IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 63/08
5042307

	BETWEEN	JIENJU CHEW Applicant
	AND	ASLAN CONSULTING LIMITED First Respondent
	AND	TRINITY SYSTEMS LIMITED Second Respondent
	AND	HAMISH HOWARD Third Respondent
Member of Authority:	Helen Doyle	
Representatives	Wiman and Rose Chew, Counsel for Applicant Susan Rowe, Counsel for Respondents	
Submissions Received	From the respondent 25 February 2008 From the applicants 25 March 2008	
Determination:	9 May 2008	

COSTS DETERMINATION OF THE AUTHORITY

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[1] In my determination dated 5 October 2007 I dismissed all of the applicant's claim against the second respondent and the third respondent. I dismissed all but one of the claims against the first respondent.

[2] I reserved the issue of costs in my determination. The parties have been unable to reach agreement with respect to costs.

[3] The second respondent seeks an order for the applicant to pay costs and disbursements of $28,487.95 being 90% of its actual solicitor-client costs and disbursements of $31,653.28.

[4] The applicant submits that the Authority should order that costs lie where they fall, and/or award him a portion of costs with respect to an interlocutory investigation and assess costs with respect to the substantive investigation on the basis of a notional daily rate for costs in the Authority.

The submissions

[5] Ms Rowe refers in her submissions to the relevant principles that the Authority should consider when awarding costs and disbursements as set out in the judgment of the Full Court of the Employment Court *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

[6] Ms Rowe does not accept that a notional daily rate is appropriate for assessing costs with respect to this matter. Ms Rowe submits this is because the nature of the applicant's claim and the manner in which his case was conducted falls well outside the usual conduct of cases in the Authority.

[7] In particular Ms Rowe submits:

- The statement of problem was extraordinarily lengthy and raised 19 separate issues for determination. All claims against the second respondent were unsuccessful.
- Claims were made against the second respondent when they should have been more properly against other parties.
- There were complex legal issues.
- A "scattergun" approach was adopted for the claim, various claims were time barred and many fell outside the Authority's jurisdiction.
- The second respondent was required to lodge a strike out application and the applicant required to reframe his claim and join the correct parties.
- The submissions were overly prolix and the substantive evidence irrelevant.

- Additional submissions were required to address the complex legal arguments.

[8] The applicant submits that:

- There is an issue as to the reasonableness of the costs and disbursements incurred by the respondents.
- That the second respondent should pay the applicant costs in terms of the strike out application.
- That the Authority should adhere to the principles in *Da Cruz* when considering costs.
- That the amended statement of reply was lodged three days out of time and this should be taken into account in determining costs.
- The claim for 90% of actual costs incurred is *wholly untenable*.
- The applicant does not accept his claims were in the nature of a *scattergun* approach or his submissions overly prolix.
- The applicant has not been paid by Aslan for the award made against that company because the company has no money to do so.
- Costs should lie where they fall in the substantive matter and $1,000 costs should be awarded to the applicant in terms of the application to strike out.

Determination

[9] The Authority has discretion as to whether costs are awarded and, if they are, the amount awarded. That discretion is to be exercised in accordance with principle and not arbitrarily. Costs are not to be used as a punishment or to express disapproval of the unsuccessful party's conduct, although if that conduct has unnecessarily increased costs then that can be taken into account in making an award.

[10] Costs generally follow the event and without prejudice offers can be taken into account. Awards in the Authority are usually modest. I agree with the submissions that the principles in *Da Cruz* are to be applied when determining the issue of costs.

[11] There were two investigation meetings required with respect to this matter. One was with respect to a strike out application and the other with respect to the substantive matter.

[12] The applicant's submissions raise an issue as to who was the successful party with respect to the preliminary matter .

[13] The Authority considered the application to strike out in terms of s.221 of the Employment Relations Act 2000. In its determination the Authority gave conclusions and directions to enable it to more effectively resolve the employment relationship problems and prevent further expense and the possibility of multiple proceedings at a later time.

[14] The Authority found in its determination that the claims in para.1.2 – 1.5 of the statement of problem could not succeed against Trinity, who was the only named respondent at that time. The Authority concluded that the claims would not be investigated in terms of Trinity's actions. The Authority found that the first allegation in para.1.10 would not be investigated in terms of Trinity's actions. The Authority gave the applicant an opportunity to re-frame the statement of problem and join other parties if he wanted to before the matter would be investigated in terms of the substantive issue.

[15] The second respondent seeks costs for its application of $10,406.25 plus disbursements of $260.15. The applicant seeks $1,000 in terms of the application.

[16] The first issue to resolve is who was successful in terms of that application.

[17] I accept Mr Wiman Chew's submission in terms of the correspondence from Ms Rowe prior to the application being lodged with the Authority that there was a focus on the issues relating to the Authority's jurisdiction with respect to setting or fixing terms and conditions of employment. In essence the concern from the second respondent was that the Authority was being asked to set a new salary for the applicant.

[18] The application to strike out parts to the statement of problem however made it very clear that the second respondent considered that several of the allegations were incorrectly pleaded against it. The notice of opposition provides amongst other matters that the responsibilities of the first respondent were imputed to the second

respondent and that the Authority should pierce the veil of incorporation with the second respondent. At that stage therefore, at least, there was an opportunity for reflection and consideration by the applicant as to whether the additional parties should be joined without the need for further costs to be incurred by the second respondent.

[19] Whilst I agree with Mr Wiman Chew that the Authority did conclude that it had jurisdiction to deal with some of the applicant's claims, the Authority determined it would not as part of its investigation into the claim against the second respondent, investigate several allegations which should more properly have been against the first and/or third respondents. Several paragraphs in the statement of problem were required to be re-framed. This was against the background where the applicant was not of the view during the telephone conference with the Authority that there was any jurisdictional or other issues that required amendment of the statement of problem. There was also at that time some discussion about whether some of the claims should have been against other parties.

[20] I do not agree with Mr Wiman Chew that the applicant was successful in all the circumstances in terms of the preliminary application made by the second respondent. I do not consider that such application was unnecessary given the nature of the claim.

[21] In conclusion I find in terms of the preliminary matter that the second respondent was successful in its application which the Authority considered under s.221 of the Employment Relations Act 2000. There is no good reason why costs should not follow the event in terms of that application and an award be made in the second respondent's favour.

[22] In exercising my discretion as to what award of costs should be made I have considered the invoices sent to the second respondent for professional services leading up to and including the investigation meeting in terms of the preliminary matter. The investigation meeting did not take a full day and proceeded on the basis of affidavit evidence and submissions.

[23] Ms Rowe seeks the sum of $10,406.25 and disbursements with respect to that application. I consider that an award of that nature for a preliminary matter even where there were some complex legal issues, would be inconsistent with the nature of

the role of the Authority and that the matter would not justify such an award of full solicitor/client costs.

[24] I find it is appropriate to use as a starting point the usual type of costs awards which would be made by the Authority. An appropriate starting point would be $2,000. I find that that starting point should be increased, given the complexity of the legal matters, to $2,500 together with disbursements in the sum of $260.15 which the second respondent was invoiced for, and which I have no good reason to consider were other than genuinely incurred costs as part of the legal preparation for the preliminary matter.

[25] I turn now to the substantive matter which took a full day to investigate. The actual costs incurred by the second respondent in terms of that matter were $20,475.00 together with disbursements of $511.88.

[26] This was a very important case to the parties and accordingly in my view justified a higher level of preparation. There were some complaints in both submissions about matters related to evidence and in the applicant's submission about a late lodging and serving of an amended statement in reply. I do not consider they contributed in a such a way that should be reflected in the costs award.

[27] The applicant is correct that the Authority is a low level tribunal and that costs should reflect that. The case that the applicant chose to present which the second respondent had to answer contained wide ranging claims. This increased the amount of preparation required by the second respondent, particularly with respect to the detail of legal submissions.

[28] I accept Ms Rowe's submission which was consistent with the approach in D*a Cruz* that regard has to be had in determining costs to the particular characteristic of the case. The notional daily rate based approach is not necessarily to be applied in every instance. A cost award in excess of $2,000 or $3,000 may well be justified for a one day meeting depending on the circumstances. It is also important though that parties in the Authority have an idea of what range of costs awards they may be facing or indeed entitled to and conduct their cases on a cost effective basis.

[29] Ms Rowe refers to an Authority determination *Heffernan v. Estate of Patrick Heffernan* (Member Cheyne) CA59A/06. In that case an award of $34,000 or 90% of the reasonably incurred costs was made together with disbursements to the successful

respondent. There are two matters that distinguish that case from this one. The first was that the whole matter was conducted as if it was an adjudication hearing before the Employment Tribunal and that costs were assessed by reference to the principles applied by the Tribunal following the jurisprudence of the Employment Court. The second is that there were four hearing days required in that case.

[30] I do not consider in this particular matter that it would be just to determine costs simply on the basis of a notional daily rate between $2,000 - $3,000. To do so would be to disregard the particular characteristics of this case in terms of the approach taken to the claim by the applicant, which required additional work and effort for the second respondent to defend than would normally have been the situation.

[31] On the other hand I do not find that a claim of 90% of actual costs would be reasonable or justified in this matter.

[32] I have stood back and carefully considered the issue of costs having regard to all matters in the submissions provided. I accept that there was a large amount of preparation for which the second respondent has incurred considerable costs. I am of the view that a fair award for costs for the substantive investigation will be greater than would normally be the case and justifies an award in excess of $3000.00. In all the circumstances I am of the view that a fair and reasonable award for the substantive investigation is the sum of $5,000 plus disbursements in the sum of $511.88 that I accept Trinity Systems Limited was invoiced for and I have no good reason to believe were other than reasonably incurred costs in terms of the substantive matter.

[33] I order Jienju Chew to pay to Trinity Systems Limited the sum of $7,500 in costs, together with the sum of $772.03 being disbursements for both the preliminary and substantive matters.

Helen Doyle
Member of the Employment Relations Authority