

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 53A/09
5112278

BETWEEN MELT LOUW
 Applicant

AND BRIAN ANDERSON
 ACCOUNTING SERVICES
 LIMITED LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Eska Hartdegen, Counsel for Applicant
 Paul Tremewan, Advocate for Respondent

Submissions Received 7 April 2009 from Applicant
 14 April 2009 from Respondent

Determination: 19 May 2009

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 19 February 2009, the Authority resolved the employment relationship problem between these parties by determining that Mr Louw had a personal grievance for unjustified dismissal.

[2] Costs were reserved.

The claim for costs

[3] Counsel for Mr Louw, after detailing the actual costs incurred of \$8,630 (inclusive of GST), seeks a costs award of 70% of that figure being \$6,041.

[4] The principal area of dispute between the parties is on the question of whether either party can be said to have materially contributed to the costs incurred by the other in the way in which the matter was handled.

[5] For Mr Louw, Ms Hartdegen claims that the delay in the provision to her of an additional bundle of documents necessitated an adjournment with consequential increases in cost to the application.

[6] Conversely, Mr Tremewan for the respondent contends that there was a material increase in costs occasioned by the applicant when Ms Hartdegen insisted on the investigation meeting proceeding with briefs of evidence being filed and served. Mr Tremewan contends that the Authority member then presiding had proposed conducting the investigation meeting without that formality.

[7] On the face of it then, it may be that the Authority can properly reach the conclusion that the contention of one side balances out the contention of the other and that the application for costs should simply be considered on general principles.

The legal principles

[8] The Full Court in *PBO Ltd v. Da Cruz* AC2A/5, identifies the salient principles traditionally referred to by the Authority in a costs setting and confirms the appropriateness of those principles. The Full Bench of the Employment Court also specifically approved the tariff-based approach often adopted by the Authority in a costs environment, as long as the particular circumstances of the individual case are taken into account as well.

[9] In addition, I have often found it helpful to adopt the approach taken by the Authority in an unreported decision, *Graham v. Airways Corporation of New Zealand Ltd* (Employment Relations Authority, Auckland, AA39/04, 28 January 2004). In that decision, the Authority postulated three steps in evaluating applications for costs. These are, first the consideration of the actual legal costs and expenses of the successful party; second, a decision about whether those costs are reasonable; and finally a determination of what proportion of those costs ought to be met by the other side.

Discussion

[10] Applying those principles from *Graham's* case to the present application, I have already recorded the actual quantum of the costs incurred by the successful party and the next issue is whether those costs are, in themselves, reasonable. I accept that

the costs are reasonable for a one day investigation meeting in the Authority, although they must be seen as being at the upper end of the reasonable band.

[11] Mr Tremewan refers to comments made by my colleague, Member Robinson in *Jackson v. Enterprise Motor Group (North Shore) Ltd*, 24 May 2005, AA192/05, when the Authority substituted an hourly charge out rate of \$450 for the lower rate of \$250 contending that the latter was *a reasonable hourly rate* in this particular form.

[12] Further, the more informal and inquisitorial nature of the Authority's proceedings tend to militate against significant costs awards and, in a sense, the whole point of the Authority as a decision-making body is to reduce unnecessary formality and limit the occasionally prohibitive costs of trial in the traditional adversarial system.

[13] The Authority has always watched the movement of costs in matters before it and Members are familiar with the range of costs charged to parties before the Authority. While the Authority can derive little real guidance in the costs setting from evaluating comparators in the traditional adversarial context, it is appropriate for the Authority to make those comparisons within its own jurisdiction.

[14] Costs in the Authority have moved upwards over time, as one might expect. In *PBO Ltd* (supra), which was a 2005 decision, Judge Shaw noted that costs awards for one day meetings were then in the range of \$2,000-2,500. My own view is that it is now reasonable to consider that those average daily awards have moved closer to between \$3,000-3,500 at the present time.

[15] The final question then to determine is what percentage of the costs actually and reasonably charged to the successful party ought to be recovered from the unsuccessful party. In *PBO Ltd*, Judge Shaw accepted that the Authority's traditional practice of applying a notional daily tariff was reasonable and I have just indicated my view that a notional daily tariff in the order of \$3,000-3,500 represented the present working average.

[16] Given the balancing factor that I referred to earlier, where in effect, each party accuses the other of taking steps which unreasonably escalate cost, I think the proper course of action is to treat this costs matter as one where the notional daily tariff ought to apply.

Determination

[17] This was a straightforward personal grievance, dealt with by the Authority within a single day's hearing time. There were no matters of particular complexity which could be said to materially add to the time taken to deal with the matter or the time taken for the representatives to prepare for the investigation meeting.

[18] I am not persuaded by the argument of either party that there are any issues in the present case which allow me to depart from the usual rules for the fixing of costs in this jurisdiction, and accordingly I direct that, on an application of the daily tariff approach traditionally used by the Authority and referred to with approval in *PBO*, Brian Anderson Accounting Services Limited is to pay to Mr Louw the sum of \$3,500 as a contribution to Mr Louw's reasonably incurred legal costs.

James Crichton
Member of the Employment Relations Authority