

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 95  
5447842

BETWEEN LYNDON FREDERICKS  
Applicant  
AND VIP FRAMES & TRUSSES  
LIMITED  
Respondent

Member of Authority: M B Loftus  
Representatives: David Beck, Counsel for Applicant  
John Shingleton, Counsel for Respondent  
Submissions Received: 22 January 2015 from Applicant  
23 January 2015 from Respondent  
Date of Determination: 14 July 2015

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] On 9 January 2015 I issued a determination<sup>1</sup> concluding Mr Fredericks had a personal grievance in that he was unjustifiably disadvantaged by virtue of his employer's<sup>2</sup> failure to provide a safe workplace. Mr Fredericks was unsuccessful with his prime claim, constructive dismissal, along with other disadvantage claims.

[2] Costs were reserved and both parties now seek a contribution toward those incurred in attaining the outcome they did.

[3] Mr Fredericks asks that he be given \$12,071.56 which is approximately two thirds of his total costs.

[4] VIP also seeks two thirds of its actual costs though as these exceeded Mr Fredericks, the amount sought is higher - \$20,844.13.

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<sup>1</sup> [2015] NZERA Christchurch 2

<sup>2</sup> VIP Frames & Trusses Limited (VIP)

[5] The fact both parties have sought a contribution toward their costs raises the question of which, if any, party should be successful.

[6] It is well established costs follow the event. The event was the bringing of a personal grievance. In that respect Mr Fredericks was successful and while his level of success fell short of that initially sought I note it is improper to adopt a scorecard approach where the issues are intrinsically intertwined as they were here.<sup>3</sup>

[7] For this reason it is Mr Fredericks who should be the beneficiary of a contribution toward the costs he incurred in pursuing a successful grievance.

[8] Normally the Authority will use a daily tariff approach when addressing a costs claim.<sup>4</sup> The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[9] The investigation took a day and two thirds so the above formula would see a contribution in the order of \$5,845.

[10] As already said, Mr Fredericks seeks a greater sum *due to extraordinary circumstances including the Respondent's unprecedented legal usage of the acts lockout provision and a generally confrontational approach to defending the grievance*. He also refers to various Calderbank offers which passed between the parties in anticipation VIP will refer to these as a reason why the tariff should be reduced.

[11] These arguments fail to convince me an award exceeding the tariff should be considered. First VIP was successful in defending its *unprecedented legal usage of the acts lockout provision*. Second there is little or no evidence to support the allegation VIP was generally confrontational and here note must be made that it was, to some extent, successful which would suggest it was entitled to take a *strong* stance.

[12] Turning to the Calderbank letters which as anticipated by Mr Fredericks are referred to by VIP but not as a means of reducing the tariff. VIP argued they were grounds for awarding it a costs contribution.

[13] There are a number of these with the first being proffered by Mr Fredericks and advising a willingness to settle for \$11,680 plus one months' wages. The

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<sup>3</sup> *Bourne v Real Journeys Ltd* [2012] NZEmpC 2

<sup>4</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808

rejection contained a counter offer of \$10,450. Further exchanges followed with the amounts being sought and offered increasing as costs escalated.

[14] All the amounts mentioned exceeded the award Mr Fredericks achieved and it is on that VIP bases its claims.

[15] With respect to these exchanges I note the Employment Court is no longer endorsing a steely approach<sup>5</sup> but instead suggesting their existence is simply a factor to be considered when exercising the discretion in respect to costs.<sup>6</sup> There is also the fact the Employment Court now takes issue with a situation that sees the benefits of success eroded by the cost of attaining that success.<sup>7</sup>

[16] I am also cognizant that Mr Fredericks' success was the result of a significant failure on VIP's behalf and notwithstanding the fact the offers were tendered on a *without prejudice except as to costs* basis they are consistent with the Act and its objective parties endeavour to resolve their differences without recourse to litigation.

[17] Having considered the submissions I consider it appropriate to apply the tariff approach and do so in Mr Fredericks favour.

[18] Accordingly I order the respondent, VIP Frames & Trusses Limited, pay the applicant, Lyndon Fredericks, the sum of \$5,845 (five thousand, eight hundred and forty five dollars) as a contribution toward the cost Mr Fredericks incurred pursuing his claim.

M B Loftus  
Member of the Employment Relations Authority

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<sup>5</sup> *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA)

<sup>6</sup> See for example *Mattingly v Strata Title Management Limited* [2014] NZEmpC 15

<sup>7</sup> For example *Metallic Sweeping (1998) Limited v Ford* [2010] ERNZ 433 and *Mattingly*