

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Barry Angel (First Applicant)  
AND Ken Hutton (Second Applicant)

**AND** Fonterra Co-operative Group (Respondent)

**REPRESENTATIVES** Andrew McKenzie, Counsel for First Applicant  
Andrew McKenzie, Counsel for Second Applicant  
Garry Pollak, Counsel for Respondent

**MEMBER OF AUTHORITY** Paul Montgomery

**SUBMISSIONS RECEIVED** 5 May 2006  
26 May 2006

**DATE OF DETERMINATION** 9 June 2006

**COSTS DETERMINATION OF THE AUTHORITY**

***The application***

[1] In the determination dated 6 April 2002, I found the applicants' dismissals were justified and invited the parties to attempt to resolve the issue of costs between them.

[2] The applicants have filed a challenge to the determination and Mr Pollock, on behalf of his client, has advised that the parties' respective counsel had not discussed costs prior to the filing of the challenge, nor had the respondent decided whether to seek costs.

***The claim for costs***

[3] Counsel for the respondent now advises that his client seeks a reasonable contribution to its costs in defending its actions before the Authority. On behalf of his client, Mr Pollock seeks a contribution of \$6,000.00 plus GST based on two days preparation and two days engaged in the Authority's investigation meeting. He also seeks \$250.00 in disbursements and a further \$500.00 for executive time expended in preparing the defence and assisting the Authority at the investigation meeting. The total sought by the respondent is \$6,750.00 plus GST.

[4] Relying on *Okeby v Computer Associates (NZ) Limited* [1994] 1ERNZ 613 Mr McKenzie adopts a multiplier approach to arrive at a notional cost of \$4,500.00. He then submits that a reasonable contribution to those costs would be \$3,000.00 which he points out is *consistent with the general unofficial tariff of \$1,500.00 per day in the Authority*.

[5] On behalf of the applicants, counsel disputes the appropriateness of the respondent's claims for disbursements on the ground that given the documents produced for the investigation meeting, \$250.00 is excessive. He also opposes the claim for executive time because the executives appeared as witnesses for the respondent, have not claimed the standard witness expenses and that the HR manager's input to the defence was part and parcel of her duties in performing a senior human resources role.

[6] Finally, counsel submits that the applicants do not object to costs in the Authority being fixed but that such costs do not become payable until the challenge is determined. The respondent has not opposed the submission.

### ***Legal Principles***

[7] The matters to be weighed in coming to a decision on costs are well established and have been thoroughly canvassed in *PBO Limited v Da Cruz* AC2/05, a decision of the full Court. In delivering the judgment her Honour Judge Shaw said, *there is nothing wrong in principle with the Authority's tariff based approach so long as it is not applied in a rigid manner without regard to the particular circumstances of the case.*

[8] Previously, if adopting a tariff approach, the Authority was guided by the principles set out in *Harwood v Next Homes Ltd* [2003] 2 ERNZ 433. At that time the average cost award for a day in the Authority lay between \$1,000 and \$1,500.00. The average cost award has risen and Department of Labour figures up to 30 June 2005 now lie in the \$2,000 - \$2,500.00 range.

### ***Discussion***

[9] Counsel for each party agrees that there are no extraordinary issues relating to the other party's behaviour which the Authority needs to consider in a costs setting. Both conducted their cases in a straight forward manner and witness statements and closing submissions were devoid of irrelevant material.

[10] The Authority's investigation effectively occupied some eight hours spread over two days and was relatively uncomplicated in terms of the facts and the legal issues.

[11] While it is customary for the Authority to consider an application for disbursements, its task, on this occasion, is hindered by the lack of a detailed analysis of how the disbursements were incurred.

### ***Determination***

[12] Having considered counsel's submissions in the light of the legal principles I think it just to award the respondent the sum of \$2,750.00 as a contribution to its reasonably incurred costs.

[13] Further, I award the sum of \$100.00 as a contribution towards disbursements. I decline to make an award for executive time.

[14] The applicants are ordered to pay the respondent the above sums however, the order is stayed pending the Court's determination of the applicants' challenge to the Authority's determination.