

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Tony Cowley (Applicant)  
**AND** T.S.L. Plastics NZ Limited (Respondent)  
**REPRESENTATIVES** Sandra Callanan, Counsel for Applicant  
Phillipa Muir, for Respondent  
**MEMBER OF AUTHORITY** Marija Urlich  
**INVESTIGATION MEETING** 2 March 2004  
3 March 2004  
6 April 2004  
**DATE OF DETERMINATION** 14 October 2005

DETERMINATION OF THE AUTHORITY AS TO COST

**Application for costs**

[1] Following a three day investigation meeting and the filing of closing submissions, I found, in a determination dated 23 December 2004, that Mr Cowley's dismissal for abandoning his employment was unjustified. He was awarded remedies totalling \$7000 plus three months lost wages (less earnings). Those remedies were reduced by 25% pursuant to section 124 of the Act.

[2] The parties were invited to resolve costs between them and in the event such attempts were unsuccessful, leave was given for application to be made to the Authority to determine costs. The parties have not been able to agree the issue of costs and have filed submissions in the Authority setting out their respective positions.

**Costs in the Authority**

[3] The Authority has a discretion to award costs and expenses as it thinks reasonable<sup>1</sup>. The usual principles and rules applicable to costs' determinations in a traditional setting are relevant to the Authority's exercise of its discretion, though such principles must be seen in light of the investigative nature of the Authority process and the objects of the Act. In exercising its costs discretion the Authority must take into account relevant issues and exclude irrelevant issues from its consideration.

[4] Recent costs tables compiled by the Department of Labour show most costs awards in the Authority range between \$2000 and \$2500 for a one-day hearing.

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<sup>1</sup> Schedule 2 clause 15 Employment Relations Act 2000

## The parties' submissions

[5] For Mr Cowley, Ms Callanan submits:

- (i) Mr Cowley was the successful party and as such he is entitled to a reasonable contribution to costs reasonably incurred;
- (ii) at the conclusion of the hearing TSL accepted Mr Cowley's holiday pay claim and made a settlement offer – which she described as too little too late;
- (iii) Mr Cowley's legal costs and expenses amount to \$15,000 (including costs of attendance and preparation for two mediations); and
- (iv) Mr Cowley is entitled to seek an award of full costs to avoid rendering the remedies awarded nugatory.

[6] For TSL Plastics, Ms Muir submits:

- (i) of the eight causes of action pleaded by Mr Cowley one was successful;
- (ii) this is not a situation where full costs should be awarded;
- (iii) TSL made a reasonable costs settlement proposal, that costs should lie where they fall, which Mr Cowley rejected;
- (iv) this was a form of Calderbank offer and accordingly, TSL seeks a contribution to its costs of between \$7000 and \$9000;
- (v) in the alternative, costs should lie where they fall; and
- (vi) a further alternative, an award of no more than \$400 should be made to Mr Cowley applying the principles in *Binnie, Elmsly* (referred therein) and *Jensen*<sup>2</sup>

## Determination

[7] Mr Cowley was the successful party and it is usual that costs should follow the event. The extent of that success was modest given the number of claims raised and remedies sought. That success was further eroded by the reduction of remedies for contribution. These are relevant factors when considering an appropriate award of costs. These are also relevant factors in concluding that an award of full costs is not warranted in this case.

[8] The costs settlement proposal does not meet the test for a valid Calderbank offer<sup>3</sup>. There will be no costs award in favour of TSL plastics.

[9] Taking into account the submissions made and the principles relevant to costs awards in this jurisdiction, TSL Plastics Limited is ordered to contribute to Mr Cowley's costs to the sum of \$3000. TSL Plastics is also required to contribute to expenses incurred by Mr Cowley to the sum of \$150.

Marija Urlich  
Member of Employment Relations Authority

<sup>2</sup> [2002] 1 ERNZ 438; Colgan J, 26 October 2004, AC46A/04

<sup>3</sup> *Health Waikato v Van der Sluis* [1997] ERNZ 236