

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Harley Wilson Foote (Applicant)
AND Transpower New Zealand Limited (Respondent)
REPRESENTATIVES Joan Forret, Counsel for Applicant
Susan Hornsby-Geluk, Counsel for Respondent
MEMBER OF AUTHORITY Janet Scott
SUBMISSIONS RECEIVED 14 July & 4 August 2006
DETERMINATION September 2006

COSTS DETERMINATION OF THE AUTHORITY

Background

The applicant brought a personal grievance claim against the respondent alleging his termination on the grounds of redundancy was unjustified as it was not a genuine redundancy and it was not implemented in a fair manner. He also alleged the respondent breached his employment agreement in that it did not correctly interpret the compensation payable to him and that it had underpaid the compensation he was entitled to.

The applicant was unsuccessful in all aspects of his claim. The Authority found that Mr Foote's employment was terminated as a result of a genuine redundancy following full consultation. It also found that Mr Foote was treated fairly in the process and that his redundancy entitlements had been correctly calculated and paid in full.

The parties were invited to address and agree costs between them. They have been unable to agree and have now asked the Authority to determine the matter.

The respondent submits it incurred costs and expenses in excess of \$20,000 & \$2,100 (being travel and accommodation costs for counsel and respondent's witnesses). It considers an award of costs in the sum of \$10,000 is appropriate and that as a minimum is entitled to an award of \$6,000 (plus GST) plus disbursements of \$2,100. Reasoned arguments support the respondent's application.

The applicant also provided reasoned submissions which support a much lower award of costs against the applicant. The Authority is reminded that the majority of costs awards given by the Authority are in the range of \$2000-\$3000 per day and it is submitted that an appropriate award of costs in the matter be \$1,500.

Legal Principles

In *PBO Ltd v Da Cruz* AC 2A/05 the Employment Court held that the principles guiding the Authority's approach to costs are different to those that apply to the Court because the institutions function according to different procedural structures and standards. It held that the Authority must judge the reasonableness of the parties' costs in light of whatever procedure it has adopted be it formal, informal, inquisitorial or adversarial.

The Court has held that the following principles are appropriate where the Authority is exercising its discretion in relation to costs:-

- *There is discretion as to whether costs should 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 an unsuccessful party's conduct although conduct which increase costs unnecessarily can be taken into account in inflating or reducing an award.*
- *It is open to the Authority to 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 and Determination

In determining costs I have had regard to the submissions of the parties and to relevant case law.

This case was notable for the fact that Mr Foote challenged every aspect of the employer's conduct in justifying and implementing its relocation proposals and sought to establish the existence of improper motive in his particular case. Mr Foote did not succeed on the evidence

– evidence which was available to Mr Foote and well known by him. The respondent was as a result required to mount a very wide ranging defence of its actions in relocating to Auckland and its decision to terminate Mr Foote's position on the grounds of redundancy.

In considering costs I have weighed the wide scope of the claim. Against this I have weighed the fact that Mr Foote was a very long serving employee for whom the relocation and his subsequent redundancy had a significant deleterious impact on him.

I have also weighed the co-operation given by both parties to expedite the hearing so that it was concluded in one day as opposed to the two days it was reasonably expected to occupy.

In all I consider costs should be set according to the convention that costs will follow the event having regard to the normal allowance for costs in the Authority of \$2000 to \$3000 per day. In all the circumstances and award costs at the higher end of this range is called for in this case.

Determination

The applicant is directed to pay to the respondent the sum of \$3,000 to reimburse it for costs incurred in defending the matter.

Janet Scott
Member of Employment Relations Authority