IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 151
5369644

	BETWEEN	SHARON JOHNSTON Applicant
	AND	THE SILKY OAK CHOCOLATE COMPANY LIMITED Respondent

Member of Authority:	P R Stapp
Representatives:	Dave McLeod, Advocate for the Applicant Dave Robb, Advocate for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	by 7 November 2012
Determination:	3 December 2012

COSTS DETERMINATION OF THE AUTHORITY

Application for costs

[1] In a Determination [2012] NZERA Wellington 103 dated 14 September 2012 I reserved the matter of costs. The parties have been unable to resolve the matter of costs, and thus it falls to the Authority to determine the matter.

The issue

[2] Which party is entitled to receive costs, and how much?

The facts

[3] The applicant's claims for a constructive dismissal were dismissed. The respondent has requested the Authority to award a substantial contribution to its costs. The respondent's costs for preparation for a hearing from the date of filing, including

witness attendance at the Authority's investigation meeting, amount to $3,426.05. In addition the respondent's hearing costs were $877.50. The total costs plus GST is $4,303.55. In essence the respondent is requesting the Authority to increase the notional daily tariff that applies.

[4] In reply, the applicant has asked the Authority to let costs lie where they fall because the applicant brought her claim to the Employment Relations Authority in "good faith" believing that the employment agreement she had with Silky Oak Chocolate Company Limited had been repudiated and that she accepted that repudiation, as she was entitled to. Furthermore, there is a reliance on *Balfour v The Chief Executive, Department of Corrections* [2007] ERNZ 808 where the Employment Court in dismissing a claim made the following observation:

> *... Normally, costs would follow the event. In the present case, Mr Balfour submitted that the cost he was put to in defending the ACC prosecution largely ate into his settlement moneys in spite of receiving an award of costs from the District Court. In light of my findings that, although misguided, his claim was brought in good faith, and having regard to the comparative resources of the parties, costs will lie where they fall.*

[5] In addition, the applicant has identified for the Authority that she made a modest request for settlement from the respondent before the Authority's investigation meeting. A *Calderbank* letter sent to the respondent on 15 February 2012 has been produced to support that this matter could be disposed of early for considerably less than what it would ultimately cost the respondent.

[6] Finally, the applicant has pleaded that she should not be penalised through the award of a costs contribution that she cannot afford. It has been submitted she has suffered a loss of income which has been difficult to recover from, and has limited resources when compared with the respondent, and that she must preserve her income to meet her financial outgoings.

[7] In reply, the respondent has rejected the applicant's submissions on the following grounds:

(a) That *Balfour v Chief Executive, Department of Corrections* [2007] ERNZ 808 is distinguishable, and is not a precedent for the proposition that simply because an applicant may pursue a claim in good faith that this will avoid an award of costs;

(b) The *Calderbank* offer should be given little weight, if any where the applicant was completely unsuccessful: applying *Shanks v Agar (trading as Rod Agar & Co.)* [1996] 2 ERNZ 5781.

(c) That the applicant has produced no evidence to support claims of impecuniosity.

Determination

[8] The applicant was unsuccessful in the claims she made before the Authority. A determination on the issue of costs is based on principles that are set out in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 at para.44. I do not need to repeat these principles as they are well-known and well-used. My consideration relates to the following:

(a) That the applicant was unsuccessful in her application before the Employment Relations Authority. This means that the starting point must involve costs going against the applicant. The successful party is entitled to a contribution to its costs.

(b) That the respondent has been put to an expense by virtue of the applicant's claim because the respondent was represented and has incurred costs to defend the matter.

(c) That the respondent's costs are neither unnecessary nor unreasonable. Indeed the amount of costs are moderate and only a little more than the daily tariff.

(d) That costs have been reasonably incurred in regard to the need for the respondent to produce written statements of evidence.

(e) That there was a need for the respondent to arrange for two managers to attend the Authority's hearing. The time and expense for these two witnesses is executive time and unrecoverable. They were both part of the problem and would ordinarily expect to give evidence in regard to their involvement.

(f) That there are no issues relating to the conduct of the respondent during the course of the hearing to set aside any costs.

(g) That the onus has been on the applicant to prove her case of constructive dismissal, and she was not able to do so. Therefore the applicant needed to assess the risks and must have known that if she was not successful then she would face having to pay some costs to the other side.

[9] This was a one day investigation meeting and the starting point is the notional daily tariff of $3,500. Factors that are relevant in deciding to move the tariff up or down are

(a) That both parties attended mediation to try and save costs. The mediation occurred on 15 February 2012. The employment relationship problem was filed in the Authority on 12 April 2012. By consent there was an extension of time given for the filing of a statement in reply, which was filed on 4 May 2012. Both parties participated in a case management telephone conference on 8 May 2012 with the Authority. There is nothing unusual in the sequence of events.

(b) That the respondent provided a comprehensive statement in reply that detailed its position, the events and circumstances, and the reasons why the respondent believed the claim would be unsuccessful.

(c) That the respondent provided comprehensive statements of evidence and supporting documentation to the Authority to assist the Authority with the determination. Indeed these were provided in advance and in accordance with timetabling as agreed.

(d) That the respondent and applicant were both cautioned about the liability and risk of an award of a "notional daily rate" for costs at the hearing by the Authority. The opportunity remained to settle at any time.

(e) That a costs award is only a contribution to costs that have been incurred and not full reimbursement.

(f) That any costs for the respondent's witnesses' time lost and costs for the respondent's business have to be incurred by the respondent.

(g) That the Authority's investigation meeting was set down for one day, but was dealt with in less than a day (approximately 4 hours). This was in part because of both parties' preparation (including statements of evidence and all the required documents in advance), and their focus on the issues. There were only three witnesses involved and submissions were presented on the day.

(h) That there is no detailed evidence that supports that the applicant is unable to pay costs, even if it is by some arrangements and instalments.

[10] It is my decision that the costs on the basis of the daily tariff should be a little less than the daily tariff to reflect the time involved. I award Silky Oak Chocolate Company Limited $2,000 contribution towards its costs.

Order of Authority

[11] Sharon Johnston is required to pay the Silky Oak Chocolate Company Limited $2,000 as a contribution to costs.

P R Stapp
Member of the Employment Relations Authority