

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 53  
5339578

BETWEEN                      KRISTINA MOHN  
   Applicant  
  
AND                                SMITHS CITY (SOUTHERN)  
   LIMITED  
   Respondent

Member of Authority:      K J Anderson  
  
Representatives:            S Austin, Advocate for Applicant  
   S Wilson, Counsel for Respondent  
  
Submissions received:      23 December 2011 from Respondent  
   Nil from Applicant  
  
Determination:              14 February 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In a determination dated 14<sup>th</sup> December 2011<sup>1</sup>, the Authority found that the claims of Ms Mohn against the respondent Smiths City (Southern) Limited (SCL) could not be upheld. The parties were invited to resolve the matter of costs but have been unable to do so. As the successful party, SCL have filed submissions on costs. There are no submissions for Ms Mohn.

[2]     The investigation meeting took half of a day. The respondent has incurred total costs of \$15,000.00 (GST exclusive) as revealed by the invoices provided. The submissions for the respondent acknowledge the principles set out in *PBO Limited (formerly Rush Security Limited v Da Cruz*, [2005] ERNZ 808 and the usual tariff based approach of the Authority, which would usually see a costs award of around \$1,500 for a half day hearing.

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<sup>1</sup> [2011] NZERA Auckland 530

[3] However, the respondent provides evidence of a “*Without prejudice save as to costs*” letter (commonly known as a *Calderbank* letter) dated 1<sup>st</sup> July 2011, in which an offer of settlement in the sum of \$1,500 was made to Ms Mohn but not accepted. And given that this offer was made substantially before the Authority’s investigation meeting on 13<sup>th</sup> September 2011 and prior to the respondent incurring the substance of its costs, then; “... *a costs award well in excess of the tariff guidelines is merited and warranted.*” The respondent submits that an award of costs “*in the region*” of \$6,000 is appropriate.

[4] Ms Mohn was completely unsuccessful with her claims. And they were barely arguable, particularly given the clarity of the evidence that was freely available to her and her advocate prior to the investigation meeting; and which gave considerable credence to the defence adopted by the respondent. In the round, this was always going to be a high risk case for the applicant. Therefore, following established precedent<sup>2</sup> whereby a “steely approach” to awarding costs should be taken, where reasonable settlement proposals have been rejected, within a reasonable time frame prior to a hearing, an award of costs in excess of the normal tariff based scale is warranted.

[5] Regrettably, there are no costs submissions for Ms Mohn and hence I have no evidence of her resources in regard to paying a reasonable contribution to the costs incurred by the respondent. Nonetheless, due to the fact that I heard the substantive matter, I have some knowledge of Ms Mohn’s personal circumstances; particularly that she has a relatively low income derived from her new employment. Therefore, I conclude that an award of costs of the sum of \$2,500 is appropriate.

### **Determination**

[6] Taking all of the circumstances into account, Ms Mohn is ordered to pay to Smiths City (Southern) Limited, within 28 days, legal costs of \$2,500.00.

**K J Anderson**

Member of the Employment Relations Authority

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<sup>2</sup> For example: *Watson v New Zealand Electrical Traders Ltd t/a Bray Switchgear* (2006) 4 NZELR 59; and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172