IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 112
5306650

	BETWEEN	BRONWEN JOY KYLE Applicant
	A N D	HA & FM BRITTENDEN PARTNERSHIP Respondent

Member of Authority:	James Crichton
Representatives:	Bob Gillanders, Advocate for Applicant Joseph O'Neill, Counsel for Respondent
Submissions received:	11 April 2011 from Applicant 28 April 2011 from Respondent
Date of Determination:	29 July 2011

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In the substantive determination issued by the Authority on 31 January 2011, the applicant (Ms Kyle) had her claim for unjustified dismissal by reason of a constructive dismissal, dismissed and costs were reserved.

The claim for costs

[2] In submissions for the respondent employer (the Brittenden Partnership) the Authority is told that costs incurred by the Brittenden Partnership amounted to $3,375 exclusive of GST. The Brittenden Partnership claims full reimbursement of that sum on the basis that Ms Kyle had turned down a *Calderbank* offer five weeks before the investigation meeting which would have placed her in a materially more advantageous position than was the case after the Authority's investigation into her claim.

[3] For her part, Ms Kyle's advocate, in his costs submission, simply recites matters of fact and opinion pertaining to the Authority's concluded investigation and, save for the observation that Ms Kyle *"has already lost thousands* (and) *it would be very rough justice indeed to award costs against her"*, there is nothing in the costs submission to assist the Authority in fixing costs.

The legal principles

[4] The law concerning costs fixing in the Authority is well summarised in the decision of the Full Bench of the Employment Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[5] From that decision a number of relevant principles can be derived, including:

(a) That costs will usually follow the event;

(b) That costs awards in the Authority will usually be modest, consistent with the inquisitorial nature of the Authority's hearings;

(c) That the Authority will usually consider whether the costs claimed by a successful party are necessary and/or reasonable;

(d) That costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct;

(e) Costs will regularly be awarded in accordance with a notional daily rate or tariff;

(f) That the nature of the proceeding may encourage the Authority to determine that costs should lie where they fall;

(g) That a *Calderbank* may be relevant;

(h) That in any event costs are a discretionary remedy, but the Authority's discretion must always be exercised on a principled basis.

Determination

[6] This was a factually unchallenging matter dealt with by the Authority in about half a day's hearing time. Ms Kyle alleged that she had been constructively dismissed

and failed to meet the onus of satisfying the Authority that that was the case. She did demonstrate, however, that there were difficulties in the employment and in particular in the organisation of the workplace. However, neither of those aspects were, in the Authority's view, sufficient to ground a claim that she had been left with no alternative but to repudiate her employment agreement.

[7] As I have already noted, there is nothing in the submissions filed on behalf of Ms Kyle which assist the Authority in any way in fixing costs.

[8] In the normal course of events, costs follow the event, that is the unsuccessful party has to contribute to the costs of the successful party. Ms Kyle was completely unsuccessful in the present proceeding and therefore, in principle, an argument exists for her to contribute to the costs of the successful employer.

[9] Further, the successful employer was represented by able counsel who not only did a thoroughly competent job in dealing with the matter, but also did so most cost effectively. Counsel's services were timely and cost effective.

[10] There is a *Calderbank* letter in play. If it had been accepted by Ms Kyle, it would have materially advantaged her over the eventual outcome after the Authority's investigation. The *Calderbank* letter was timely; it was issued some five weeks before the investigation meeting and properly after the second unsuccessful mediation. The Brittenden Partnership urge on me the conclusion that because they had tried to settle the matter prudently and well in advance of the investigation meeting, the fact that Ms Kyle failed to pick up that settlement offer ought to count against her in the fixing of costs.

[11] While I think it would be wrong for the Brittenden Partnership to have to meet all of the costs of their successful defence of Ms Kyle's claim, they have had the benefit of able counsel who dealt with the matter most cost effectively and it is probably fair for the Authority to observe that the Brittenden Partnership is in a better position to absorb the greater part of their costs than Ms Kyle may be.

[12] However, Ms Kyle should make a contribution to the successful party's costs and in the absence of any information about her ability to pay, I fix her contribution at $1,500 and direct that she is to make that payment to the Brittenden Partnership as a contribution to their legal costs in this matter.

[13] If necessary, Ms Kyle is to have time to pay this amount.

James Crichton
Member of the Employment Relations Authority