

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Michael Lord (Applicant)
AND Fletcher Steel Ltd t/a Pacific Steel (Respondent)
REPRESENTATIVES Chris Patterson, Counsel for Applicant
Samantha Turner, Advocate for Respondent
MEMBER OF AUTHORITY Marija Urlich
SUBMISSIONS 1 and 10 November 2004
DATE OF DETERMINATION 20 April 2005

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] In a determination dated 4 October 2004 I found the applicant's dismissal for redundancy was conducted in a procedurally unfair manner and awarded him \$7000.00 pursuant to section 123(c)(i) of the Act. Costs were reserved and I invited the parties to attempt to resolve this issue themselves.

[2] The applicant has since challenged the determination. The parties have requested a determination of the issue of costs.

[3] I have received and considered submissions on costs from Mr Patterson and Ms Turner.

[4] In his costs submissions Mr Patterson advises the total costs incurred by Mr Lord are \$21,710.77 plus disbursements of \$70.00. Mr Patterson seeks a costs award of \$12,594.46, a sum equivalent to 60% of actual costs incurred and, he submits, a reasonable contribution towards actual costs reasonably incurred. In the alternative, Mr Patterson seeks a contribution to costs of \$7000.00, representing \$3500.00 per day for the two day hearing. Mr Patterson submits as the successful party the applicant is entitled to a contribution to his costs. Mr Patterson submits the respondent's settlement offer of 25 November 2003 was a contribution to legal costs only, made no admission of liability, did not mention contractual entitlements or compensate for hurt and humiliation and was ultimately rejected by the applicant. Mr Patterson submits the costs incurred by the respondent are excessive.

[5] Ms Turner seeks a costs award in favour of the respondent to the sum of \$16,679.91 (including GST and disbursements). She relies on the settlement offer made to the applicant by the respondent for \$10,000.00 on 25 November 2003. This settlement offer was made on a "without prejudice save as to costs" basis. Ms Turner advises costs of \$18,714.93 were incurred by the respondent subsequent to the settlement offer and that the total costs incurred by the respondent were in excess of \$65,000.00. She submits the respondent is entitled to rely on the settlement offer because it was a valid Calderbank offer, the applicant was awarded less than the offer and the case was unduly complicated and protracted due to the applicant's conduct.

[6] The investigation meeting was held over two days, on 2 and 3 October 2003, and was adjourned part heard. An investigation meeting was unable to be reconvened and the Authority received further information from the parties through December 2003 and January and February 2004. The respondent's settlement offer was made at a mid-point in the investigation and after both parties had incurred the majority of their costs. A valid Calderbank offer is made prior to commencement of a hearing. However, given the Authority's investigation model it is appropriate for a settlement offer in this form to be a factor in the consideration of costs.

[7] This was a lengthy investigation. The applicant raised multiple claims most of which were not upheld. However, the applicant did achieve a measure of success and it follows that a costs award should be made in his favour. Any award should fairly reflect the particular circumstances of the proceedings; the importance of the proceedings to the parties (of which I do not doubt), that a reasonable settlement offer was made part way through the investigation and declined causing further costs to be incurred and that the investigation meeting was unable to be reconvened, at no fault of the respondent, which protracted and complicated the conclusion of the investigation. Assuming a reasonable charge out rate of \$250.00 per hour and allowing 24 hours for hearing time, twice the actual hearing time, the total reasonable costs incurred would be \$6000.00.

[8] Taking all the circumstances into account \$4000.00 is a reasonable contribution for the respondent to make to the applicant's costs and I so order.

Marija Urlich
Member of Employment Relations Authority