

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 155A/09
5158555

BETWEEN FRANCIS KAIWAI
Applicant

AND FRESH CONNECTION
LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Bede Laracy for Applicant
Elizabeth Briggs for Respondent

Submissions received: By 23 December 2009

Determination: 24 December 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] There is an outstanding issue in regard to costs which was reserved on 16 October 2009 (WA 155/09).

[2] Fresh Connection Limited has applied for \$1,200 after failing to get an agreement with Ms Kaiwai on a sum to contribute to the respondent's costs when it had been successful in defending her claims.

Issues

[3] How much costs should be awarded to the respondent?

The facts

[4] The respondent was successful in defending claims made by Ms Kaiwai. The company was not represented by legal Counsel at the Authority's investigation meeting, but did rely on preparation that incurred Counsel's costs. The respondent tried to save costs by attending mediation and made an offer to settle. A without prejudice offer, save for costs, was made on 20 August to settle and the Authority has been requested to take this into account in setting a sum for the applicant to pay.

[5] The applicant has opposed the claim and has relied on not having an ability to pay because of financial hardship. In the event the applicant has to pay it has been submitted costs be set at \$750.

Determination

[6] The offer to settle costs followed the costs of the investigation meeting being incurred. It is commendable the parties did try to settle. That attempt has no influence on the outcome in regard to the parties' conduct. I have taken into account the range of figures both parties have relied upon in trying to settle to set a platform on the tariff that should apply.

[7] The *Calderbank Offer* was made on 20 August 2009 by the respondent giving the applicant at least 4 days to respond. However, it appears this involved less time before the deadline given, because of the time the applicant's representative received the offer. The Authority's notice for an investigation meeting was dated 17 July 2009, and the investigation meeting took place on 8 September 2008. The Authority's timetable was put in place following a telephone conference on 22 June 2009. The respondent's witness statements were due on 18 August. By 4 August the applicant was committed to the Authority's timetable, and had filed a written statement prepared by her advocate. A written witness statement from Mr Knolles's, a director of Fresh Connection Limited, was filed in the Authority on 25 August by email from his lawyers, and a hard copy was filed on 29 August. The respondent left its offer until the last moment, and I find that the time allowed for consideration was not reasonable, especially considering the time the company had before the Authority's

telephone conference and the timetable commenced. There was no consideration given to the applicant's costs in the offer after 4 August. Thus, I have decided not to take the *Calderbank Offer* into account for assessing costs. Furthermore costs follow the event for the respondent because it was successful. I accept that the parties tried to save costs. In particular they attended mediation and Fresh Connection Limited did not use Counsel at the investigation meeting.

[8] I accept that the applicant faces financial difficulties, but there is no information available that she will not sometime in the future be able to pay a contribution to the respondent's costs. Also, the suggestion has been made that if any costs are awarded a payment of \$750 would be equitable. She has properly recognised that costs follow the event and that the respondent has incurred costs.

[9] Costs follow the event because the respondent was successful and had legal Counsel's assistance in the background. That assistance not unreasonably involved written statements being drafted and typed and written submissions being filed.

[10] Both parties sought vindication of their positions in the matter and credibility needed to be tested. I have decided that in equity and good conscience an adjustment needs to be made to the daily tariff given the investigation meeting lasted a half day, both parties tried to save costs, attended mediation and had to prepare for an investigation meeting that included written statements and documents and written submissions. The applicant is required to pay a contribution to the respondent's costs of \$750.

Orders of the Authority

[11] I order Francis Kaiwai to pay Fresh Connection Limited a contribution of \$750 towards the respondent's costs.

P R Stapp
Member of the Employment Relations Authority