

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Digby Green (Applicant)
AND Marexim Export-Import Limited (Respondent)
REPRESENTATIVES Hamish Russ, Advocate for Applicant
Kim Stretton, Advocate for Respondent
MEMBER OF AUTHORITY R A Monaghan
SUBMISSIONS RECEIVED 24 November and 9 December 2005
DATE OF DETERMINATION 13 January 2006

FURTHER DETERMINATION OF THE AUTHORITY ON COSTS

[1] In a determination dated 18 November 2005 (AA403A/05) in the above, I made an order for costs against Mr Green. I did so because I had before me correspondence that appeared to amount to submissions on the matter from both parties.

[2] However I was mistaken about the status of a letter from Mr Russ, which appeared to set out the applicant's submissions on costs. It was no more than part of the correspondence between the parties, created in the course of their attempt to resolve the matter without further recourse to the Authority.

[3] On 24 November 2005 Mr Russ filed a 'memorandum as to costs on behalf of the applicant'. The memorandum made no reference to the recently-issued determination, but once I had identified the above error I received the submissions and gave Ms Stretton an opportunity to respond.

[4] Neither party made any reference to what I should do about the fact that the determination dated 18 November 2005 was issued and cannot be ignored. Mr Russ in particular made no application in respect of it. However I considered it was in the interests of justice that I reopen that part of the investigation relating to costs for the purpose of considering Mr Russ' full submissions.

[5] Mr Russ asks that costs be allowed to lie where they fall. He relies on the following:

- (a) the failure of Marexim to present its full 'defence' to the Authority until the investigation meeting, with particular reference to evidence concerning Marexim Lighting and Electrical Technologies Limited ("MLETL");
- (b) a 'Calderbank' offer the applicant made to the respondent;
- (c) Mr Green's case had merit; and
- (d) Mr Green's limited ability to pay.

1. MLETL

[6] Mr Russ' submissions complained that the respondent did not submit all of its evidence in a timely fashion, 'withheld their full defence' and 'used a lot of defences that were found to be

unjustified.’ With the possible exception of references to MLETL no further details were provided, but there is nothing on file or arising from the investigation itself to suggest there is any force in the complaints. There was some lack of clarity about both parties’ positions in respect of MLETL prior to the filing of the briefs of evidence, but Mr Coleman’s brief shed further light and the matter was discussed fully during the investigation meeting. If Mr Russ was taken by surprise by anything, then on the material I have I would say such surprise was within the scope of the normal unpredictability associated with litigation, and there was an opportunity to consider and respond to information received. In particular Mr Russ and his client had an opportunity to consider and respond to matters relating to MLETL, with the Authority subsequently following up on some of their points before issuing the determination. There was also an opportunity to make and reply to submissions.

[7] Mr Russ’ costs submissions also misunderstood and misstated the position in respect of the way issues involving MLETL were addressed, including the Authority’s actions. It is not necessary to detail how in a decision on costs, rather I record that fact against the possibility that the misunderstanding is repeated. Overall there was nothing to indicate that any of the matters complained of added to the applicant’s costs in the sense they should be reflected in an order for costs.

2. The Calderbank letter

[8] Mr Russ produced a ‘Calderbank letter’ dated 29 March 2005. The letter said Mr Green would accept a payment from the respondent of \$2,000 under s 123(c)(ii) (sic).

[9] Calderbank letters are the province of respondents, not applicants, and concern offers for the making of a payment rather than the receipt of a payment. The letter is not correctly described as a Calderbank letter - it is merely a letter setting out proposed terms of settlement.

[10] In addition, Mr Green was the losing party. The offer does not assist him now. It is not open to him to argue that the parties’ costs could have been limited if the offer had been accepted.

3. Merits of the case

[11] Mr Green had a case he was entitled to bring. However he was not the successful party. I do not accept that anything in the merits of his case should be reflected in a reduction in his resulting liability to contribute to the successful party’s costs.

4. Ability to pay

[12] I addressed this matter in the determination dated 18 November 2005. I was not given any further information on the point beyond a reiteration of it, and see no reason to change my view.

Conclusion

[13] Now that I have heard and considered full submissions from both parties, my conclusion on costs has not changed. Mr Green is to contribute to the respondent’s costs in the sum of \$2,200.

R A Monaghan
Member, Employment Relations Authority