

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 337
5427205

BETWEEN GREGORY ALAN GOURLEY
 Applicant

A N D INDUSTRIAL SITE
 SERVICES CO LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Gregory Gourley on his own behalf
 Simon Scott for the Respondent

Submissions Received: By 12 August 2014

Date of Determination: 14 August 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] In my substantive determination, I concluded that Mr Gourley was successful in one of his three claims for unjustifiable disadvantage, all of which were defended by the respondent (ISS). He was awarded \$3000 in compensation.

[2] On behalf of ISS, Mr Scott sought costs in the sum of \$15,446 plus GST and disbursements of \$265 plus GST. This was on the basis that the Authority awarded compensation to Mr Gourley of \$3,000 yet ISS had made a *Calderbank* offer of \$5,000 in the year before the investigation meeting. On this basis, ISS claimed that it rather than Mr Gourley was entitled to costs.

[3] In response, Mr Gourley did not dispute the terms of the *Calderbank* offer but noted that he had been successful in one of his claims, and that the *Calderbank* offer did not address the failure of ISS to support him through an investigation into his conduct by a third party who was not his employer. Mr Gourley also submitted that he had no money to pay costs and would be unlikely to afford to pay costs over time

given that he was now on a disability benefit. It was possible that he would not be able to work again in his usual occupation, if at all.

[4] I accept that ISS provided a proper *Calderbank* offer which Mr Gourley would have been better off to have accepted. The Authority must apply a *steely* approach in such circumstances. On the other hand, a *Calderbank* offer is only one factor that the Authority needs to take into account in its equity and good conscience jurisdiction.

[5] In this case, the starting point is that this was a standard one day investigation meeting and therefore the tariff based approach would lead to a conclusion that it was Mr Gourley (as the successful party) who was entitled to costs in the sum of \$3,500. From this starting point, account must be taken of the *Calderbank* offer and Mr Gourley's inability to work and therefore generate an ability to pay any costs should they be awarded against him.

[6] In these circumstances it is fair that Mr Gourley should lose the benefit of a costs award in his favour, because of his failure to accept the *Calderbank* offer and therefore unnecessarily force ISS into significant expenditure, but not that he be required to pay costs to ISS.

[7] I therefore order that costs lie where they fall.

G J Wood
Member of the Employment Relations Authority