

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 54B/08
5084097

BETWEEN JONATHAN DAVIDSON
 Applicant

AND Y3K ENERGY PTY LTD
 First Respondent

Y3K ENERGY LTD
Second Respondent

Member of Authority: Yvonne Oldfield

Representatives: Mark Ryan for Applicant
 Maria Dew for First and Second Respondents

Submissions received: 4 August 2008, 26 August 2008 from Respondent
 1 September 2008 from Applicant

Determination: 23 September 2008

COSTS DETERMINATION OF THE AUTHORITY

[1] This employment relationship problem has been the subject of two determinations. In the first, dated 20 February 2008, I concluded that the first respondent, Y3K Energy Pty Limited was Mr Davidson's employer and removed its New Zealand subsidiary, Y3K Energy Ltd, as respondent. Costs were not determined in relation to the preliminary issue.

[2] Upon Y3K Energy Pty Limited challenging that determination (and with the agreement of all parties) I rejoined the second respondent and proceeded with an investigation into the substantive employment relationship problem.

[3] In a further determination dated 21 July 2008 I found that Mr Davidson had been unjustifiably dismissed but set his contribution to the situation that gave rise to the grievance at 100%. In that determination I also recorded at paragraph [2]:

“a first investigation meeting of 18 April 2008 ...did not complete the investigation and it was arranged (by agreement with the parties) that it should resume on 27 June 2008. At the meeting of 27 June 2008 Ms Dew (who had been acting for both respondents up until then) advised that she had recently had instructions that the second respondent had been wound up and was deregistered on 14 June 2008. This had been done in the interval since the 18 April meeting and without advice having been sought from her.

[3] I advised the parties of my view that winding up should not have been completed when the matter was effectively part heard. For this reason this determination will be issued with Y3K Energy Limited still identified as second respondent.”

[4] For the same reasons as set out at paragraph [3] of that determination this costs determination also will be issued with Y3K Energy Limited identified as second respondent.

[5] The determination of 21 July concluded by reserving the issue of costs and setting timeframes for the provision of submissions should the parties be unable to agree on the issue. They have now provided written submissions as follows.

[6] The first respondent seeks payment of its actual and reasonable legal costs and disbursements incurred in defending the substantive proceeding. It does so on the basis that the applicant received and rejected two reasonable offers made “without prejudice save as to costs.”

[7] The first of these offers was made on 26 October 2007 by Y3K Energy Limited. Ms Dew says in submissions that:

“In October 2007 the identity of the employer was not yet in issue between the parties or determined by the Authority. However, it is submitted that it is still relevant to the Authority’s discretion in settling costs in this matter. The defendants conducted their defence jointly and the option of settlement available in that letter would have avoided costs now incurred.”

[8] The second without prejudice letter (dated 16 May 2008) records an offer to settle made on the morning of the 18 April investigation meeting. It was for a total of \$10,000.00 made up of \$8,000.00 to be paid under s.123 (1) (c) (i) and \$2,000.00 contribution to costs. Other terms without a direct monetary value (relating to matters such as provision of a statement of service) were also included. The settlement was expressed to be “*in full and final settlement the [sic] employee’s current personal grievance, the employer’s challenge in the Employment Court and all other employment relationship matters between the parties and the employers counterclaim allegation.*”

[9] The total claimed by the first respondent in costs is \$17,050.00¹ plus disbursements of \$6,410.25 (including business class airfares for witnesses travelling from Melbourne to Auckland to attend the investigation meeting.) Ms Dew notes that the claim excludes costs incurred in relation to mediation and in relation to the preliminary issue of the identity of Mr Davidson’s employer.

[10] In a brief submission, Mr Ryan argued that costs should lie where they fall. He did not identify the costs his client incurred in relation to either the preliminary matter or the substantive matter.

sCope of determination

[11] The respondent’s submissions imply that it is taking the position that I have before me for determination the issue of costs in the substantive matter only. I do not consider this to be the case and begin by clarifying this point.

[12] Unless requested to do otherwise by one or other of the parties, the Authority usually adopts a practice of disposing of all costs issues arising out of the investigation of an employment relationship problem (preliminary and substantive issues) at the completion of that investigation. The fact that the preliminary determination made no provision for separate determination of costs signalled to the parties that such a practice would be adopted in the present case, and neither party has requested that I depart from this approach. The timetable set at the conclusion of the determination related not to the making of an application for costs, but to the making

¹ I was told that no Goods and Services Tax was charged because the services were provided to an Australian entity.

of submissions on claims for costs made in the statement of problem and statement in reply. Those claims remain at large and fall to be determined now.

[13] Against this background the only reasonable construction to be placed on Mr Ryan's submission is that his client's position is that costs overall should lie where they fall.

[14] I note also that I am reinforced in the view that I must treat costs globally by the fact that the first respondent's letter of 16 May records an offer to settle all matters. It did not isolate the substantive personal grievance from the preliminary matter determined by the Authority and the Employment Court challenge on it.

DETERMINATION

[15] I am not persuaded that the offer made by the second respondent in October 2007 is effective as a "Calderbank" letter. In order for that to be the case I would need to be satisfied either that the two entities were operating effectively as one or that the second respondent was an agent for the first. Neither of these propositions has been advanced by either of the respondents. I do not therefore take the first letter into consideration in relation to the issue of costs.

[16] The second letter does record an offer "*without prejudice save as to costs*" purporting to settle all matters on behalf of the first respondent. It was made, orally, on the morning of the investigation meeting, when Mr Davidson had already flown from Melbourne to attend the meeting.

[17] I am not satisfied that this gave Mr Davidson a reasonable period in which to consider the offer. Costs had already been incurred in relation to the investigation of the preliminary issue (in which the applicant was successful) and in preparation for the investigation of the substantive matter. I conclude that the offer was not presented in a timely fashion and was not reasonable in all the circumstances. It will not be taken into consideration in relation to costs.

[18] However, costs remain a matter for the discretion of the Authority and I must take all the circumstances into consideration in relation to the issue. In this case, each

party has had a degree of success. The applicant established that the first respondent was his employer and that he was unjustifiably dismissed. The respondents were successful in establishing that Mr Davidson had contributed (in a high degree) to the situation giving rise to his grievance, with the result that no remedies were awarded.

[19] In these circumstances I am satisfied that the fairest course is, as Mr Ryan has suggested, for costs overall to lie where they fall.

[20] **I make no order for costs.**

Yvonne Oldfield

Member of the Employment Relations Authority