IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 173
5466956

	BETWEEN	TERE LAWSON Applicant
	A N D	NEW ZEALAND TRANSPORT AGENCY Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Applicant in person Rachel Burt, Counsel for the Respondent	
Submissions received:	16 June 2015 received from the Applicant 18 May 2015 & 17 June 2015 from the Respondent	
Date of Determination:	19 June 2015	

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 28 August 2014, [2014] NZERA Auckland 350, the Authority refused to grant an application by the Applicant, Mr Tere Lawson, to be granted interim reinstatement to his employment with the Respondent, New Zealand Transport Agency (NZTA).

[2] By determination issued on 21 April 2015, [2015] NZERA Auckland 116, the Authority found that Mr Lawson had not been unjustifiably dismissed from his employment by NZTA.

[3] Costs were reserved in both matters in the hope that the parties would be able to resolve this issue between themselves. Unfortunately, they have been unable to do so, and Ms Burt, on behalf of NZTA, has filed a submission in respect of costs.

[4] The two matters involved 5½ days of meeting time. Ms Burt, citing actual costs of $99,907.80 plus GST incurred in defending Mr Lawson's personal grievance between the time a Calderbank[1] offer, that is a without prejudice save as to costs offer, (the Calderbank Offer), was made to Mr Lawson expired on 8 July 2014 and the conclusion of the substantive hearing on 18 March 2015. Ms Burt is seeking a contribution to costs in the sum of

[1] *Calderbank v Calderbank* [1976] Fam 93 (CA)

$33,000.00 based on a daily tariff of $6,000.00, which sum represents approximately one-third of the actual costs incurred by NZTA.

Principles

[5] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

> ***15 Power to award costs***
>
> *(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*
>
> *(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[6] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*[2].

[7] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[3] *(PBO Ltd)* these include:[4]

- *There is a discretion as to whether costs would be awarded and what amount.*
- *The discretion is to be exercised in accordance with principle and not arbitrarily.*
- *The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.*
- *Equity and good conscience is to be considered on a case by case basis.*
- *Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.*
- *It is open to the Authority consider whether all or any of the parties costs were unnecessary or unreasonable.*

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[2] [1996] 2 ERNZ 622
[3] [2005] 1 ERNZ 808
[4] Ibid at para [44]

- *That costs generally follow the event.*
- *That without prejudice offers can be taken into account.*
- *That awards will be modest.*
- *That frequently costs are judged against a notional daily rate.*
- *•The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.*

[8] It is a principle of *PBO Ltd* that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*[5] at para [48] "*As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.*

Submissions for the Respondent

(i) The Calderbank Offer

[9] Ms Burt on behalf of NZTA submits that the legal costs total of $99,907.80 incurred following the date when the Calderbank Offer expired consisted of $33,570.00 plus GST associated with preparation, communications with the client and the Authority, and attendance at the interim hearing.

[10] The remaining $62,337.80 plus GST was associated with the preparation, communication with client, the applicant and the Authority, and attendance at the five day substantive hearing which was split into two separate investigation meetings.

[11] While there were two solicitors working on the matter at times, each handled different aspects of the preparation and duplicated time was charged. Further, junior counsel's attendance at the investigation meeting was charged at a significantly lower rate than the standard junior counsel rate.

[12] Although counsel for the Respondent was based in Wellington, it is submitted that this did not inflate costs as the lawyers and witnesses spoke by telephone, liaised by email, or arranged to meet when the witnesses were on business in Wellington, which is where NZTA's head office is based. In addition, Ms Burt submits that NZTA has not asked for expenses or disbursements which include the cost of any flights between Wellington and Auckland, or the costs of accommodation.

[5] [2001] ERNZ 305

[13] NZTA submits that in accordance with the principle from *PBO Ltd* the *Calderbank* Offer of $12,000 was made to Mr Lawson on 7 July 2014, just after mediation. It submits that this *Calderbank* Offer should be taken into account and the total costs awarded to NZTA should be increased on this basis.

[14] It is submitted by NZTA that the Calderbank Offer was very generous in the circumstances which included Mr Lawson having just attended mediation and being legally represented at that time. He should therefore have been well aware of the costs consequences in rejecting the *Calderbank* Offer. It was made at a time when both parties had incurred only small legal costs. It was a pragmatic offer made by NZTA in the hope that a resolution would mean both parties could then avoid having to incur substantial legal costs.

[15] It is submitted that both the Authority and the Court have held that where an offer to settlement has been made by a party in litigation and the other party unreasonably rejects that offer, that rejecting party should bearing some responsibility for the costs incurred after the time of that offer. In various cases before the Authority such a decision has resulted in an increase to the daily tariff being awarded

[16] NZTA's Calderbank Offer was emailed to Mr Lawson's representative at 10.01am on Monday 7 July 2014. At that time Mr Mark Ryan was Mr Lawson's representative. The Calderbank offer remained open for acceptance until the close of business on Tuesday 8 July 2014.

[17] In clause 8 of the Calderbank Offer letter, which was entitled *Without Prejudice except as to costs*, it stated:

> *In the event this offer is not accepted and Mr Lawson proceeds with his claim, but fails or does not succeed to any great extent in the offer made in this letter, we reserve the right to produce this letter to the Authority or Court on the question of costs.*

[18] Mr Ryan on behalf of Mr Lawson did not accept the Calderbank Offer and made no effort to negotiate. Mr Ryan later confirmed in a telephone call to NZTA counsel that he had received the *Calderbank* Offer on the day it was sent.

[19] Following Mr Ryan's withdrawal as Mr Lawson's counsel on 6 August 2014 and after NZTA had incurred substantial further costs associated with the interim hearing, Mr Paul Barrowclough, Mr Lawson's new representative, advised NZTA that apparently Mr Ryan had not passed the Calderbank letter on to Mr Lawson. Mr Barrowclough claimed that his client therefore did not have an opportunity to consider the Calderbank Offer either prior to the deadline or at any stage after the deadline.

[20] NZTA submits that if Mr Ryan did fail to pass on the Calderbank letter to Mr Lawson, that is not something which should disadvantage NZTA but rather is a matter between Mr Lawson and Mr Ryan.

[21] It is submitted that Mr Ryan had authority to act on behalf of Mr Lawson and so had an obligation to promptly disclose all information he acquired that was relevant to the matter for which Mr Lawson had engaged his services.[6]

[22] Mr Ryan held himself out as being Mr Lawson's representative and so NZTA was entitled to rely on that authority and indeed was *obliged* therefore to rely on any settlement offers through Mr Ryan. Accordingly NZTA was entitled to assume that the offer would be passed on to Mr Lawson[7].

[23] It follows that whether or not Mr Ryan did then pass on the Calderbank Offer to Mr Lawson, NZTA is still reasonably able to rely on the Calderbank Offer in consideration of assessing appropriate costs, given the fundamental principles regarding the recognised authority of a legal representative.

[24] As is stated in the Calderbank Offer, the timeframe was short because legal costs (associated with the urgent interim hearing) were already accruing and because the *Calderbank* Offer followed on from discussions at mediation. Mediation between the parties took place on Friday 4 July 2014. The Calderbank letter was sent the following working day, on Monday 7 July 2014. NZTA submits that the Calderbank Offer was therefore made in a timely way and Mr Lawson had sufficient time to take advice on the Calderbank Offer and consider that advice before making his decision.

[25] NZTA submits that the Calderbank Offer reflects a generous offer by it to resolve the issues and is a significant factor to be taken into account when assessing costs. The Calderbank Offer was made well before the application for reinstatement had been heard and, if accepted, would have saved both parties significant time and expense.

[26] In all of the circumstances, and especially given NZTA's complete success at the Authority, it was unreasonable for Mr Lawson to reject the offer.

[27] NZTA submits that in these circumstances, Mr Lawson should bear responsibility for significant costs incurred after the time of the Calderbank Offer and as such a significant increase to the daily tariff is appropriate.

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[6] Lawyers and Conveyances Act (Lawyers Conduct and Client care) Rules 2008, rule 7; see also *McKastell v Benseman [1989] 1 NZLR, 87 per Jeffries J;* Clark Mouat [1993]3 NZLR 641 (PC)
[7] *Sandilands v Chief Executive of the Department of Corrections* WC 23/09, 14 October 2009 at [29]

[28] It is submitted that the costs awarded to NZTA should be further increased in accordance with the principle from *PBO Ltd* that there were delays caused to the proceeding by Mr Lawson and his representatives which greatly added to the costs. In particular –

(a) Mr Lawson's refusal to proceed straight to a substantive hearing

[29] NZTA was keen to proceed urgently to a substantive hearing as opposed to having a separate interim hearing on the matter first. It made its position clear at the Authority teleconference on 14 July 2014 and said it could make itself urgently available for a substantive hearing.

[30] However, Mr Lawson insisting on having two separate hearings, an interim one and then a substantive one. Such an approach significantly increased overall costs for both parties.

[31] At the time of the teleconference NZTA made it clear it took the view that having an interim hearing and a separate meeting on the merits caused unnecessary additional costs and noted for the record that it would make such a point when it came to consider costs. This was further reinforced in a letter from NZTA and by subsequent emails sent to both the Authority and Mr Lawson's representative.

[32] Mr Lawson wanted, despite NZTA's view, to proceed with an interim hearing, and one was set down for 8 August 2014. However, the interim hearing scheduled for 8 August 2014 was subsequently postponed by Mr Lawson. Given Mr Lawson's express preference for a separate interim hearing, the Authority following teleconferences, set down a new date for an interim hearing on 21 August 2014.

[33] NZTA submits that Mr Lawson's continued insistence on having a separate interim hearing and refusal to proceed straight to an urgent substantive hearing unnecessarily inflated costs.

(b) Last minutes changes in counsel

[34] After a teleconference with the Authority on 14 July 2014, the interim hearing was set down for 8 August 2014. Prior to this date NZTA had spent significant time and attention to ensure the selected date could fit with Mr Lawson's chosen representative, Mr Ryan's, schedule.

[35] At a further teleconference with the Authority on 24 July 2014, Mr Ryan advised that the date in October suggested by the Authority for the substantive investigation did not suit

him. He advised he would not be available for a substantive hearing until February or July 2015.

[36] On 29 July 2014, one week before the interim hearing, the substantive hearing was set down 8, 9 and 10 October 2014. Mr Ryan did not take any issue with those dates or indicate that it would impact on his availability to appear at the interim hearing.

[37] However, on 6 August 2014, two days before the scheduled interim hearing, Mr Ryan informed the Authority and NZTA that he was unable to represent Mr Lawson at the substantive hearing set down for 8 to 10 October and so was withdrawing as counsel, and was therefore unavailable for the interim hearing in two days' time.

[38] NZTA and the Authority were originally informed that Mr Lawson would represent himself at the interim hearing. However, later on the evening of 6 August 2014, NZTA received an email from Mr Paul Barrowclough, which stated that he now represented Mr Lawson. He requested a postponement of the interim hearing. This suggestion was strongly opposed by NZTA in a letter to Mr Lawson and the Authority dated 7 August 2014.

[39] The ultimate outcome of the communications between the parties as noted above was that a postponed interim hearing could take place on 21 August 2014.

[40] NZTA submits that the frequent unavailability of Mr Lawson's counsel and subsequent change in his counsel, required additional liaison with its client and various witnesses, additional teleconferences, significant additional written communications and the postponement of an interim hearing – all of which conduct by Mr Lawson increased costs unnecessarily.

[41] It is further submitted in relation to the costs associated with the change in counsel and postponement of the interim hearing, that NZTA had suggested to Mr Ryan in the very first teleconference on 14 July that he might not be the appropriate counsel for Mr Lawson given his apparent limited availability for hearing dates and suggested that Mr Lawson might consider a change in counsel. Mr Ryan sought his client's view on this point and confirmed on 15 July 2014 in an email that Mr Lawson wished to proceed with him as counsel. Unfortunately, NZTA's concern on this point proved to be warranted.

[42] It is submitted that the actual costs incurred by NZTA in relation to liaising with witnesses to ascertain dates, attending telephone conferences in relation to setting dates, drafting letters and emails to the Authority and to Mr Lawson's two counsel in relating to dates and postponement of the interim hearing was $7,156.50.

(c) The late filing of the key evidence – Tribunal transcript and following

[43] Mr Lawson filed a key document, the Disputes Tribunal transcript of close to 100 pages, the afternoon before the investigation meeting. There was no notice that this document was coming and the document bundle had been prepared by NZTA with Mr Lawson's input and finalised the week before.

[44] Not wishing to postpone the investigation meeting, NZTA agreed to proceed the next day and asked for a slightly later start time the next morning so that it could discuss the document with its witnesses. Having the document received prior to the start of the investigation meeting meant that NZTA then had to use some time on the first day of the investigation meeting to consult with its witnesses and to consider whether it wanted to apply to have some additional documents submitted into evidence in response.

[45] In explanation for the late delivery of the document, Mr Lawson advised only that the Tribunal Transcript was difficult to obtain.

[46] NZTA submits that the delay to the investigation meeting caused by Mr Lawson as late introduction of evidence contributed to the investigation meeting being needlessly lengthened and was a key factor in why the meeting was unable to be heard in the original three day time slot that had been set down for the investigation meeting.

[47] It is further submitted that ultimately the document was not even helpful to Mr Lawson's case, and so it was a completely unnecessary inflation of costs both in the delay to the start of the investigation and to the additional time taken to examine the witnesses in relation to the document.

(d) A lack of expedition in the presentation of Mr Lawson's case to the Authority

[48] It is submitted that the cross examination of NZTA's witnesses by Mr Barrowclough was unnecessarily long and repetitive, frequently regarding issues that were not in dispute or were irrelevant to the proceedings.

[49] The Authority Member had to intervene on a number of occasions to remind Mr Barrowclough of the issues in dispute and ensure relevance of questions. The meeting was needlessly lengthened by this approach and as a direct consequence the investigation meeting could not be completed in the scheduled three days.

[50] A further two days were then required to be set down in March 2015 (five months later) for the two remaining respondent witnesses to give their evidence.

[51] NZTA make it clear that it was available later in 2014 for a resumed hearing date, but Mr Barrowclough was unable to agree a date until March 2015. Subsequently, just prior to the resumed hearing in March 2015, Mr Barrowclough informed the Authority that he was withdrawing as counsel.

[52] Given the time delay of over five months between the two hearings, NZTA incurred further costs in having to spend time refreshing itself, re-preparing its witnesses and also had to cover further travel and accommodation expenses for counsel and its witnesses; associated expenses which are not being claimed as part of this costs application.

[53] At the resumed investigation meeting there were only two NZTA witnesses remaining. However, Mr Lawson, now representing himself, cross examined each of them for over a day. Again, the cross examination was repetitive and often irrelevant to the matter at hand and so the matter was needlessly lengthened. The Authority Member had to interrupt on a regular basis and ask Mr Lawson to focus on the relevant issues.

[54] While that NZTA acknowledges that some leeway should be given for an applicant representing himself, Mr Lawson was advised frequently of what was required by his questioning, but despite these frequent reminders by the Authority, continued to ask irrelevant and repetitive questions.

[55] NZTA submits therefore that the investigation meeting was unnecessarily and significantly lengthened as a result of Mr Lawson's approach to it. NZTA was put to unnecessary additional costs because Mr Lawson elected to run untenable arguments and ask questions that were largely irrelevant to the matters at hand. NZTA submits it is appropriate to reflect this conduct in the costs that are awarded.

Increase to the daily tariff

[56] NZTA submits that this is not a typical example of an unsuccessful claim where costs against the Applicant are limited to daily tariff. In the circumstances as outlined above, NZTA says in summary:

(a) The matter could have been resolved before the interim hearing and the parties could have been saved significant expense had Mr Lawson accepted the generous settlement offer; and

(b) Numerous delays and the conduct of Mr Lawson and his representatives significantly inflated costs.

[57] NZTA submits that a higher award of the usual amount of costs is appropriate to compensate it for the unnecessary time and costs incurred. Accordingly, it is submitted that the daily tariff rate should be increased to $6,000.00 per day.

[58] NZTA submits that in the circumstances this is not an excessive amount and is equal to only around one-third of its actual costs incurred.

[59] Finally, NZTA submits that any limitations on Mr Lawson's ability to pay should be regarded as a matter going to the discretion of the Authority to award compliance of any costs order if and when there arises any issue of enforcement in relation to the costs decision that the Authority should make.

[60] In conclusion, NZTA submits that Mr Lawson should be ordered to pay costs of $33,000.00 based on a daily tariff of $6,000.00 and being approximately one-third of NZTA's actual costs incurred.

Submissions for the Applicant

[61] Mr Lawson submits that the actual costs incurred by NZTA are grossly excessive; citing the engagement of two solicitors from Wellington when his employment was based in Auckland and the investigation meetings took place in Auckland which unnecessarily inflated costs.

[62] In respect of the Calderbank Offer, Mr Lawson submits that issues regarding its non-disclosure to him are now irrelevant and should not act as a reason to increase costs.

[63] Mr Lawson further submits that he did not refuse to proceed straight to an urgent substantive hearing, but that there were difficulties in so doing due to commitments of the counsel engaged at that time.

[64] In particular he submits that the Authority had set a date for the interim investigation meeting which was difficult but not impossible for Mr Ryan to set into his diary, primarily because Mr Ryan was involved in a High Court trial in the two weeks preceding the interim hearing. Mr Ryan further advised that as NZTA would probably seek dates for a substantive hearing that would not be suitable for him, he (Mr Lawson) should obtain the services of alternative counsel, however he did not wish to do so at that time as the preparation time would be excessive.

[65] Ultimately an inability by Mr Ryan to meet the substantive hearing dates requested by NZTA and agreed with the Authority for October 2014 meant that a change in representation was imposed upon Mr Lawson, causing considerable disruption to his preparation for the interim hearing.

[66] Mr Lawson submits that the change in counsel was imposed upon him by the insistence of NZTA on an early date for the substantive hearing, and this should be taken into consideration in a costs determination.

[67] Mr Lawson submits that his witnesses took just over a day of the investigation meeting whilst the remainder of the investigation meeting was devoted to NZTA's witnesses, two of whom were irrelevant, with the result that an additional two days were required.

[68] In addition, other largely irrelevant issues were canvassed and occupied unnecessary time.

Determination

[69] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a 1 day investigation meeting this would normally equate to $3,500.00, and therefore for 5½ days of investigation meeting, this would normally equate to an award of $19,250.00.

[70] However as observed by the Employment Court in *PBO Ltd* : "*The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs"*[8]

[71] There are two grounds on which NZTA argues that costs should be increased above the notional daily tariff rate.

(1) The Calderbank Offer

[72] It is necessary to consider what effect the Calderbank Offer should have upon the award of costs in this matter. The Court of Appeal in *Health Waikato Limited v Van Der Sluis*[9] observed that: "*the Calderbank letter field is fully discretionary".* The nature of this wide discretion is that if the Authority awarded a lesser amount than the amount offered in the Calderbank Offer, there would be no absolute protection to the party which had made the

[8] [2005] 1 ERNZ 808 at para [45]

[9] [1997] 10 PRNZ 514

offer in terms of costs. Equally, the Authority may take into consideration a *Calderbank* Offer when more has been awarded than was offered.

[73] The Court of Appeal in *Aoraki Corporation Ltd v McGavin*[10] in commenting on the exercise of this discretion, noted that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore these Calderbank offers without costs being impacted:

[74] Ms Lawson was wholly unsuccessful in both his claims before the Authority. Seen in this context, the Calderbank Offer which was made in a timely manner and represented a reasonable and fair opportunity to resolve the matter at an early stage prior to either party incurring further, and significant costs.

[75] The Calderbank Offer was sent to Mr Ryan, at that time, engaged by Mr Lawson to act as his representative. Mr Ryan failed to make Mr Lawson aware of the Calderbank Offer sent to him by NZTA on 7 July 2014. Ms Burt on behalf of NZTA submits that this fact should not disadvantage NZTA.

[76] It is a long held principle at common law that when a principal has authorised an agent to receive documents or money on the principal's behalf, receipt by the agent is receipt by the principal, which proposition is supported in *McGrath v Freer*[11].

[77] It is also a long held principle that knowledge acquired by an agent is imputed to his principal if the agent was at the time employed on the principal's behalf as held by the Court of Appeal in *Jessel Properties v UDC Finance*[12] as stated at para [143]:

> *The general principle that notice given to or knowledge acquired by an agent is imputed to his principal only of the agent was at the time employed on the principal's behalf is recognised in the texts and the cases ….This accords with good sense and justice. Thus if notice is given to an agent in reliance on his ostensible authority to receive it, the principal will be stopped from denying receipt of the notice … But there is no reason to prevent the principal from denying receipt in the absence of such reliance. Apart from this kind of case, the reason for imputing to the principal knowledge which the agent has acquired has been variously explained. Bowstead at p. 412 puts it in terms of a presumption that the knowledge will have been passed on, either because it was acquired in respect of a matter where the agent has power to bind the principal or because he has a duty to inform the principal.*

[10] [1998] 1 ERNZ 601
[11] (1982) 10 NZLR 688
[12] [1992] 1 NZLR 138

[78] I find that this is a classic agency situation, and therefore the Calderbank Offer is a significant factor which can be taken into consideration when I am determining the appropriate level of costs in this matter.

(2) Conduct of the parties

[79] I accept that there were several delays in the progressing of this matter which can be attributed to both other commitments of, and to the changes to, Mr Lawson's representatives, and that this resulted in additional costs to NZTA as submitted by Ms Burt.

[80] The role of the Authority is to:[13] "*to deliver speedy, informal, and practical justice to the parties in any matter before it".* I do not find it unreasonable for NZTA to have sought an urgent early substantive hearing rather than an urgent interim hearing followed by a subsequent substantive hearing as, provided dates can be agreed by the parties and the Authority, this can often lead to speedy and practical justice for the parties.

[81] However there were significant delays in being able to set this matter down, particularly in relation to the substantive investigation meeting, due to lack of availability of the Applicant's counsel, which resulted unnecessary delays and postponements, and which I find increased costs for NZTA.

[82] I also accept that the late filing of the Tribunal Transcript caused some delay in the proceedings.

[83] I find that the substantive matter was further prolonged by the conduct of questioning by both Mr Barrowclough at the initial investigation meeting and Mr Lawson himself at the resumed substantive investigation meeting. Whilst I accept that an unrepresented applicant may have some difficulty in conducting cross-examination, I consider it pertinent that Mr Lawson is an intelligent and articulate individual and that I explained the principles and purpose of the cross-examination process to him several times during the course of the investigation meeting.

[84] Mr Lawson has submits that NZTA presented two witnesses at the investigation meeting who had no relevant information to provide. I find it is relevant that Mr Lawson was initially seeking reinstatement, and only withdrew this claim at a late stage in the investigation process. It is submitted by NZTA that the two witnesses' evidence was initially required in respect of the reinstatement application, and that the length of time of their examination at the investigation meeting was lengthened due to cross-examination by the Applicant. This accords with my own recollection and notes.

[13] Employment Relations Authority Regulations 2000 s. 4(1)(c)

[85] I do not find that the inclusion of the evidence of these two witnesses resulted in a full additional two days being required for the investigation meeting.

Application for a stay on costs

[86] Mr Lawson has applied for a stay on a costs determination on the basis that this matter is still 'ongoing' in that he has appealed my determination to the Employment Court. Pursuant to s. 180 of the Act, an election to have a challenge heard by the Employment Court does not operate as a stay: "*...unless the court, or the Authority, so orders".*

[87] I consider it appropriate that costs are dealt with in the Authority to conclude the Authority's process prior to the appeal process. This is a widely accepted principle upheld in the Authority on many occasions as referenced in *Sandilands v Chief Executive of the Department of Corrections*[14].

[88] I find that the conduct of the Applicant in this matter increased costs to NZTA unnecessarily and this is also a factor which should be taken into consideration when I am determining the appropriate level of costs in this matter.

[89] Having considered all of the circumstances, I can see no justification for not making the costs award to NZTA as claimed in the submissions by Ms Burt as the successful party in the proceedings.

[90] Accordingly, Mr Lawson is ordered to pay a contribution to NZTA's costs in the sum of $33,000.00 pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[91] Mr Lawson has alluded to his financial circumstances being such that he would find it difficult to meet an award of costs against him. Although he has provided no supporting documentary evidence, I note that he has offered to provide such documentation upon request.

[92] There is no evidence that Mr Lawson is impecunious, although I accept he may find it difficult to pay an award of costs. However I consider that considerations of ability to pay can be dealt with at the discretion of the Authority at such time as an application in respect of compliance with the costs award is made, should that be the case.

Eleanor Robinson
Member of the Employment Relations Authority

[14] NZERA Wellington, WA67A/09