

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Michael Curry (applicant)
AND	Fonterra Co-Operative Group Limited (respondent)
REPRESENTATIVES	Sarah Ross for the applicant John Rooney for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
SUBMISSIONS RECIEVED	13 & 23 December 2004
DATE OF DETERMINATION	14 January 2005

DETERMINATION OF AUTHORITY: Costs

Employment Relationship Problem

1. In my substantive determination dated 16 September 2004 (WA 126/04) I found against the applicant, Michael Curry's, claim that the respondent, Fonterra Co-Operative Group Limited (the Company), had unjustifiably dismissed him. Costs were reserved.

2. In a submission received on 13 December 2004, the Company's counsel Mr John Rooney, applied to the Authority for an order for costs. He says that efforts to reach an agreement with Mr Curry as to a reasonable contribution to its costs have been unsuccessful.

Submissions

Company's position

3. Amongst other arguments, the Company's claims for costs relies on the fact that the Mr Curry's claim failed in every respect and that the principles to be applied by the Authority in such applications are well settled; including *Victoria University of Wellington v Alton-Lees* [2001] 1 ERNZ 305, *Binnie v Pacific Health Limited* [2002] 1 ERNZ 438, etc.
4. As a general rule, costs are discretionary and will usually follow the event. Any award should not be illusory and reflect a reasonable contribution to the costs reasonably incurred by the successful party.
5. The respondent's legal costs in this matter exceeded \$20,000 (excluding GST).
6. Adopting the traditional multiplier, the matter resulted in a one day hearing (8 hours). Applying a multiplier of three this results in 24 hours at \$400/hour which totals \$9,600 (excluding GST).
7. Disbursements of \$563.79 were also incurred in relation to photocopying, facsimiles and toll calls. Accordingly, the Company seeks a contribution to its total costs in the sum of \$10,163.79 (excluding GST).
8. It is anticipated the applicant may plead an inability to pay costs due to financial hardship. However, Mr Curry proceeded in his application knowing he would have to pay costs if he was unsuccessful. And, the applicant has sought a full *de novo* hearing of his claim in the Employment Court. If the applicant is in a position to fund the latter he should be able to meet the Company's costs in respect of the former.

Applicant's position

9. Counsel for the applicant, Ms Sarah Ross, does rely on her client's difficult personal financial circumstances to ask the Authority to exercise its discretion and order that costs lie where they fall. However, Mr Curry accepts that costs usually follow the event.
10. *Binnie* (above) is disputed per the Employment Courts' observations in *Harwood v Next Homes*, AC 70/03, unreported, Travis J, 19 December 2003, to the effect that the Authority is not bound by the former as it is a specialist decision-making body and not a Court.
11. In *Harwood* (above) the Employment Court approved of the Authority's approach of awarding costs in ordinary cases within a range between \$1,000 and \$3,000.
12. Details of Mr Curry's present financial circumstances were provided. It was submitted that an award of costs at the higher end of the \$1,000 to \$3,000 range would cause Mr Curry hardship and be punitive. Mr Curry's decision to have the matter heard *de novo* in the Employment Court is not reason to doubt the truth of the applicant's financial position and is irrelevant to the Authority's determination as to costs.
13. Any costs awarded against Mr Curry would, of necessity, have to be repaid by instalments.

Discussion and Findings

14. Mr Curry's financial circumstances are – I accept – parlous but not impossible: they are not reason for finding that costs should not follow the event in the usual fashion.
15. I prefer Ms Ross' submissions as to calculating what is a reasonable contribution to the costs reasonably incurred by the successful party, particularly as the Company itself accepts that a "*traditional multiplier*" (par 14 of its submissions) approach should be adopted even while it goes on to claim the entire amount resulting from the application of that formula.

16. I am also satisfied that counsel's hourly rate of \$400 is at the upper end of a spectrum otherwise available in the legal market place. The current legal aid hourly rate at the most experienced level of provider experience for a body like the Employment Relations Authority is \$130. A compromise is required which I set at \$250.
17. The investigation was, because of the contribution of the parties, undertaken efficiently in less than a full-day. Some of that time was taken up by the parties attempting to settle the matter on their own terms.
18. Having regard to the above, in particular the traditional multiplier, the length of the investigation and Mr Curry's financial situation, I am satisfied that \$2,000 plus the disbursements identified by the Company amount to a reasonable contribution to the costs it has reasonably incurred.

Determination

19. For the reasons set out above I find in favour of the respondent, Fonterra Co-Operative Group Limited's, claim that it is entitled to recover from the applicant Michael Curry, a reasonable contribution to the costs it has reasonably incurred in successfully defending the latter's claim that he was unjustifiably dismissed. Accordingly, I direct Mr Curry to pay to the Company the sum of \$2,000 (two thousand dollars) plus disbursements of \$563.79 (five hundred and sixty three dollars and seventy-nine cents).
20. It seems inevitable that payment of these monies will be by instalments and I suggest, but cannot direct, that the parties reach agreement on an automatic payment scheme that takes account of Mr Curry's financial circumstances.

Denis Asher

Member of Employment Relations Authority

