

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 372  
5328358

BETWEEN                      MICHAEL MAHER  
   Applicant  
  
AND                                APEX GENERAL LIMITED  
   Respondent

Member of Authority:        Yvonne Oldfield  
  
Representatives:              Richard Harrison for Applicant  
   Kathryn Beck for Respondent  
  
Submissions received:        12 August 2011 from Applicant  
   4 August 2011 from Respondent  
  
Determination:                24 August 2011

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In a determination dated 10 June 2011 it was found that an accord and satisfaction between the parties precluded the applicant's pursuit of his personal grievance claim. The determination concluded with the following directions regarding costs:

*"[32] Costs are reserved. In the event that this issue cannot be resolved between the parties any application for costs, with submissions in support, must be lodged within 28 days of this determination."*

[2]     On 4 August 2011 Ms Beck lodged a memorandum as to costs on behalf of the respondent. She advised that the parties had attempted to settle the issue of costs but had been unable to reach agreement and went on:

*"Regrettably, negotiations between the parties attempting to resolve the issue of costs took longer than the 28 days prescribed by the Authority. On the basis that this matter has been unable to be resolved between the parties, without the intervention of the Authority, the Respondent now seeks a determination of the Authority as to an appropriate award of costs."*

*The Respondent seeks an award of costs and disbursements in its favour in the amount of \$2,250.00 plus GST and disbursements."*

[3] For the applicant, Mr Harrison opposed the costs application. In relation to it being out of time, he had this to say:

*“The determination of the Authority makes clear that any application for costs was to be lodged within 28 days of the determination, this required an application to be filed by 8 July 2011. This application was not filed until August 2011, well out of time. It is submitted that the Authority should not in all good conscience consider an application that is over 3 weeks out of time.*

*The parties did have without prejudice discussions/email exchanges around the issue of costs; however this does not negate that requirement to comply with the 28 day timeframe set out in paragraph 32 of this determination, which clearly directs that any submissions in support of an application “must be lodged within 28 days of this determination.” It would be quite unfair for the Authority to now make a direction in respect of costs in these circumstances as the applicant assumed that the respondent was not going to pursue costs, a factor in his deliberations around whether or not to appeal the decision.”*

### **Determination**

[4] I accept that timetabling directions (such as those set out in paragraph [32] above) should not be applied rigidly or in a way that is contrary to the equity and good conscience jurisdiction of the Authority. Extensions to the time for filing may be granted in circumstances where leave is sought prior, or where the party seeking the extension provides good reason why it would be unfair for the Authority to decline to do so.

[5] This is not however such a case. The only reason advanced by the respondent as to why it should be permitted to file its costs application out of time is that it has been engaged in negotiations which ran past the 28 day period provided. I am not satisfied that this justifies an extension of time. It was open to the Respondent to reserve its rights in relation to costs by advising the Authority of this on or before the 28<sup>th</sup> day after the substantive determination. In circumstances where this did not happen, the arguments made for the applicant must prevail.

[6] I decline to consider costs on the basis that the application was well out of time.

Yvonne Oldfield

Member of the Employment Relations Authority

