

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 48/08
5045914

BETWEEN IT MANIACS LIMITED
 Applicant

AND RONALD FORD
 Respondent

Member of Authority: R A Monaghan

Representatives: Michael Smyth, Counsel for Applicant
 Ken Nicolson, Advocate for Respondent

Submissions received: 10 and 31 January 2008 from Applicant
 23 January 2008 from Respondent

Determination: 15 February 2008

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination of the above dated 12 November 2007 I determined IT Maniacs' numerous allegations of breach of employment agreement against Mr Ford, Mr Ford's personal grievances in respect of a disciplinary suspension and unjustified dismissal, and both parties' claims for penalties. Costs were reserved.

[2] Mr Ford was adjudicated bankrupt on his own application on 29 May 2007. The Authority was not advised of this at the time, which is unacceptable. However the Official Assignee has confirmed that he seeks a determination on costs, and has instructed Mr Nicolson in that respect.

[3] Neither party addressed me on the implications of Mr Ford's bankruptcy with reference to his ability to pay any award against him, although this determination does not turn on the point.

Who was the successful party

[4] Mr Smyth submitted that all of the costs incurred were for the purpose of establishing Mr Ford's breach of duty to his employer, and the Authority found in IT Maniacs' favour on that matter. Accordingly IT Maniacs was entitled to costs. Mr Smyth produced invoices for fees totalling a little over \$30,000, and suggested a starting point of \$22,875 to reflect the unnecessary expense to which he said IT Maniacs was put.

[5] Mr Nicolson submitted that Mr Ford was the largely successful party, and sought a reasonable contribution to Mr Ford's costs of \$23,496.

[6] Since Mr Ford's dismissal was based on essentially the same breaches as IT Maniacs' claims in respect of breach of contract, it is not correct to say that all of the costs incurred were for the purpose of establishing Mr Ford's breach of duty to his employer. The evidence was central to both parties' main causes of action.

[7] Further, I do not accept that either party can claim to be the largely successful party. IT Maniacs established some of its allegations of breach of contract although not the most substantial of the allegations as it framed them, while Mr Ford's dismissal was unjustified but Mr Ford was awarded no remedies. He was awarded only a payment of salary which had been withheld from him when it should not have been. As for the claims for penalties, neither party was successful in the claims as they were put to me.

[8] On that basis I would conclude that costs should lie where they fall, but there is one other matter I have been asked to take into account.

Offers to settle

[9] Mr Ford made IT Maniacs an offer of settlement expressed to be 'without prejudice save as to costs', in a letter dated 2 March 2007. The date of the letter was the date scheduled for the investigation meeting, and the start of the meeting was delayed to allow discussion of the offer in the letter.

[10] The offer was that Mr Ford would pay \$20,000 to IT Maniacs - \$5,000 being payable within 7 days and the balance payable on the sale of property Mr Ford owned. Mr Ford would also withdraw his personal grievance. The offer was rejected in a letter dated 5 March 2007 because it was produced in circumstances which did not offer IT Maniacs a modicum of time for calm reflection, and made no provision for pre-offer costs. Moreover the condition that the balance of the \$20,000 be paid on the sale of Mr Ford's property was not satisfactory.

[11] I am not prepared to say IT Maniacs' rejection of the offer means it should now contribute to Mr Ford's costs. It had every reason to find unsatisfactory the condition that \$15,000 be payable on the sale of Mr Ford's property, leaving it with at best an offer of \$5,000 payable in 7 days. Coincidentally that amount is close to the difference between the amount I have ordered Mr Ford to pay IT Maniacs and the amount IT Maniacs is to pay Mr Ford. It does not, however, take into account any costs.

Conclusion

[12] For the above reasons, costs are to lie where they fall.

R A Monaghan

Member of the Employment Relations Authority