

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** John Joseph Maio (Applicant)

**AND** Effective Fencing Management Limited (Respondent)

**REPRESENTATIVES** Helen Thorpe, for Applicant  
Hugh Fulton, for Respondent

**MEMBER OF AUTHORITY** Y S Oldfield

**SUBMISSIONS** 16 July 2003, 21 July 2003, 22 July 2003, 1 August 2003, 6 August 2003

**DATE OF DETERMINATION** 1 September 2003

**DETERMINATION OF THE AUTHORITY AS TO COSTS**

The applicant's claim of unjustified dismissal was determined on 19 June 2003. I concluded that the applicant's dismissal was unjustified and awarded remedies for distress and for loss of earnings. However remedies were reduced by 75% for contributory conduct. The total awarded to the applicant was \$7,379.16. That determination is the subject of a challenge to the Employment Court.

Mr Maio is also pursuing further claims in respect of holiday pay and commission payments, which have been set down for an investigation meeting in September 2003. However I have concluded that it is appropriate for me to proceed to determine the costs application in relation to the personal grievance before the challenge is heard in the Employment Court.

Mr Maio was represented in his personal grievance proceedings but because he engages in professional employment advocacy himself, and in order to keep costs to a minimum, he undertook much of the preparation work himself. He told me that he has "absorbed these costs to date in the sum of \$8550.00" and "reserves the right to claim those costs in the event that the Respondent seeks costs for himself for the purpose of the proceedings."

However Mr Maio told me that he claims to costs of and incidental to this application as follows:

- “(i) Counsel, Ms Helen Thorpe in the amount of \$2,328.76.
- (ii) In respect of the application for compliance and costs, dated 8 October 2002, a table cost of \$1,140.00.
- (iii) In respect of invoice #1324 from ERS in the amount of \$300.00.
- (iv) Filing costs of \$70.00
- (v) A compensatory allowance for Mrs Maio, Mr Jones and Mr Dickenson in respect of the hearing 4 March 2003.”

Mr Maio told me that his preparation and expense were increased in two ways:

- Early in the investigation the respondent indicated that it was making certain counter-claims against the applicant however these claims were not particularised and were not pursued.
- On several occasions the respondent had failed to adhere to the Authority's timetable for the investigation. (One of these being the incident which was the subject of the above mentioned 8 October application.)

Counsel for the respondent also seeks an order for costs. He relies on a Calderbank offer made to the applicant in October 2002 in the total sum of \$10,250.00, of which \$7,000.00 was consideration for withdrawal of the problem before the Authority. The balance was to be in settlement of issues between the parties which are the subject of High Court proceedings (and are yet to be determined.) The Calderbank offer was conditional on the resolution of all matters between the parties, not just those before the Authority. The respondent seeks a contribution towards costs of \$6,000.00. It argues:

- The amount of costs sought is less than half the actual costs of \$14,387.02.
- costs were increased by the applicant's conduct of the case and unnecessary pre-investigation applications.
- The applicant's prosecution of the case is on the basis that he "has a serious principle to debate and will do so regardless of cost."
- This is "not an affluent employer but rather a struggling business."

### **Conclusions**

Irrespective of the outcome of the other proceedings in which the parties are involved, and whatever their merits, I cannot treat the respondent's offer for settlement as a true Calderbank offer. The respondent made settlement of the applicant's claim conditional on matters unrelated to the problem before the Authority. No award of costs will therefore be made in the respondent's favour.

Instead I now turn to consider the applicant's own application for an order for costs. I make the following points:

- On occasions the respondent failed to meet deadlines contained in the Authority's timetable. However, I do not find any grounds for the applicant's assertion that the respondent acted in breach of good faith towards the applicant. I point out that the timetable is imposed principally for the benefit of the Authority. In any event, I am not satisfied that the applicant has demonstrated that this increased his costs. I do not therefore take into account the "table cost of \$1,140.00" associated with the application of 8 October.
- Nor can I make any award in respect of the unexplained "compensatory allowance" for three of the applicant's witnesses.
- I accept that the applicant unnecessarily complicated the investigation process. In my view, Mr Maio has not grasped the informal and low level nature of the Authority's process. However, the costs claimed do not reflect this and are reasonable given the nature and complexity of the case. The investigation meeting ran over two days but totalled approximately a day and a half of meeting time. Ms Thorpe's costs are very modest, no doubt because Mr Maio conducted much of the preparation for himself.

It is appropriate that the respondent make a contribution to the applicant's costs. In all the circumstances, I consider a costs award of \$2,000.00 is appropriate.

**The respondent is ordered to pay to the applicant the sum of \$2,000.00 as a contribution to his costs, as well as a further \$370.00 disbursements.**

Y S Oldfield  
Member of Employment Relations Authority