

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Julian Paul Blaker (Applicant)
AND B & D Doors (NZ) Limited (Respondent)
REPRESENTATIVES Paul Pa'u for the applicant
Paul White for the respondent
MEMBER OF AUTHORITY James Wilson
INVESTIGATION MEETING 8 February 2006
DATE OF DETERMINATION 14 July 2006

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] In a determination dated 16 February 2006 (Determination Number AA 40/06) I found that Mr Blaker's dismissal by B & D Doors (NZ) Ltd was justified and that he did not have a personal grievance. In that Determination I reserved the question of costs and urged the parties to settle this issue themselves. Unfortunately they have been unable to do so and Mr White has submitted a memorandum seeking costs on behalf of B & D Doors.

[2] Mr White suggests that a reasonable contribution to costs would amount to \$2500 plus \$559 in disbursements (i.e. the airfares of a witness who was required to travel from Christchurch). He submits that his client made a reasonable offer of settlement to Mr Blaker in January 2006 and costs incurred after that date amounted to almost \$12,000. Mr White also suggests that applying a *notional reasonable costs* formula (\$280 per hour x 8 hrs for the investigation meeting x 2 for preparation time) would result in notional reasonable costs of \$4480. He suggests a reasonable contribution to this amount would be \$2956. In anticipation of Mr Blaker arguing undue hardship to restrict the level of costs awarded, Mr White says that Mr Blaker was fully aware that, if he was unsuccessful in his claim and in the light of the Calderbank offer made, he may be required to make a contribution to B & D Doors costs.

[3] Mr Pa'u, for Mr Blaker, argues that there is nothing in this case which would justify an award of costs over and above that which is generally awarded in cases of this type. He suggests that rather than taking a full day, the investigation meeting took closer to a half day. He says that his client made a counter offers (presumably to the Calderbank offer) which were unacceptable to B & D Doors. As anticipated by Mr White, Mr Pa'u says that Mr Blaker continues to be unemployed and his wife has only a part-time job. They are

supporting a young son and paying off a mortgage. Mr Pa'u suggests that an award of \$750, plus reasonable disbursements, would be appropriate.

Legal principles

[4] The Employment Court in a decision dated 9 December 2005 (*PBO Ltd v Eneido De Cruz* AC 2A/05), reviewed and endorsed the principles used by the Authority in awarding costs, saying:

The costs principles which the Authority now applies are not necessarily as comprehensive or as prescriptive as those set out in Okeby and similar earlier judgments. The Authority is able to set its own procedure and has, since its inception, held to some basic tenets when considering costs. These include:

There is a discretion as to whether costs would be awarded and what amount.

The discretion is to be exercised in accordance with principle and not arbitrarily.

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 the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

It is open to the Authority 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.

Discussion

[5] I have reviewed the file and considered the representatives submissions in this matter and agree in general with Mr Pa'u's suggestion that there is nothing to indicate a greater than usual award of costs in this case. However I do not accept Mr Pa'u's suggestion that \$750 plus disbursements is an appropriate award. The legal principles involved were relatively straightforward and the investigation meeting lasted less than a full day. However Mr Blaker was aware from the outset that, should his claim be unsuccessful he may be liable to make a contribution to the respondent's costs. While I have some sympathy for Mr Blaker's financial position, and I have taken this into account, I do not accept that the award for costs should be discounted to the level suggested by Mr Pa'u.

Determination

[6] Mr Blaker is to pay B & D Doors (NZ) Ltd the sum of \$1200 plus \$500 in reimbursements, as a contribution towards their costs.

[7] I note that Mr Blaker has filed a challenge in the Employment Court against my substantive determination. Under the circumstances it may be that the parties can agree that the payment of costs be stayed until the outcome of that challenge.

James Wilson
Member of Employment Relations Authority