

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 382
5531204

BETWEEN F
 Applicant

A N D G
 Respondent

Member of Authority: James Crichton

Representatives: Helen White, Counsel for the Applicant
 Kirsty Johnson, Advocate for the Respondent

Submissions Received: 9 October 2015 from the Applicant
 15 September 2015 from the Respondent

Date of Determination: 7 December 2015

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In the substantive determination issued as [2015] NZERA Auckland 164 on 10 June 2015, I found exclusively for G who had successfully resisted all of F's claims.

[2] Costs were reserved.

The claim for costs

[3] G, as the successful party, seeks costs. They advise they incurred costs totalling \$13,470 but do not identify a particular sum that is sought.

[4] The invoices from their adviser are attached to the submission for reference. Those invoices refer to certain communications between the parties, including a putative Calderbank offer.

The response

[5] In submissions filed for F, it is suggested that costs should lie where they fall.

Determination

[6] Because of the reference to a Calderbank offer, I caused enquiry to be made of the parties as there was no such offer before me. In the result, it is contended by one party that the offer, if made, was conveyed in the course of mediation proceedings and as such ought not to form part of the Authority's consideration now. Conversely, the other party maintained the offer was made outside of mediation and ought therefore to be considered by the Authority.

[7] Given that the issue here is when the offer was made, rather than its nature per se, I have decided that it will not assist me to have another Member of the Authority review the offer, which (quite properly) has been sealed by the Authority officer. Indeed, the only way that the issue here could be resolved is by hearing further evidence and given that the substantive matter has gone on challenge to the Court, I think the proper course is to deal with the matter expeditiously and make my costs decision without reference to the prospect of an operative Calderbank offer.

[8] Strictly speaking, this matter involved one hearing day; however, the parties attended on the Authority on another occasion which had been set down for hearing the matter. However, as I indicated in the substantive determination (paragraph [18]), that I considered the time ought to be spent endeavouring to resolve matters by agreement, with the consent of both representatives, I spoke to the parties separately with a view to exploring whether the matter could be resolved by agreement. In the result, that was not successful.

[9] It follows from the foregoing that there may be a basis on which G could expect consideration of costs in this matter not being limited to the hearing day simpliciter but including another day as well because of the earnest attempts that I made to get the parties to resolve matters on their own terms, which of course necessarily increased the costs.

[10] G was wholly successful in resisting F's claims and as a consequence, in the normal course, would be entitled to an award of costs to assist them to meet the legal costs in successfully resisting those claims.

[11] Because of the daily tariff that the Authority traditionally uses in the fixing of costs in its jurisdiction, the starting point ought to be \$3,500 for the hearing day and the question is whether that amount should be reduced or added to as a consequence

of any factors that the Authority is required by law to take into account, including the issue I have referred to above.

[12] Litigation comes with risk and it is unreasonable of parties to proceed to sue another party, even in this jurisdiction, and not be prepared to meet a share of the successful party's costs if they do not make their case.

[13] While I have no information before me as to F's current financial circumstances, I think I can reasonably assume from the evidence I have already heard that he is a person of modest means and accordingly I think the proper course is to fix a contribution to costs in the sum of \$4,000 but indicate that the parties ought to discuss with each other the payment of that sum over time.

[14] That figure reflects a slight uplift on the daily tariff to acknowledge the factor I referred to above.

James Crichton
Chief of the Employment Relations Authority