

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 45/09
5101001

BETWEEN	ROWAN (PETER) McCUTCHEON Applicant
AND	CHARLES (PAUL) GALLAGHER practising as PAUL GALLAGHER LEGAL Respondent

Member of Authority:	Alastair Dumbleton
Submissions Received	28 November and 15 December 2008
Determination:	13 February 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 10 October 2008 issued under AA352/08, the Authority found that Mr Peter McCutcheon had been dismissed justifiably by Mr Charles Gallagher and that he was therefore not entitled to any of the remedies claimed by him. Mr McCutcheon's personal grievance claim was resolved on that basis.

[2] As the parties have not been able to settle it themselves, the question of costs must now be determined by the Authority. Submissions have been received from Mr Gallagher and from Mr Chris Patterson, counsel for Mr McCutcheon. Both have referred to the leading decision on costs in the Authority, *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[3] In principle costs should follow the event to entitle Mr Gallagher to an award as a contribution to his actual legal costs reasonably incurred by him, and his disbursements, in preparing for and participating in the investigation commenced by Mr McCutcheon.

[4] For the reasons outlined in his submissions Mr Gallagher seeks an award of full or indemnity costs against Mr McCutcheon. Actual costs of \$8,876.25 (including GST) were invoiced to Mr Gallagher by counsel he retained up to the end of the investigation meeting, Mr Barter.

[5] For Mr McCutcheon it is conceded that in principle he is liable to an award against him in recognition of the outcome of his claim but that the amount should be only at the level of a reasonable contribution rather than indemnity. On this basis it is submitted that \$2,000 would be appropriate. Anything above, it is submitted, would be punitive rather than compensatory and beyond a “*modest*” contribution.

[6] As invariably required in this jurisdiction, this particular claim by Mr McCutcheon was (belatedly) the subject of mediation before the Authority fully embarked on its investigation. I note that the costs incurred by Mr Gallagher include “*attendance at the mediation.*” Although the amount billed for that item is not disclosed, I expect it would have been between \$1,000 and \$2,000.

[7] As a matter of policy costs are not awarded in relation to mediation because of the nature of that process and the expectation and incentive for parties to bear their own costs of mediation.

[8] In his costs submissions Mr Gallagher sought to inform the Authority about some of what took place at mediation. This was rightly objected to by Mr Patterson as being subject to confidentiality which his client was entitled to see preserved.

[9] The Authority will often have a natural curiosity as to what did take place at mediation, because in cases such as this one it can be hard to fathom why it ever reached investigation and was not resolved by the parties.

[10] While it may be revealing to know precisely why a matter did not resolve at mediation, the curiosity of the Authority is not able to be satisfied because the mediation must remain confidential unless both parties waive that.

[11] It does have some relevance in this case that Mr McCutcheon, who brought the unsettled claim on to the Authority for investigation, was an experienced legal practitioner, although not a specialist in employment law. He was though advised by a specialist Mr Patterson. If the investigation resulted from bad advice given by Mr Patterson, or if good advice given by Mr Patterson was not taken by

Mr McCutcheon, neither of those situations are the responsibility of Mr Gallagher who, in my view, was quite unnecessarily presented with this claim over three years after the employment had ended.

[12] That delay is some indication of the failure by Mr McCutcheon to appreciate the true merits of his claim or to have it resolved as quickly as possible if he believed it was a good one. There was no attempt at mediation until the Authority directed the parties to attend, after the claim was lodged. This level of delay can only have increased the cost to Mr Gallagher when preparing for the case by having to revisit what happened a long time earlier, and because of the relatively higher fees his counsel is likely to have charged three years further on from the events. The loss of professional earnings from Mr Gallagher's own time needed to be spent on this case would no doubt have also increased because of the unreasonable delay.

[13] Although a breakdown of the hourly rate charged by Mr Barter to Mr Gallagher has not been provided, it does seem to me that the costs incurred by Mr Gallagher were reasonable, allowing some reduction for the mediation costs which are not to be taken account of.

[14] Mr McCutcheon's personal grievance claim had no merit. While strictly speaking he was dismissed by Mr Gallagher, the reality is that Mr Gallagher merely pronounced the ending the employment relationship rather than initiating that outcome in any way. Mr McCutcheon had made it quite clear that he saw no future in the relationship. The realities should have been recognised and the claim settled or discontinued without putting Mr Gallagher to the expense of the investigation.

[15] It is a factor that can affect the amount of costs awarded as to whether arguments lacking substance were advanced or whether unduly technical or legalistic points were needlessly taken in personal grievance proceedings; *Ogilvy & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943 at 954.

[16] I disregard the matter raised by the Authority as to whether a grievance was raised at all within 90 days as required. Although the Authority made observations about that matter it did not finally determine it, for the reasons given to the parties. It does however colour the overall character of this claim, along with the delay in pursuing it, as being a niggling or vexatious response by Mr McCutcheon to a situation brought about largely by him.

[17] Included among the *Da Cruz* principles is the equity and good conscience jurisdiction of the Authority exercisable in awarding costs, which I take into consideration.

[18] There is no advice that any without prejudice offers were made between the parties outside of the mediation.

[19] In my view, its singular lack of merit as a factor of Mr McCutcheon's claim does not quite bring it to the level required for full indemnity costs. It does however justify an award of increased costs at above usual levels for this kind of claim taking less than a day of investigation meeting.

[20] I fix those costs at \$5,000 in total.

[21] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000, Mr Peter McCutcheon is therefore ordered to pay \$5,000 as costs to Mr Paul Gallagher.

A Dumbleton
Member of the Employment Relations Authority