

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 35A/08
5079908

BETWEEN MICHAEL PATRICK ORGAN
Applicant

AND INTEGRAL TECHNOLOGY
GROUP LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Rodger Pool for Applicant
Chris Patterson for Respondent

Submissions received: 5 March 2008 from Applicant
1 April 2008 from Respondent

Determination: 1 April 2008

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination AA 35/08 (8 February 2008) the Respondent was found to have unjustifiably disadvantaged the Applicant in how it carried out the redundancy of his position and was ordered to pay him \$6300 compensation. The Applicant failed to establish that the redundancy was not made for genuine business reasons and amounted to an unjustified dismissal.

[2] During the investigation meeting the Respondent accepted that aspects of how it carried out its redundancy decision were unjustified and that it had wrongly withheld certain payments to the Applicant. It agreed to pay for an agreed notice period, a withheld commission, holiday pay and interest.

[3] The Applicant seeks \$3000 costs noting he was awarded compensation and the Respondent's belated concessions during the investigation meeting. The Respondent

did not appear to have properly considered the validity of the notice and bonus claims between the matter being raised by Applicant's counsel in November 2006 and the investigation meeting, despite attending mediation in the interim.

[4] The Respondent submits costs should lie where they fall because:

- (i) it made a Calderbank offer during an adjournment on the day of the investigation meeting, which if accepted would have let the Applicant with a net benefit of \$3700 more than was subsequently awarded by the Authority; and
- (ii) the Respondent successfully defended the Applicant's redundancy as justified for genuine business reasons but was put to some cost to do so.

[5] Costs in this matter may be set according to a usual daily tariff after considering any factors in the particular circumstances of the case requiring an adjustment up or down: *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.

[6] I give the following circumstances of this case particular weight in considering costs. Firstly, the Respondent only belatedly conceded some of its actions in carrying out the redundancy were unfair and that it had wrongly withheld notice and bonus payments. Secondly, the payments were improperly withheld in order to exert pressure on the Applicant (see para [36] of AA 35/08). Thirdly, the 'without prejudice save as to costs' offer made to the Applicant by the Respondent was not made until the latter half of a one-day investigation meeting. In this light I accept the Applicant's submission that the settlement offer was made after the substantial proportion of costs had been incurred and without reasonable time for it to be considered by him on the day or to now be weighed by the Authority as a factor in reducing an award for costs now.

[7] Neither do I accept the Respondent's argument that it was put to unnecessary expense in defending the genuineness of the redundancy. It may well not have faced such a case if it had acted fairly to the Applicant in making him redundant, including exercising unwarranted leverage by withhold agreed payment of notice and bonus entitlements.

[8] Accordingly I am not persuaded that costs for the Applicant should not be set

in the usual range for a one-day investigation. Overall costs follow the event of the Applicant establishing his treatment by the Respondent was unjustified.

[9] In this case costs are to be paid by the Respondent to the Applicant in the amount of \$2500.

Robin Arthur
Member of the Employment Relations Authority