

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Nigel Craig Lines (Applicant)
AND Ohau Snow Holdings Limited (Respondent)
REPRESENTATIVES Quentin Stratford, Counsel for Applicant
Alan Jones, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
SUBMISSIONS RECEIVED 13 January 2006
1 March 2006
DATE OF DETERMINATION 16 March 2006

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 21 September 2005, the Authority resolved the employment relationship problem between these parties by determining that Mr Lines had been unjustifiably dismissed by the respondent (Lake Ohau Lodge).

[2] Costs were reserved.

The claim for costs

[3] Mr Lines seeks a substantial award of costs arguing that the failure of the respondent to contemplate either mediation assistance prior to the investigation meeting or even a willingness to contemplate negotiating the matter of costs after the hearing evidences a cavalier unwillingness to deal with the matter in a cost effective fashion.

[4] Mr Lines encourages me to see this case as in the same category as the well known decision of Chief Judge Goddard in the case of *Open Systems Limited v Pontifex* [1995] 2 ERNZ 211 where His Honour said in effect that a refusal to attend mediation was *indefensible* in the present day and age and that that failure ought to sound in costs.

[5] For its part, Lake Ohau Lodge argue that they believed they had genuine grounds for dismissing Mr Lines and that that, coupled with their belief that Mr Lines' aspirations were allegedly unrealistic, justified their stance.

[6] Mr Lines points out the effect of the failure of Lake Ohau Lodge to attend mediation (despite a number of attempts to persuade them of the usefulness of that approach) was to materially

increase his legal costs such that the result of his successful claim was to leave him with a residue of unpaid legal fees.

[7] In effect, the net benefit to Mr Lines of my earlier decision on the substantive matter was a payment of \$4162 while his total legal costs were \$7505.47. The net effect is to leave Mr Lines with a legal bill outstanding of \$3343.47. Mr Lines says, with some justification, that had Lake Ohau Lodge been prepared to attend mediation prior to the investigation meeting then the matter could have been settled perhaps for more modest cost to Lake Ohau Lodge and certainly at a lower cost in fees to Mr Lines so that the net benefit to both parties would have been greater.

[8] I accept the force of that argument and am disappointed by the continuing evidence that Lake Ohau Lodge still seems unwilling to accept the realities of its obligations as an employer in the present legislative environment. I am particularly disappointed to be told in submissions that it required a statutory demand in order for Mr Lines to be paid the money due to him as a consequence of my earlier substantive determination.

The legal principles

[9] The very recent decision of the full Court in *PBO Limited v Da Cruz* AC2A/05 dated 9 December 2005 helpfully sets out the relevant principles.

[10] In the judgment of the full Court delivered by Judge Shaw, Her Honour refers to the principles that the Authority has used in dealing with costs matters, and indicates that those principles are appropriate and consistent with the Authority's statutory powers.

[11] Generally speaking it is not the role of the Authority to punish an unsuccessful party through costs nor is it appropriate for an unsuccessful party to be punished for the way in which they have chosen to run their case. However, a successful party is entitled to make a claim to recover part or all of their costs reasonably incurred in meeting an unsuccessful party's claim where the unsuccessful party's conduct has directly contributed to the successful party's costs. In the particular circumstances of this case, it is in my view entirely appropriate for Mr Lines to seek to recover a contribution to his costs in having to progress the matter through to the conclusion of an investigation meeting before the Authority, when it was available to both parties to resolve the matter by agreement in mediation.

[12] In relation to an appropriate order for costs in respect to the investigation meeting proper, it is certainly the position that awards of costs have generally been more modest in the Authority than in the more formal setting of a Court of record but it is still important that the Authority continues to update any notional daily rates to reflect actual practice and also to reflect movement in costs reasonably incurred by successful parties.

[13] To that end it is illustrative to compare one of the earlier decisions of the Court frequently relied on by the Authority with the most recent information from the Department of Labour on costs awards. In *Harwood v Next Homes Limited* [2003] 2 ERNZ 433 average awards of costs for a one day investigation meeting in the Authority were held to be in the order of \$1000 to \$1500 whereas Judge Shaw pointed out in *PBO Limited* the figure for costs awards for the six months to 30 June 2005 (according to Labour Department statistics) now range, for the majority of costs awards, from \$2000-\$2500.

Conclusions

[14] Lake Ohau Lodge invite me to either order that costs lie where they fall or in the alternative propose that they pay \$750 towards to Mr Lines costs. They calculate this latter figure by a mathematical calculation based on the difference between the claim by Mr Lines for compensation

and my award in my substantive determination. They encourage me to apply the same principles to costs such that on the basis that Mr Lines is allegedly claiming \$3000, he should be paid \$750 being a quarter of that figure.

[15] That is not a proper basis for calculating the costs due by one party to another. Nor is there any reasonable basis that costs should lie where they fall. The effect of the decision the Authority made in respect to Mr Lines' claim was that he was unjustifiably dismissed by Lake Ohau Lodge and he is entitled to the benefit of the usual principle that costs follow the event.

[16] Lake Ohau Lodge draw the Authority's attention to the costs they incurred in dealing with Mr Lines' claim. If they had been inclined to attempt mediation at an early stage, they might have incurred significantly less cost and the matter would have been resolved long since.

[17] In my view, the proper approach in matters of this kind is to consider an appropriate award of costs in respect to the investigation meeting proper and then look at whether any further contribution should be made as a consequence of the other decisions which the unsuccessful party made which impacted on the costs incurred by the successful party. In this latter regard, in the present case, the issue of the refusal to attend mediation is a matter that I will want to consider.

[18] I am satisfied that the costs incurred by Mr Lines are in the circumstances reasonable.

[19] The investigation meeting spanned a day but by virtue of the particular logistics involved an overnight stay for Mr Lines' counsel. The investigation meeting was by agreement between counsel and the Authority heard in Christchurch because both counsel and both parties had to travel and Christchurch appeared to be a reasonable mid-point.

[20] Mr Lines instructed Dunedin counsel who by definition incurred travel costs in Christchurch. In my opinion, it is proper that the travel costs of Mr Lines' Dunedin counsel be met as part of the costs award.

[21] I accept that Mr Lines' argument that the respondent's failure to meet him in mediation materially increased his costs in the particular circumstances of this case. Accordingly, I propose to make an award in that regard as well. I accept that, had Lake Ohau Lodge been prepared to enter into mediation with Mr Lines, the matter might well have been able to be resolved by agreement which might have cost Lake Ohau Lodge less money in terms of settlement and would have cost both parties less in terms of their legal costs.

Determination

[22] I direct that Lake Ohau Lodge pay to Mr Lines the sum of \$4379.14 as a contribution to costs. This amount is made up of three amounts, an amount of \$2000 as a contribution to the costs of the investigation meeting proper, a further figure of \$2000 as a contribution to the costs incurred by Mr Lines in additional legal costs which might not otherwise have been incurred if Lake Ohau Lodge had been prepared to attend mediation, and the sum of \$379.14 being the amount identified by Mr Lines' counsel in the latter attending the investigation meeting in Christchurch.