IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 553
5337005

	BETWEEN	GARY CORNISH Applicant
	AND	EVERLAST CONSTRUCTION LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Michael McFadden for the Applicant Susan Wicks and Jeff Wicks for the Respondent
Submissions:	21 December 2011 from both parties and 22 December 2011 from the Applicant
Determination:	22 December 2011

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By determination [2011] NZERA Auckland 505 the Authority found the dismissal for redundancy of Gary Cornish by Everlast Construction Limited (ECL) was not carried out in a fair way. Mr Cornish was awarded $2000 as compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[2] The parties were encouraged to resolve any costs issue themselves but were given a preliminary indication that if a determination was required the Authority would likely set costs at $1000 for the two-and-a-half hour investigation meeting. That amount was noted as subject to the parties' submissions on whether any factors in the particular case and its conduct required an upward or downward adjustment of the usual tariff.

[3] ECL declined to settle costs at the level of $1000 sought by Mr Cornish and

his representative lodged a memorandum seeking an award of costs of $1518 plus reimbursement of the fee to lodge the matter in the Authority. The award is sought on the basis that it is around two-thirds of his actual costs. Those costs comprised a flat fee of $2300 to be charged only in the event that his claim was successful.

[4] Mr Cornish has taken the two-thirds starting point used in the Court of Appeal decision in *Binnie v Pacific Health Limited* [2002] 1 ERNZ 438. The principles and starting point identified in that case are appropriate for setting costs in the courts but the decision of the Employment Court in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 confirmed the use in the Authority of a tariff-based approach applied flexibly to the particular circumstances of the case. The daily tariff, currently around $3000, is adjusted up or down according to established principles on costs and any other factors relevant to the particular case.

[5] The starting pointing in this case, for a meeting of around a third of a day, is $1000. ECL submitted this should be adjusted downwards for two reasons – firstly, that Mr Cornish was not successful in his claim that the redundancy was not for genuine purposes, and secondly, because he did not accept an offer made earlier to him to settle for an amount similar to the compensation later awarded by the Authority.

[6] Mr Cornish's representative objected that the settlement offer was made in mediation. A copy of an email from ECL's directors confirms that was where the offer was made. There is no evidence that offer was repeated outside mediation and accordingly was not the sort of "without prejudice" offer that I could have taken into account to make a downward adjustment of the tariff in setting costs for this case.

[7] While Mr Cornish was not successful in his entire claim, he did establish a personal grievance for which remedies were awarded. Costs follow that event.

[8] The amount of $1000 would be a modest contribution to the costs said to be incurred by Mr Cornish.

[9] That amount is to be increased a further $200 because costs submissions had to be lodged. Mr Cornish is also entitled to reimbursement of his filing fee.

[10] I order ECL to pay Mr Cornish $1200 as a contribution to his costs and a further $71.56 in reimbursement of the fee he paid to lodge his application in the Authority.

Robin Arthur
Member of the Employment Relations Authority