

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Michael Sutherland (applicant)

**AND** Petkovden Company Limited (respondent)

**REPRESENTATIVES** Grant Shand for the applicant  
Neville Waldren for the respondent

**MEMBER OF AUTHORITY** Denis Asher

**SUBMISSIONS** 18 & 25 July & 2 August 2005

**DATE OF DETERMINATION** 3 August 2005

**COSTS DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. In my substantive determination dated 11 July 2005 (WA 112/05) I found in favour of the applicant, Michael Sutherland's, claim that the respondent, Petkovden Company Limited, was in breach of (the then) s.64 (now s.65) of the Act and ordered a penalty of \$1,000 to be paid to the Crown.
2. I found against Mr Sutherland's other claim that the Company dismissed him in a procedurally unfair manner.

3. Costs were reserved.

### **Applicant's Position**

4. In a submission received on 19 July, Mr Sutherland's counsel, Mr Grant Shand, seeks costs of \$2,000 on behalf of his client. He relies on clause 15 of Schedule 2 of the Act and well known principles and case law.
5. Attached to the submission was a copy of an invoice to Mr Sutherland that details total costs incurred by him of \$9,502.39 (inclusive of disbursements and GST).
6. Mr Sutherland accepts he failed in part of his claim but says there was no lack of merit in that claim. He says he succeeded in respect of the other part of his claim (a penalty for the failure to provide him with a written employment agreement) and the application of conventional practice would now entitle him to a costs award. The respondent was obviously at risk of a penalty but did not make a *Calderbank* offer in relation to that risk.
7. *Binnie v Pacific Health Limited* [2002] 1 ERNZ 438 is relied on.

### **Respondent's Position**

8. In support of his client's claim, Mr Neville Waldren questions the credibility of the applicant's substantive claim and the remedies originally sought. He points out that Mr Sutherland's claims substantially changed from the statement of problem first filed on 26 January, via an amended statement of problem submitted on 11 May which in turn was varied on 24 & 27 June and again in closing submissions on 4 & 8 July.
9. The respondent incurred significant cost "*when procedures were challenged and when unrealistic claims were advanced (namely) loss of income ... exemplary damages ... termination of employment (and) status of claim against (one of the respondent's directors)*" (submission 25 July).
10. By way of an itemised list (but without an invoice) Mr Waldren asks that costs of \$4,800.00 be awarded in favour of his client.

## Costs Decision

11. The respondent would have put itself on a surer footing in respect of its claim for costs had it advanced a sensible and timely *Calderbank* offer to Mr Sutherland, but it did not do so at any time during these proceedings.
12. Following the Authority's first telephone conference call on 18 April, and by way of a minute of that conference, Mr Sutherland and his counsel were put on clear notice of the need to address the question of why the former should be awarded compensation for lost income when Mr Sutherland was in receipt of an ACC benefit.
13. The unlikelihood of Mr Sutherland successfully pursuing other remedies sought in his statement of problem – because of his ACC status – was also made clear.
14. The Authority's initiative may account for the significant amendments to the description of Mr Sutherland's employment relationship problem and the remedies he sought, but to date the reasons for these changes have not been explained.
15. What is certain is that, from an original claim totalling well over \$300,000 (statement of problem received on 26 January), the applicant's closing submission dated 30 June sought – by way of substantially changed grounds – much reduced compensation of \$15,000 and a \$1,000 penalty. Only the latter claim succeeded but not so as to directly benefit the applicant: I directed the sum be paid to the Crown.
16. The changes to Mr Sutherland's claims however were equally matched by the variations in the account by Mr Slavko Petkovski, one of the Company's directors, as to how a knife held by him caused serious injuries to the applicant's hands. But, as is made clear in my substantive decision, those injuries entitled the applicant to qualify for ACC compensation. And it was those injuries that caused his employment to come to an end.
17. What is certain is that neither party lent itself in a realistic fashion to find a solution to this employment relationship problem. The outcome was foreseeable. This is because the Company faced the near certain prospect of being found to have breached s. 64 of the Act but took no *Calderbank* initiative to protect itself. Equally

foreseeable was the need for Mr Sutherland to substantially amend his claims to properly take account of his ACC status. While he succeeded in part it was much the smaller part of his much amended claim.

18. I find that both parties elected to approach this problem in a way that unnecessarily added to their costs. I am therefore not prepared to apply my discretion in favour of either party. Costs are to lie where they fall: clause 15 of Schedule 2 of the Act applied.

### **Decision**

19. As is made clear above, I am satisfied that costs are to lie where they fall.

**Denis Asher**  
**Member of Employment Relations Authority**