

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Colin Gauld (Applicant)  
**AND** Bay of Plenty District Health Board (Respondent)

**MEMBER OF AUTHORITY** Alastair Dumbleton

**COSTS SUBMISSIONS  
RECEIVED** 17 and 19 May 2006

**DATE OF DETERMINATION** 31 May 2006

**DETERMINATION OF THE AUTHORITY AS TO COSTS**

[1] In a determination dated 26 April 2006 given under AA 136/06, the Authority resolved Mr Gauld's claim of unjustified dismissal in favour of the Bay of Plenty DHB. Mr Gauld's redundancy was found to be genuine and his termination from employment was found to have been effected in a fair manner.

[2] In accordance with directions given by the Authority in its substantive determination, counsel for the parties have submitted memoranda addressing the question of costs reserved by the Authority.

[3] As Mr Ken Anderson the Authority member who investigated the claims is now overseas on extended leave, I have determined the question of costs. This course is permitted by clause 16 of Schedule 2 of the Employment Relations Act 2000.

[4] Counsel have referred me to *PBO v Da Cruz* unreported, AC 2A/05, 9 December 2005, a case which sets out the principles generally to be applied when fixing costs.

[5] The investigation meeting was one day long. The employment relationship problem was not overly complex legally, and the decision turned largely on the facts to be established by the Authority.

[6] The respondent DHB was entirely successful, but it incurred legal costs of over \$20,000 assisting the Authority to produce that result. While noting that in the majority of one day cases costs awards are in a band between \$2,000 and \$2,499, for reasons it has given the DHB seeks a much higher contribution of \$7,000.

[7] Mr Gauld incurred costs all up of nearly \$24,000. This amount includes GST and disbursements, and it also covers mediation. Counsel submits that between \$1,000 and \$2,500 is the band the award should be in, and then at the lower end.

[8] I consider that an award of greater than \$2,500 is justified in the circumstances of this case. Of particular relevance is the 'Calderbank' offer of \$8,000 made by the DHB to Mr Gauld. As he was entirely unsuccessful with regard to the liability issue, a true 'Calderbank' situation did not ultimately arise, however the making of the offer and its rejection may be taken into account as relevant factors along with others such as the length of the investigation meeting and the complexity of the case.

[9] It is reasonable for the Authority to assume that in rejecting the last Calderbank offer (the second of two made) Mr Gauld had some appreciation of the risk he faced that his claim would not be upheld by the Authority. I can assume that his own representative, a barrister, would have felt duty bound to advise him of the degree of risk he would be taking in proceeding with the claim. I am confident that the mediator too would have given him a neutral evaluation of that risk, basing it on the legal and factual merits of the grievance. With that information and advice Mr Gauld elected to go on with the investigation rather than settling the claim. By doing so he passed up a good opportunity to salvage something from this whole matter. In taking a risk that could reasonably have been avoided he put the DHB to the additional expense of the investigation meeting, and equitably that should sound in the amount of costs.

[10] An amount of \$7,000 is too high but I consider \$3,800 is appropriate in the circumstances outlined above. Pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000, I therefore order that Mr Gault is to pay the Bay of Plenty DHB the sum of \$3,800 as a contribution to its legal costs and expenses.