

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Craig Darling (Applicant)  
**AND** Platinum Properties Limited (Respondent)  
**REPRESENTATIVES** Jenny Guthrie, Counsel for Applicant  
Simon Shreeve, Advocate for Respondent  
**MEMBER OF AUTHORITY** Philip Cheyne  
**SUBMISSIONS RECEIVED** 3 July 2006  
17 July 2006  
**DATE OF DETERMINATION** 31 July 2006

**COSTS DETERMINATION OF THE AUTHORITY**

[1] In a determination dated 29 May 2006, I partially upheld claims by Mr Darling against his former employer and reserved costs. Since then, I have received written submissions from counsel for Mr Darling and a response from Mr Shreeve on behalf of the respondent. This determination resolves the disputed question of costs.

[2] The claim for Mr Darling is for an award of at least \$9,288.14 being 66% of his actual legal costs. The respondent's position is that any costs award be limited to \$1,600.00 in line with a *Calderbank* offer made on 27 May 2005. That offer was open to acceptance until 5pm on 30 May 2005. It followed a mediation held on 27 May 2005. The present proceedings were lodged on 19 September 2005.

[3] The first question for consideration is whether there ought to be an award of costs in favour of Mr Darling, he having been partly successful in his claims. His statement of problem sought remedies of \$4,500.00 lost wages, \$6,000.00 distress compensation for unjustified disadvantage and unjustified dismissal grievances, a penalty for the failure to provide an employment agreement and costs. Mr Darling was awarded arrears of wages but for a shorter period than he sought, \$1,500.00 distress compensation for an unjustified disadvantage grievance and a penalty of \$500.00 payable to the Crown was imposed. The dismissal grievance was not established. His claims were far from frivolous and he was largely successful although that fell a little short of the claim. His is a not untypical outcome for a successful party so I see no reason not to make an award of costs in his favour following that success.

[4] The *Calderbank* offer is irrelevant. Whether only the compensation offer is compared to the arrears plus compensation result or the offer plus costs is compared to the outcome plus costs, the *Calderbank* offer falls short of the mark.

[5] It is clear that Mr Darling's legal costs cover work by counsel prior to lodging the statement of problem including attendance at mediation. Those are not relevant costs when the Authority is assessing an appropriate award of costs. That assessment starts with a consideration of the costs reasonably incurred by the party in assisting the Authority with the investigation. The other difficulty in the present case is that Mr Darling was granted legal aid of \$780.00 but there is an undecided application for an amendment to that grant. I infer that there was a grant for the purposes of a mediation then a request for an extension to cover the ERA proceedings but no decision was made on that request before the investigation meeting (or to date). If legal aid is granted, that will probably limit the amount able to be charged by counsel. Given these difficulties, the best course is to assess the time reasonably required for Mr Darling's participation in the investigation process as a starting point.

[6] The following steps had to be taken. Obtaining initial instructions, drafting a statement of problem, consideration of the reply including receipt of further instructions on matters arising, participation in a directions conference, preparing and lodging statements of evidence for Mr Darling and two other witnesses, consideration of the respondent's five statements of evidence and receiving instructions on matters raised by them, preparation of submissions, attendance at the investigation meeting lasting approximately 1.66 days, reporting the outcome and attending to costs. That amounts to about 32 hours professional time. That is a little over twice the meeting time, not unreasonable in a matter of some factual complexity. If one took \$200.00 per hour as a reasonable rate, then assessed reasonable fees would be around \$6,000.00.

[7] I am mindful of counsel's point that a modest award of costs will see Mr Darling out of pocket when the Authority has largely upheld the validity of his claims. However, that cannot be a determining factor. It is for each party to assess for themselves the level of legal resource they wish to deploy in pursuit or defence of a claim. The proper point of reference for a Tribunal when assessing a claim for costs, assuming it is decided that there should be an award, is the level of costs reasonably incurred.

[8] The next question is what proportion should the respondent meet? The respondent says that it is a start-up enterprise operating at a monthly deficit. I accept that the company is only about 18 months old but I have no evidence about its ability to meet a reasonable award of costs. Counsel makes a point about the respondent's introduction of a substantial amount of evidence that on the respondent's view of events must have been irrelevant. Mr Shreeve went to considerable effort to show what a bad employee Mr Darling was despite his assertion that he never dismissed Mr Darling. That is why the matter took more than a single day, causing extra costs. Bearing that in mind, I find that the respondent should contribute \$4,500.00 to Mr Darling's costs.

[9] There is also a claim for disbursements, being the lodgement fee of \$70.00 and the meeting fee of \$150.00. The respondent is ordered to pay those costs to Mr Darling as well.

Philip Cheyne  
Member of Employment Relations Authority