Determination Number: AA 53A/07
File Number: AEA 1156/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Jeffrey McCarthy (Applicant)
AND	Centurion GSM Limited (First Respondent) **AND** Millennium Group Holdings Limited (Second Respondent)
REPRESENTATIVES	James Turner, Counsel for Applicant Chris Patterson, Counsel for Respondents
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION MEETING	18 September 2006 and 11 October 2006
DATE OF DETERMINATION	11 April 2007

COSTS DETERMINATION OF THE AUTHORITY

[1] In determining the substantive matter between the parties (AA53/07, 1 March 2007), costs were reserved and the parties encouraged to resolve that issue themselves. They have been unable to do so and the applicant seeks an order for his costs.

[2] Determination AA53/07 is currently the subject of partial challenges by the first respondent (ARC 7/07) and the applicant (ARC 15/07). However these are no reason that the Authority should not determine costs for parties in respect of the Authority's investigation and determination of the issues between them.

[3] The principles applied by the Authority in exercising its discretion to award costs, as summarised in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, include:

- Costs follow the event; and
- Awards are modest and frequently calculated on a notional but not unduly rigid daily 'tariff'; and
- consistent with the equity and good conscience jurisdiction, costs are considered on a case by case base and may be influenced by the nature of the case; and
- costs are not used to punish or express disapproval of parties' conduct although conduct which unnecessarily increases costs may be taken into account in increasing or reducing an award.

[4] Further, as noted by the Court in the *PBO* case at [47], representatives of parties should be conscious of accumulating costs and ensure costs incurred are reasonable in light of the amount likely to be recovered as remedies and costs from the Authority.

The applicant's submission

[5] The applicant says he was successful with his claims for unjustified dismissal, holiday pay owed, compensation for loss of benefit and for general distress. He seeks a "substantial contribution" to legal costs, including GST and disbursements, said to total $45,968. No breakdown of the costs is provided.

[6] He says he should get indemnity costs, or at least a two-thirds contribution, because he was put to the expense of:

- establishing the identity of his employer and his terms and conditions of employment because of a failure of the employer to provide a written agreement; and
- responding to a claim that termination of his employment was by expiry of a fixed term rather than by redundancy as said at the time; and

- pursuing the provision of wage and holiday records which were never properly provided; and
- responding to an ill-founded counterclaim for repayment of redundancy compensation; and
- responding to an additional counterclaim for return of a company document; and
- dealing with postponement and rescheduling of the investigation meeting due to the respondents' delay in providing witness statements according to the investigation timetable.

[7] The applicant says that the argument regarding an alleged fixed-term contract turned a matter otherwise able to be investigated in a single day into a one-and-a-half day hearing (19 September and 11 October 2006).

The respondents' submission

[8] The first respondent seeks an order that costs lie where they fall or that any award to the applicant "not exceed the tariff based approach of $3000". The second respondent, found not to be an employer of the applicant, seeks two thirds of its costs.

[9] The respondents' actual costs and disbursements are said to be $25,662. As with the applicant, no breakdown of costs has been provided. However, excluding costs of mediation and an issue in the proceedings akin to an interlocutory matter, the total costs were $20,527 with each respondent bearing half that cost – that is $10,263.

[10] The issue in the proceedings akin to an interlocutory matter concerned the applicant's possession of a company financial document. The respondents sought an order for its return. As the parties could not resolve this issue between themselves, it was dealt with by way of an order made in determination AA334/06 (31 October 2006). The respondents say they incurred actual costs of $2721 and seek a costs contribution of $2000.

[11] The respondents then analyse the extent of the applicant's claims and remedies sought against the outcome. They say he was successful in only around one-fifth of his total claim. He failed in his claims that he was:

- an employee of the second respondent; and
- entitled to compensation for the loss of shareholding rights to the alleged value of $780,000; and
- entitled to compensation for injury to professional reputation; and
- entitled to lost earnings of $145,833.

[12] The respondents say the extent and nature of the applicant's claims unnecessarily increased their costs. They submit there is no evidence that the applicant suffered any prejudice by postponement of the investigation meeting due to the delay in the respondents' lodging and serving witness statements. They also submit that the applicant's alleged costs of $45,000 for one full day and one half day of investigation are excessive.

Discussion

[13] Standing back from the twists and turns, stops and starts, and many minutes and submissions of what has become a rather thick file, to look at this matter overall for the purposes of costs, I see no reason to depart from the usual starting point of a daily tariff regarding costs. However there are some factors in the course of this particular case that should be weighed in determining whether any award of costs should be added to or reduced.

[14] I do not accept the respondent's fractional success approach to determining costs. The applicant was, in my determination, successful in establishing that he was unjustifiably dismissed, lost wages and was entitled to compensation. Costs follow that event.

[15] The usual tariff ranges between $1500 and $3000 a day, and I consider the latter figure appropriate for what was a reasonably complex case heard over one full day and a further half day. The starting point for costs then is $4500.

[16] In considering the parties' submissions on the extent to which this starting point should be added to or reduced, I consider only two factors are of sufficient weight in this matter to warrant change – the effect of unmeritorious arguments on the cost and length of the investigation, and the issue about possession of a document that was determined in the course of the proceedings.

Unmeritorious arguments

[17] The respondent has suggested that the failure of the applicant's argument on shareholding rights is a factor which should be weighed in reducing any costs awarded to him. It says this was a "frivolous" claim. The applicant claimed to be entitled to shares as a term of employment for which he would have paid $50,000 but would by now have been worth, he alleged, $780,000. While that claim was not successful, for the reasons given in determination AA53/07, I do not accept that it was unfounded in the sense that it lacked an evidential basis for the claim. Rather there was documentary and other reliable evidence about shareholding issues which could be analysed and argued over.

[18] The same cannot be said of the respondents' defence that the applicant's employment ended in June 2005 due to the expiry of a fixed term employment agreement. That defence was also the basis for a counterclaim for repayment of redundancy compensation which was now said to have been paid by "mistake".

[19] This defence emerged only in a statement in reply lodged in the Authority in early January 2006. It was repeated – as an assertion – in the witness statement and oral evidence of the first respondent's managing director Ajay Sharma. He asserted there were documents – perhaps letters – which confirmed this but was unable to produce any such documents.

[20] The fixed term defence was entirely at odds with the available documentary evidence from the time of the applicant's termination of employment – including a detailed letter of redundancy to the applicant which Mr Sharma accepted he had approved. That letter was signed, on Mr Sharma's behalf, by the first respondent's human resources consultant who gave evidence under a witness summonses issued at the first respondent's application. She was not aware of any alleged fixed term at the time that she, with the assistance of an employment lawyer, carried out the redundancy process ending the applicant's employment.

[21] Other documents also revealed that redundancy – or the prospect of it – had been discussed, by Mr Sharma and his human resources consultant, in the weeks preceding the termination in June 2005. At no time was the expiry of a fixed term agreement discussed.

[22] I am satisfied that the argument regarding a supposed fix term was so lacking in merit, because it lacked any evidential basis, that it unnecessarily increased the time and expense of the investigation. In my assessment at least half a day of investigation time was unnecessarily wasted on points in and around that meritless argument. It warrants an additional $2000 in contribution to the applicant's costs.

The document issue

[23] During the investigation the respondents filed an amended counterclaim seeking a compliance order for return by the applicant of a company financial report. It had been included in the applicant's bundle of documents but became a source of dispute as to how the applicant had come to have it and whether he was entitled to keep it.

[24] Despite my best efforts I could not persuade the parties to resolve this matter pragmatically between them and took some steps to assure the applicant would not be disadvantaged in advancing his case if he were to do so. However the parties could not agree and a determination was required (AA334/06, 31 October 2006) which included a compliance order requiring the applicant to return the document to the respondent. A sealed copy of the document remained on the Authority's file in case it was required later in the investigation. It

was not.

[25] However costs were reserved on the respondents' successful application. They are now entitled to have costs for that application determined. Dealing with matter took around an hour of the investigation meeting and some submissions for which I award a contribution of $500 to be paid by the applicant to the first respondent.

The second respondent

[26] I do not accept the second respondent is entitled to any separate consideration on costs because it was found not to be an employer of the applicant. The respondents' principals share some responsibility for the poorly documented nature of the applicant's employment arrangements during periods when he was entitled to a written employment agreement.

[27] The second respondent is in the nature of a parent company to the first respondent. It did not, in my assessment, incur any separate additional costs. No additional witnesses or counsel were required. The attendance, written statements and oral answers of Mr Sharma and Mr Patel were required for the purposes of giving evidence for the first respondent. However I do accept that any order of costs to the applicant should be against the first respondent only and not the second.

The overall outcome

[28] At this point I make the following observation regarding the overall outcome regarding a reasonable contribution to the applicant's costs. From a starting point of $4500 I have considered it appropriate to add a further $2000 because of the additional time and effect requried to respond to an unmeritorious argument advanced by the respondents, and then offset that by $500 that the applicant should contribute to the respondent's costs of seeking a compliance order for return of a document he should not have kept.

[29] I am aware that the "net result" of $5000 is considerably below the amount of around $30,000 that the applicant sought as two-thirds of his declared actual costs. I do not know if those claimed costs included amounts for mediation or other items which cannot be included because no breakdown of the applicant costs has been provided.

[30] I am also aware that if the applicant's actual costs were as claimed, the net result of his claim after offsetting his legal costs against the awards made – around $40,000 in lost wages, benefits, holiday pay and distress compensation – is little if anything. The applicant may consider his legal costs actually incurred to date reasonable in pursuit of claims which he valued at $780,000 for lost share rights and $145,833 for lost salary over 14 months. The actual outcome in the Authority has not matched those expectations. That is the calculated risk of litigation. And in light of the caution given by the Court in the *PBO* case about accumulating costs, that is a responsibility of lawyers to discuss with their clients. In this case I have exercised the discretion on costs within the applicable principles as best I can and cannot in equity and good conscience alter their application to produce a different result in respect of the required contribution to the costs of the applicant.

Determination

[31] **The first respondent is ordered to pay to the applicant the sum of $6000 as a reasonable contribution to his costs.**

Robin Arthur
Member of Employment Relations Authority