

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 243A/08  
5081019 & 5081026

BETWEEN                      NEVILLE SHAKES &  
   MALCOLM HELYAR  
   Applicants

AND                              NORSKE SKOG TASMAN  
   LIMITED  
   Respondent

Member of Authority:      Vicki Campbell

Representatives:            Lou Yukich for Applicants  
   Richard McIlraith for Respondent

Submissions Received:    6 August 2008 from Applicant  
   7 August 2008 from Respondent

Determination:              25 August 2008

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]        This costs determination relates to an application by Mr Shakes and Mr Helyar to have an investigation by the Authority reopened on the grounds of a miscarriage of justice.

[2]        In my determination dated 10 July 2008, after considering the tests for re-openings I declined to re-open the matter. I reserved the question of costs and invited the parties to resolve the matter between them. They have been unable to do so and I am now in receipt of memorandum from the Respondent.

[3]        I have considered the submissions and I am satisfied that the discretion under clause 15 of Schedule 2 of the Act ought to be exercised in favour of Norske Skogg Tasman Ltd (“NSTL”).

[4] The following principles are appropriate where the Authority is exercising its discretion in relation to costs (*PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, [2005] 1 ERNZ 808):

- There is a discretion as to whether costs should be awarded and what amount;
- The discretion is to be exercised in accordance with principle;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience is to be considered on a case by case basis;
- Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;
- That frequently costs are judged against a notional daily rate;
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[5] The respondent has incurred legal costs of \$15,180.50 including disbursements, but excluding GST, for a matter which was decided on the papers, and therefore required no personal appearances at the Authority. The costs are much higher than would normally be the case for a matter which was not complex in nature and required no attendances.

[6] In a letter dated 22 May 2008, five working days after the application for reopening was lodged in the Authority, NSTL wrote to Mr Yukich advising him that both Mr Shakes and Mr Helyar had been credited with one days annual leave and offered to refund to Mr Shakes and Mr Helyar, the \$1000 they had paid in costs with regard to their original application in the Authority. NSTL also advised:

Mr Shakes and Mr Helyar are on notice that if they proceed with the reopening application notwithstanding that there is in essence no live issue between the parties, NSTL will oppose the application and will seek full solicitor-client costs for doing so.

[7] In reply to NSTL's offer dated 22 May, and on behalf of Mr Shakes and Mr Helyar, Mr Yukich referred to an earlier calderbank offer he had made, dated 17 August 2007. He then sought a contribution to the costs incurred by Mr Shakes and Mr Helyar.

[8] It seems to me that the offer Mr Yukich refers to in his correspondence was in fact in respect of the original proceedings before the Authority and the challenge in the Employment Court, but did not relate to the application for reopening.

[9] The Authority takes into account calderbank offers when assessing appropriate costs awards and has awarded significant contributions to costs after parties have rejected reasonable offers to settle employment relationship problems on the understanding that costs incurred after the offer is rejected may be sought in full.

[10] However, costs are not punitive in nature and are not available to be used as a punishment. After taking the submissions of both parties into account I have concluded that Mr Shakes and Mr Heylar are required to pay to Norske Skog Tasman Ltd the sum of \$1,500.00 each as a contribution to the costs incurred by the Respondent.

[11] An order is made accordingly.

Vicki Campbell  
Member of Employment Relations Authority