs;
- (f) Resene made considerable efforts to explain to Mr Christoforou his arguments around the application of the Resene employment agreements, the non-acceptance of the staff alternative plan, and the improper inclusion of performance factors in its selection that were misplaced and ill conceived. Examples of evidence for this have been included in:
 - (i) The Resene letter dated 24 July 2009 (Bundle P41);
 - (ii) The Resene memo dated 17 August 2009 (Bundle P48);
 - (iii) Discussions on 24 August 2009 (Danoucha Wypych Brief of Evidence, paras.55-64); and

- (iv) The Resene letter of 8 September 2009 (Bundle P54).

- (g) The applicant unnecessarily pursued claims and prolonged the process when reasonable offers aimed at addressing his claims were provided to him. He was offered while he was working out his notice an *ex gratia* payment of an additional four weeks pay (\$5,420). This offer demonstrated that Resene made efforts to bridge the gap between the applicant's expectations and the fair and reasonable terms of his relevant individual employment agreement. It also went somewhat towards meeting his claim for an additional period of notice which made up the bulk of his claim for \$20,325.00. Resene says the applicant rejected this offer;

- (h) Resene subsequently and before the filing of the applicant's claim before the Authority in April 2010 offered the applicant through his representative a payment. It is submitted this has the effect of a *Calderbank* offer. There was no response from the applicant by a deadline set and the offer has been attached to the respondent's application for costs with sections blanked out due to references made to mediation discussions;

- (i) The applicant was not successful in any of his claims.

[5] Mr Christoforou has opposed the respondent's claim for costs and has requested me to make a decision that no costs should be awarded at all. He relied on his claims being genuine requiring the Authority to make a determination. He has raised many points in regard to the Authority's determination and matters that go to the substance involved in that determination. These are not relevant for a costs determination. He has responded to the matters raised by Resene in attempting to settle the claims for a monetary sum. He has requested the Authority to disregard these as he brought genuine matters before the Authority for a determination.

Determination

[6] One of the principles involved in setting a level of costs is not to penalise the unsuccessful party. Costs are determined as a matter of principle. Mr Christoforou was not successful with his claims. Resene Paints Ltd therefore is entitled to seek a

sum for costs. I do not accept that the reasons put forward by Resene mean that this matter should be determined beyond the parameters of the notional daily tariff.

[7] However in regard to the tariff, I am minded to assess the contribution for costs at the upper level because Mr Christoforou had considerable risks with the claims that he was making. Those risks inevitably put Resene to the expense of defending the claims. Also, Resene made reasonable attempts to try and settle the matter pragmatically to avoid any costs.

[8] Although I have had regard to those attempts to settle this is not a situation in which the usual principles applying to *Calderbank* letter would apply. Since Resene has been successful in defending the claims costs follow the event and therefore the attempts to settle and the sums that were offered are not directly relevant.

[9] It is my assessment that costs should be set at \$3,000. I therefore order Mr Christoforou to pay Resene Paints Ltd \$3,000 as a contribution towards its legal costs.

P R Stapp
Member of the Employment Relations Authority