

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 118  
5397751

BETWEEN                      GABRIEL FLOARES  
   Applicant  
  
AND                                KIWI RAIL LIMITED  
   Respondent

Member of Authority:        G J Wood  
  
Submissions Received:        By 23 September 2013  
  
Determination:                27 September 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] Mr Floares' claim that the respondent, Kiwi Rail, be required to backdate employer contributions to a superannuation scheme he rejoined was dismissed. Even though the investigation meeting was dealt with on the papers, Kiwi Rail now seeks costs in the sum of \$3,500, as accepted by Mr Floares. However, as the parties could not reach agreement on how the sum would be repaid, a determination of the Authority has been requested by Ms Pazin on behalf of Kiwi Rail.

[2] Correspondence between the parties showed that Mr Floares was willing to accept the sum of \$3,500, but that he would have to pay instalments of \$50 per fortnight. Mr Floares proposed that sum because he is *the sole provider for a family of five with significant fortnightly payments of \$1,500 toward the mortgage.*

[3] In submissions to the Authority Mr Floares stated that he *would be inclined at this stage to ask the Authority to allow the costs to lie where they fall.* This is because the same principles as a *Calderbank* offer should apply when his offer was left open for in excess of fifty days.

[4] Mr Floares stated that he was ready to supply bank statements to prove his current difficult financial situation, but did not do so.

[5] In response Ms Pazin noted that any delays related to staff leave in her office, rather than any delay by Kiwi Rail and that the parties should be left to determine any repayment schedules.

[6] The parties have clearly agreed on the sum of costs and it follows that the Authority would not disturb such an agreement, particularly as there is no evidence of any duress being applied by Kiwi Rail on Mr Floares in obtaining that agreement. While the sum of \$3,500 may seem high within the tariff-based approach to costs of the Authority, I accept that Tranz Rail's costs were much higher than this, and that despite being heard on the papers, there was the equivalent amount of time required of Tranz Rail's representatives to compare with a one day investigation meeting.

[7] There is no express power in the Act for the Authority to order payment in instalments against an employee, even in matters of compliance, which would be the next step in this process. Therefore, in the absence of agreement, I do not accept that an order as to instalments would be appropriate. However, I would urge the parties to reach agreement on an instalment plan. There is an old saying that blood cannot be obtained from a stone. On the other hand, the sum of \$50 per fortnight would mean that Kiwi Rail would not obtain the benefits of its agreed level of contribution to its costs for some 140 weeks, which is almost three years. By that time inflation would have eroded some of the value of the sum, and such an arrangement does not give Kiwi Rail any certainty that it will receive the full amount of costs.

[8] Given that the employment relationship is continuing, Kiwi Rail should seriously consider accepting payments by instalment, even though those instalments are likely to need to be well in excess of \$50 per fortnight, for the reasons given above. It is in the interests, therefore, of both parties to agree on instalment payments that both can live with, in order to avoid the Authority having to further deal with the matter by way of compliance on the whole sum of \$3,500, which would only add to both parties' costs.

[9] I order the applicant, Mr Gabriel Floares, to pay to the respondent, Kiwi Rail Limited, the sum of \$3,500 in costs.

**G J Wood**  
**Member of the Employment Relations Authority**