

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Robert Hill (Applicant)
AND Pyrotek Products Ltd (Respondent)
REPRESENTATIVES Margaret Lewis, Counsel for Applicant
Stephen Langton, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
MEMORANDA RECEIVED 16 November 2005, 6 and 9 March 2006
DATE OF DETERMINATION 5 May 2006

DETERMINATION OF THE AUTHORITY ON COSTS

[1] In a determination of the above matter dated 21 March 2005, I found that Mr Hill was not dismissed and that a disciplinary warning issued to him was justified. Costs were reserved and the parties have submitted memoranda on the matter.

[2] Counsel for Pyrotek seeks an award greater than the range usually awarded in the Authority, and in that respect relied primarily on the existence of a Calderbank offer.

[3] The Calderbank offer was contained in a letter headed 'without prejudice save as to costs' and dated 16 June 2004. The offer was for \$6,000 under s 123(c)(i) of the Employment Relations Act 2000, inclusive of costs incurred to the date of acceptance. The offer was declined in a letter dated 7 July 2004.

[4] Counsel for Mr Hill submitted that the most equitable outcome may be to allow costs to lie where they fall. Alternatively an appropriate starting point for assessing costs would be to apply the 'usual' daily rate of \$1,500 - \$2,000 per day, bearing in mind that the investigation meeting took 2.5 days, and making a deduction to reflect Mr Hill's ability to pay. She concluded that a reasonable contribution would be no more than \$5,000.

[5] Regarding the Calderbank letter, counsel submitted that acceptance of the offer would have left Mr Hill with little compensation once his legal costs had been paid and no redress for 'non-monetary' aspects of his claim.

[6] It is unfortunate that Mr Hill's legal fees had become so high by June 2004 that an otherwise reasonable offer was declined. I do not know when preparation for the investigation meeting actually began, but note that the exchange of briefs of evidence for the meeting was to commence on 23 July 2004 with the filing and service of the applicant's briefs. A small extension was granted with the applicant's briefs to be filed and served by 28 July 2004, and additional evidence was filed later. In other words, by the date of the offer, the bulk of the preparation had yet to commence.

Parties should be wary of allowing legal costs to become so high during the early stages of a dispute that the levels adversely affect prospects of settlement.

[7] For that reason it is not a complete answer to say that the Calderbank offer was inadequate. I take it into account in assessing costs.

[8] I accept that, as the successful party, Pyrotek is entitled to a contribution to its costs. As for whether costs should be awarded in an amount outside the usual range, Pyrotek should have credit for its making of the Calderbank offer. This weighs in favour of an award above the usual range.

[9] As for the conduct of the case, there were some unfortunate skirmishes between counsel on a number of matters and I have set those aside. Otherwise, the meeting was some 2.5 days in length. It is not unusual for meetings involving issues of the kind Mr Hill raised to take that amount of time, and the meeting could easily have taken a great deal longer. I would say that in many respects Mr Hill's position, and that of his supporters, suffered from being based on a number of unfounded and ill-informed assumptions about Mr Stanley's motives, as exacerbated by gossip. Those considerations led to my dismissing Mr Hill's claims to the extent they were based on evidence of that kind, but I do not consider it necessary to reflect them again in costs.

[10] Another relevant factor is Mr Hill's ability to pay. He has suffered a significantly reduced income since his employment with Pyrotek ended, although I have not been given any other information about the extent of his ability to meet an award of costs. The factors set out above mean I would have awarded the sum of \$8,000, but taking into account the reduction in Mr Hill's circumstances I order him to contribute to Pyrotek's costs in the sum of \$5,000.

R A Monaghan
Member, Employment Relations Authority