

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
OFFICE**

**BETWEEN** Ralph and Marie Carson  
**AND** Murray and Judith Lancaster  
**REPRESENTATIVES** Phil Butler for Applicant  
Tim Mackenzie for Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**SUBMISSIONS RECEIVED** 5 September 2006  
13 September 2006  
14 September 2006  
**DATE OF DETERMINATION** 26 September 2006

**COSTS DETERMINATION OF THE AUTHORITY**

***The application for costs***

[1] By determination dated 24 August 2006, the Authority resolved a preliminary issue in the relationship between these parties by determining that there was no employment relationship between them but a contract for services.

[2] Costs were reserved.

***The claim for costs***

[3] The Lancasters (the successful party in the substantive determination) seek a contribution to their reasonable costs. Those costs are described as \$6,430 before GST. In all the circumstances, I accept that those costs are reasonable for a matter of this kind.

[4] The Carsons, through their representative, as the unsuccessful parties, seek to have costs lie where they fall on the basis of the novel argument that, while they were unsuccessful on the matter that was, by common consent, referred to the Authority they were successful in obtaining concessions from the Lancasters during the giving and taking of evidence at the investigation meeting such that they claim to have effectively been partially successful.

[5] I do not accept the logic of this claim at all. The nature of the case brought before the Authority was simply a preliminary question as to whether or not there was an employment relationship between the parties. The matter which the Carsons rely upon in their submissions on costs came out of the evidence during the investigation meeting as a concession. The fact that the Carsons say the subject matter of the concession was part of the reason on which the claim was originally brought is in my judgment, neither here nor there. The Authority's investigation was for the purpose of establishing if in fact there was an employment relationship or not and in that respect, the Carsons were completely unsuccessful.

### ***The legal principles***

[6] The recent decision of the full bench of the Employment Court in *PBO Limited v Da Cruz* AC 2A/05 sets out the relevant principles for determining costs.

[7] The judgment identifies the basic tenets which the Authority has applied to costs decisions since its inception and Shaw J makes clear that those principles are *appropriate ... and consistent with [the Authority's] functions and powers*.

[8] One particularly relevant consideration is the movement in average costs with the passage of time. In one of the earlier decisions of the Employment Court frequently relied upon in the Authority, *Harwood v Next Homes Ltd* [2003] 2 ERNZ 433, the Court refers to average awards of costs for a one day investigation in the Authority as being between \$1,000 and \$1,500. However, in *Da Cruz* Shaw J states that the figures for costs awards maintained by the Department of Labour for the six months ending 30 June 2005, show the majority of costs awards for one day investigation meetings are in a range between \$2,000 and \$2,500.

[9] The principles enunciated by the Employment Court in *Da Cruz* include the following matters:

- The Authority has a discretion on whether to award costs and on quantum.
- That discretion has to be exercised in a principled way and not arbitrarily.
- The Authority may enquire into and determine the reasonableness of a party's costs.
- Costs will generally follow the event.
- Without prejudice offers can be taken into account.
- Costs will generally be modest in the Authority.
- Costs are frequently judged in the Authority against a notional daily rate.

### ***Discussion***

[10] This was a reasonably straightforward matter which would have been dealt with in not much more than half a day were it not for the various, and entirely proper attempts that the parties made to resolve matters by agreement during the course of the investigation meeting.

[11] I do not accept the submission made on behalf of the Lancasters that the Carson's claim "lacked merit". There was a dispute between the parties as to whether there was an employment agreement in place or not and there was genuine confusion about the nature of the agreement that the parties had reached. Clearly there was an agreement between the parties; the issue was what sort of agreement legally it was. It is not unreasonable for people to seek the guidance of the Authority in determining issues of this kind. The fact that the Carsons did not agree with the Lancasters does not of itself make it inappropriate for them to bring their claim to the Authority.

[12] I do not think this is a case where costs should lie where they fall. The respondent has been put to significant expense in defending a claim which was found to be without merit. No doubt the Carsons were made aware by their experienced advocate that, in the event they were unsuccessful, the issue of costs would potentially arise. The Carsons, like other unsuccessful parties, must accept that the right to either bring or defend proceedings potentially carries with it an obligation to contribute to the other party's costs.

[13] This was a matter which was dealt with in an investigation meeting which comprised approximately a half day of hearing time. On the basis of a daily tariff, a figure of between \$2,000 and \$2,500 would be appropriate in those circumstances.

[14] In my judgment, there is nothing in the present matter which would necessitate a departure from the usual principles I have referred to earlier in this determination and accordingly I award to the Lancasters the sum of \$2,000 as a contribution to their legal costs. The Carsons are to pay that sum to the Lancasters.

James Crichton  
Member of Employment Relations Authority