

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 12A/08  
5070507

BETWEEN                      MICHAEL BAMBURY  
   Applicant  
  
   ELATION LIMITED  
AND                              First Respondent  
  
   JERRY SEWTER  
   Second Respondent

Member of Authority:        Dzintra King  
  
Submissions received:        17 March 2008 from Applicant  
   14 February 2008 from Respondent  
  
Determination:                20 March 2008

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In a determination issued on 17 January 2008 I determined that I had no jurisdiction to hear the applicant's claim as he was not an employee. The respondent now seeks costs.

[2]     The respondent's actual costs were \$5,850.00 and further costs have been incurred in preparing this memorandum. The respondent seeks a contribution of \$3,861.

[3]     On 19 September 2007 the respondent issued a Calderbank letter which was to include the holiday pay owing and a contribution to legal costs.

[4]     The applicant says given that an unanticipated finding was that there was no employment relationship, that the counterclaim has not been determined and that PAYE deductions need to be recovered, that the applicant has grounds to recover costs.

[5]     The applicant seeks an award of \$2,250 which is based on a hearing time of less than a day and is within the mid range of Authority awards.

[6] I accept that the finding that there was no employment relationship would have been unanticipated. However, the applicant brought the matter against both respondents and I found that if there had been an employment relationship, the employer would have been Elation Limited. The bringing of the claim against both respondents complicated matters.

[7] I do not see any grounds for awarding costs to the applicant.

[8] The criteria for awards of costs are set out in PBO Ltd (formerly Rush Security Ltd) v Da Cruz [2005] 1 ERNZ 808. This decision does not set the starting point at 66% of the actual costs incurred. There is reference to a scale. The Calderbank letter refers only to holiday pay, which, had the applicant been an employee would have been payable in any event; and a costs contribution. There is nothing in that letter to justify an award of indemnity costs. Given the nature of this case, the applicant is to pay the respondent the sum of \$2,000.

Dzintra King

Member of the Employment Relations Authority