

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 187A/08  
5117862

BETWEEN                      KEITH ANDREWS  
   Applicant  
  
AND                                NYALABERRY LIMITED  
   Respondent

Member of Authority:      Robin Arthur  
  
Representatives:            Applicant in person  
   Richard Mark, Counsel for Respondent  
  
Submissions received:      12 and 13 June 2008 from Applicant  
   6 and 11 June 2008 from Respondent  
  
Determination:              9 September 2008

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

[1] By determination AA 187/08 (23 May 2008) the Authority determined that the Applicant had not been constructively dismissed but had been unjustifiably disadvantaged by an action of his employer.

[2] No remedies were awarded for that disadvantage due to the level of the Applicant's contribution to the situation giving rise to it.

[3] The Respondent was ordered to pay two weeks' notice that should have been paid to the Applicant.

[4] The parties were encouraged to agree any costs issues but have been unable to do so and have both applied to the Authority for an order of costs.

[5] Costs in this matter may be determined under the principles outlined in *PBO Limited v Da Cruz* [2005] 1 ERNZ 808 on a tariff-based approach applied flexibly to the particular circumstances of the case.

[6] This was a relatively straight forward matter with one witness attending for each party. I take \$2000 as the notional daily amount for such a case, giving \$1000 as the starting point for costs in what was a half-day investigation meeting. That amount is to be adjusted up or down according to the relevant principles and the particular circumstances of the case.

[7] Costs generally follow the event. Here the Applicant failed to establish his substantive personal grievance case for unjustified dismissal but succeeded on a relatively small point regarding an unjustified disadvantage to which he was found to have contributed. He did succeed on what was essentially a wage recovery claim for two weeks paid notice which amounted to around \$550 that the Respondent was ordered to pay him. I summarise the 'event' or outcome as the Respondent having succeeded in defending the substantive personal grievance and the Applicant having succeeded in his wage recovery claim.

[8] The Respondent seeks an award of \$3000 costs. Its actual costs for the investigation (but excluding costs related to mediation) were \$4590 including GST.

[9] The Applicant seeks an award of \$855 to reimburse his lodgement fee of \$70, a fee of \$562 from his advocate and \$223 in mileage for a return trip from Kerikeri to Whangarei.

[10] A major factor in assessing costs in this case is the effect of a "without prejudice (except as to costs)" offer made by the Respondent to settle the matter. This was made immediately after the parties had attended a voluntary mediation and before the statement of problem was lodged. That offer may now properly be taken into consideration in any award of costs.

[11] In that offer, made in November 2007, the Respondent's solicitor correctly predicted that a constructive dismissal claim by the Applicant would not be successful in the Authority. He noted that if the paid notice claim were successful – as it

ultimately was – the Applicant would receive around \$550. The Respondent offered to settle the matter with an offer of \$2000. This was not accepted by the Applicant although no explicit reason for its refusal appears to have been given.

[12] Because of the ultimate outcome in light of that prior settlement offer, the Applicant cannot recover his costs from the Respondent. Instead the Respondent is entitled to a reasonable contribution to its reasonably incurred costs.

### **Determination**

[13] Costs of \$1000 are awarded to the Respondent. That amount is to be paid by the Applicant to the Respondent within 28 days of the date of this determination.

[14] I have not set a higher amount because of the nature of the case. I have taken account of the relatively modest circumstances of the Applicant and a small degree of success regarding his wages claim.

[15] The net effect is that the Applicant has to pay more in costs to the Respondent than he recovered in wages owed to him. However that is a consequence of continuing with his grievance claim after deciding not to settle the matter on the basis offered. That was a decision he was entitled to take but it comes at a cost.

Robin Arthur  
Member of the Employment Relations Authority