

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 92A/09
5129582

BETWEEN ANTHONY FLAY
 Applicant

AND VEHICLE TESTING NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Ann-Marie McInally for Applicant
 Blair Scotland for Respondent

Submissions Received: 27 April 2009 from Applicant
 20 April and 4 May 2009 from Respondent

Determination: 12 May 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 27 March 2009 I found that Mr Flay had been justifiably dismissed by reason of redundancy.

[2] In my determination I reserved the question of costs and invited the parties to resolve the matter between them. They have been unable to do so and I am now in receipt of memorandum from both parties. I have considered the submissions made by the parties and I am satisfied that the discretion under clause 15 of Schedule 2 of the Act ought to be exercised in favour of Vehicle Testing New Zealand Limited (“VTNZ”).

[3] The following principles are appropriate where the Authority is exercising its discretion in relation to costs (*PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, [2005] 1 ERNZ 808):

- There is a discretion as to whether costs should be awarded and what amount;
- The discretion is to be exercised in accordance with principle;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience is to be considered on a case by case basis;
- Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;
- That frequently costs are judged against a notional daily rate;
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[4] In addition, the Court has stated that there is nothing wrong with a tariff based approach so long as it is not applied in a rigid manner without regard to the particular characteristics of the case.

[5] The matter was not complex and the hearing lasted just under a day. Mr Scotland, on behalf of VTNZ made a calderbank offer on 26 August 2008. By this time work on witness statements and accumulating of documents for the investigation had already commenced and was well under way. The purpose of a calderbank offer is to protect the parties by limiting their exposure to costs.

[6] The Employment Relations Act seeks to reduce judicial intervention and encourages parties to resolve matters themselves without the need to engage in expensive litigation (see Sections 3(a)(iv) and 101(ab)). The Calderbank offer was reasonable and provided a reasonable period of time during which Mr Flay could weigh up all the factors and make an informed decision whether to accept the offer or not. No response was made to the offer.

[7] VTNZ incurred costs of \$17,563 plus disbursements of \$1,199.11, both amounts exclusive of GST. Taking into account the preparation required, the length of the hearing and the settlement offer, and adopting the approach taken by the Chief Judge in *David Watson v New Zealand Electrical Traders Limited t/a Bray*

Switchgear, unreported, 24 November 2006, AC64/06, Mr Flay is to contribute \$4,000 including disbursements.

[8] An order is made accordingly.

Vicki Campbell
Member of Employment Relations Authority