

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA168A/09
5281385

BETWEEN	GARRY BEGLEY Applicant	
AND	CROPMARK LIMITED Respondent	SEEDS

Member of Authority: James Crichton

Representatives: Jane Costigan, Counsel for Applicant
Scott Wilson and Sarah Townsend, Counsel for Respondent

Submissions received: 16 November 2009 from Applicant
9 November 2009 from Respondent

Determination: 7 December 2009

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 5 October 2009, the Authority declined Mr Begley's application for urgent injunctive relief.

[2] Costs were reserved.

The claim for costs

[3] Counsel for the successful respondent (Cropmark) seek a contribution to its costs in the sum of \$5,000 against actually incurred costs of \$17,400. Evidence of the rendering of those costs to Cropmark is provided to the Authority.

[4] For his part, Mr Begley contends that it is premature for the Authority to consider costs on the interim application when the substantive matter has yet to be heard and that, in any event, Cropmark's claim for costs is excessive. Mr Begley contends that if the Authority is minded to deal with costs on the interim matter at this point, costs should lie where they fall.

The legal principles

[5] The principles of costs fixing in the Authority are well known and have been helpfully set out by the Employment Court in a decision of the Full Bench: *PBO Ltd v. Da Cruz* AC2A/5. The matters referred to in that decision include the Authority's discretion, the fact that that discretion must be exercised in accordance with principle, that costs generally will follow the event, that conduct by the unsuccessful party in materially contributing to extra costs of the successful party may sound in an additional cost award, that the reasonableness or otherwise of costs is a matter for the Authority to consider, and that the tariff-based approach often used by the Authority is appropriate.

[6] Underpinning all of those principles is the notion that by reason of the inquisitorial nature of the Authority and its role as an inexpensive and uncomplicated forum designed to provide quick resolution of employment relationship problems for parties, there is the conviction that costs awards in the Authority will, of necessity, be more modest than might otherwise be the case in other jurisdictions.

[7] In addition to those general principles, counsel for Mr Begley seeks to encourage me in the view that the fixing of costs at this juncture is not necessarily in accordance with principle and in that regard I am directed particularly to an Employment Court decision *New Zealand Automobile Association Inc v. McKay* [1996] 2 ERNZ 622 which is cited as authority for the proposition that the Employment Tribunal (the precursor to the Authority) ought usually to reserve costs until the completion of the substantive litigation. Of course, this decision is an example of a line of authority to this effect.

Ought costs to be fixed at this point?

[8] Mr Begley's submission is that unless and until his substantive claim is brought on for hearing and disposed of, the determination of costs in relation to his interim application is premature. The *New Zealand Automobile Association Inc* case just referred to is cited as authority for the general principle that the Tribunal (and the Authority now) would normally wait to fix costs until the substantive matter has been disposed of.

[9] I think the difficulty with that argument is that it is by no means clear that Mr Begley is going to proceed with a substantive application. Certainly, at the

moment, no such application has been received in the Authority and even if it had been, my view is that the nature of Mr Begley's application for interim relief was different in kind from the nature of any substantive application that he might make, to such an extent as to encourage me in the view that costs should be fixed on the interim application now.

[10] This was not a situation where, for instance, Mr Begley sought interim reinstatement to his former position in anticipation of the hearing of his substantive personal grievance. This was a situation where Mr Begley sought to obtain orders which would have the effect of staying the hand of Cropmark until certain other events happened. The fact that Mr Begley has not even filed his substantive application (and may never do so), seems to me to further support the decision I have reached that costs on the interim application ought to be fixed now. If the parties, for their own good reasons choose to defer the execution of any award that the Authority makes in respect of costs on the interim application, that is a matter for them, but I consider it appropriate that both parties know where they are in terms of the financial costs of the litigation so that decisions can be made on an informed basis.

Are Cropmark's costs reasonable?

[11] I am satisfied that the evidence before me discloses that Cropmark's costs are perfectly reasonable in all the circumstances. An urgent application was made and Cropmark quite properly draws my attention to the very short span of six working days between the filing of the statement of problem and the hearing of Mr Begley's interim application. In those circumstances, it is axiomatic that able counsel would need to expend greater resources than may otherwise have been necessary in defending their client's position.

[12] I also accept the submission made on Cropmark's behalf that the application for interim relief was supported by a significant quantity of documentation contained in two lever-arch files. Mr Begley's counsel protests that that documentation primarily derived from Cropmark and/or was generated by Cropmark's solicitors. While that observation is demonstrably true, it does not alter the fact that the material must still be worked through to establish the case that the respondent Cropmark must meet.

Did Mr Begley contribute unreasonably to Cropmark's costs?

[13] Mr Begley was completely unsuccessful in his application to the Authority for urgent interim relief despite the gloss on the Authority's decision which Mr Begley's counsel seeks to advance. Counsel for Mr Begley seeks to argue that Mr Begley's application was *not entirely unsuccessful* despite Mr Begley having failed to interest the Authority in granting the relief he sought. The fact of the matter is that Mr Begley sought certain relief from the Authority and was denied it. It seems to me to draw a very long bow to claim that there was any aspect of success in that respect then.

[14] Further, and more importantly, Cropmark says that Mr Begley materially increased Cropmark's costs by failing to accept an undertaking from Cropmark which was proffered on the footing that it would, to some extent, replace the need for the claimed injunctive relief. The undertaking was refused by Mr Begley and the matter came on for a hearing in the Authority as a consequence. Cropmark says that from the point at which the undertaking was refused to the end of the proceedings, it incurred a further \$6,200 in costs.

[15] Again, counsel for Mr Begley seeks to advance the proposition that the refusal of the undertaking did not actually meet all of Mr Begley's requirements and thus it was, in effect, not reasonable for Mr Begley to accept it.

[16] No doubt that is Mr Begley's view, but it rather overlooks the fact that the Authority, in its decision on the merits of Mr Begley's claim for injunctive relief, concluded that the undertaking ought to have been part of an alternative remedy for Mr Begley which, of course, in terms of the law relating to the granting of such injunctive relief, mitigated against acceding to Mr Begley's application.

Determination

[17] I am satisfied that there is no good and sufficient reason to delay fixing costs in this matter. Mr Begley has yet to file proceedings in relation to his substantive claim and even if he does in fact do that, that matter will be so patently different in kind from the nature of the injunctive relief he sought in the present case, as to require me to distinguish the line of authority which suggests that the better view is that costs ought to be fixed at the conclusion of the substantive matter.

[18] Furthermore, I am satisfied that the costs charged to Cropmark are reasonable in all the circumstances of this particular case, and the contribution that Cropmark seeks from Mr Begley is, in my judgement, a modest one.

[19] I award Cropmark the sum of \$5,000 as a contribution to its costs in the application brought by Mr Begley for urgent interim relief. The parties are directed to engage with one another to make arrangements for the payment of that sum by Mr Begley to Cropmark.

James Crichton
Member of the Employment Relations Authority