

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 491
5341766**

BETWEEN

LARS LUNDBOM
Applicant

AND

AVISIT SOLUTIONS
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
Gretchen Stone, Counsel for Respondent

Submissions received: 14 November 2011 from Applicant
9 November 2011 from Respondent

Determination: 14 November 2011

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. In a determination dated 6 October 2011 ([2011] NZERA Auckland 436), the Authority found that Mr Lundbom was an independent contractor to Avisit Solutions Limited ("Avisit") and not an employee.
2. In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and both parties have filed submissions in respect of costs.
3. Ms Stone for Avisit submits that Avisit's legal costs are in the amount of \$8,690.10 and is seeking full solicitor client costs.
4. In support of this claim Ms Stone submits:

- Avisit made a settlement offer to Mr Lars at the earliest opportunity on a commercial settlement basis which was declined by Mr Lundbom.
 - Mr Lundbom's claim was without merit and should not have been filed.
5. Mr Lundbom opposes Avisit's application for costs on the basis that:
- It was Avisit's decision to engage legal advice and incur legal costs;
 - Mr Lundbom is of severely limited means, and facing personal bankruptcy
6. The principles applicable to awards of costs in the Authority are well established. It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹ ("Da Cruz") that costs are modest. A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. The Investigation Meeting lasted slightly in excess of half a day. For a half day Investigation Meeting this would normally equate at the notional daily rate to an award of \$1,500.00.
7. In relation to the offer made to settle the proceedings, I note that it is a principle in *Da Cruz* that without prejudice offers can be taken into consideration.
8. Ms Stone states that the settlement offer was made personally by Mr Visser, CEO of Avisit, to Mr Lundbom on 9 April 2011. Whilst this was well in advance of the Investigation Meeting, there is no evidence that this was in the nature of a Calderbank² offer, that is a without prejudice save as to costs offer. The Authority cannot therefore take it into consideration when considering the issue of costs.

¹ [2005] 1 ERNZ 808

² *Calderbank v Calderbank* [1976] Fam 93 (CA)

9. In setting the level of costs, it is also a principle in *Da Cruz* that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct. I consider that setting an award at the level sought by Avisit would be punitive in Mr Lundbom's circumstances.
10. Weighing all these considerations in the discretionary exercise of awarding costs, I consider that the notional half daily rate is appropriate. Accordingly Mr Lundbom is ordered to pay Avisit \$1,500.00 as a contribution to its costs.
11. An arrangement may need to be made for Mr Lundbom to pay the costs by way of instalments over several months. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are sought and cannot be agreed.

Eleanor Robinson
Member of the Employment Relations Authority