

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 140A/08
5119658

BETWEEN Mr C
 Applicant

AND D LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Phil James, Counsel for Applicant
 Linda Penno, Counsel for Respondent

Submissions received: 21 and 24 October 2008 from Applicant
 23 October 2008 from Respondent

Determination: 20 November 2008

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 22 September 2008, the Authority disposed of Mr C's application by deciding that he had a personal grievance because he had suffered a disadvantage as a consequence of a series of unjustified actions by his employer, as a direct consequence of which he ceased his employment.

[2] In that determination, costs were reserved. Further, a direction was made that Mr C was to be paid a contribution to his wages by his former employer in an amount equivalent to the average gross amount he would have earned from the date of the termination of his employment to the date of the investigation meeting less any amount earned elsewhere. That calculation obviously required some engagement between the representatives. Although there has been discussion, the quantum due has not been fixed.

The claim

[3] As the successful party, Mr C seeks the fixing of costs and the fixing of the quantum of the contribution to his wages.

[4] As to the costs, Mr C indicates that his costs in the matter, exclusive of GST, amounted to \$7,700 and he seeks two thirds of that as a contribution from D Limited, which amounts to a sum of \$5,774.42.

[5] In respect of the wages computation, the sum of \$8,216.50 is sought, being the computation required by the relevant paragraph of my determination of 22 September 2008. The basis for that calculation is attached to Mr C's submissions and I am satisfied that the wages calculation sought is arithmetically correct.

[6] Finally, it is appropriate to record that counsel for Mr C indicates that if a challenge is to be filed, he would undertake to hold the funds in his solicitors' trust account pending the disposal of the challenge.

[7] Counsel for D Limited, in response, notes that a challenge to the determination was filed on 17 October 2008 and accepts that, while the filing of a challenge does not, as a matter of law, operate as a stay, it is appropriate for any sums to be paid to repose in an interest-bearing trust account on undertakings pending the outcome of the challenge.

[8] The respondent's submission then goes on to accept the appropriateness of paying the compensatory sum over on the basis that that sum be held in trust but expresses doubt about the wages issue, apparently on the footing that the effect of the determination is difficult to comprehend.

[9] A similar view seems to be advanced in respect of costs.

[10] Mr C's counsel then responded to those submissions, and while accepting the submission in respect of compensation, not unnaturally took issue with the submissions in respect of lost wages and costs.

[11] In effect, Mr C's counsel argued that there was no logical basis on which there should be differentiation between the compensatory payment on the one hand and the other payments on the other. He also took issue with the contention that my original

determination was somehow difficult to understand in respect of the calculation of wages.

The legal principles on costs

[12] The decision of the Full Bench of the Employment Court in *PBO Ltd v. Da Cruz* ACA2A/05, sets out the relevant principles.

[13] Giving the decision of the Court, Judge Shaw makes it clear that the principle usually identified by the Authority when making costs awards are *consistent with (the Authority's) functions and powers*.

[14] In addition, Her Honour observes that there is *nothing wrong in principle with the Authority's tariff-based approach* so long as it is not applied rigidly and without regard to the particular facts of the case.

Discussion

[15] As to the costs matter, there is nothing particularly unique or difficult about the instant matter. It seems to me perfectly appropriate to consider the usual principles that apply and the tariff-based approach which the Authority frequently relies upon in these kinds of cases.

[16] This was a matter dealt with in the Authority over a period of a day and half and on the basis of the normal tariff-based approach, such a hearing time might attract a contribution to costs of the successful party in the order of \$4,500.

[17] In relation to the lost wages and their quantification, I am perfectly satisfied with the calculation advanced by Mr C's counsel.

[18] It is true, as Ms Penno points out, that the Authority heard no evidence about the effective date that the employment relationship ended, but that is why the Authority did not determine the calculation itself but simply identified the principles that were to apply.

[19] Further, the respondent seems to want to rely on the fact that there was no finding of a constructive dismissal to justify its belief that no wages are due. The Authority's finding, based on s.128 of the Act, is that there are wages due and owing as a direct consequence of the finding of a personal grievance. While it is unusual for

there to be a finding of lost wages without a personal grievance finding of unjustified dismissal, the statute does not preclude it.

[20] In the particular circumstances of this unusual case, the Authority's view was that Mr C lost his access to the income as a direct result of the unjustified actions of his employer and that the disadvantage in this case included wage loss.

[21] In the event that the Court disagrees with the Authority's reasoning in that regard, then the matter can be remedied once that decision issues.

[22] In the meantime, I see no reason to differentiate between the wages computation, the costs calculation and the payment of compensation.

Determination

[23] I direct that the following sums are to be paid by D Limited to Mr C's counsel for the latter to hold in his trust account on an interest-bearing basis pending the disposition of the challenge by the Court:

- (a) Compensation under s.123(1)(c)(i) in the sum of \$12,500;
- (b) A contribution to wages lost in the sum of \$8,216.50 gross;
- (c) A contribution to costs in the sum of \$4,500.

James Crichton
Member of the Employment Relations Authority