

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 145A/10
5157178

BETWEEN NIGEL McFALL
 Applicant

A N D LYTTELTON PORT
 COMPANY LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Nigel McFall, the Applicant in person
 Tim McKenzie, Counsel for Respondent

Submissions Received: 3 August 2010 from the Respondent
 16 August 2010 from the Applicant

Determination: 23 August 2010

DETERMINATION OF THE AUTHORITY ON COSTS

[1] In a determination dated 14 July 2010 I dismissed Mr McFall's personal grievance claim. Costs were reserved for each party to provide a memorandum if a decision was needed. I have now received these memoranda. This determination resolves the question of costs.

[2] Mr McFall was originally supported by his union but counsel withdrew shortly before the investigation meeting and Mr McFall represented himself at the meeting. The meeting itself took less than a full day, no doubt assisted by careful preparation by both counsel beforehand since we covered a lengthy period of the employment and a not insignificant amount of documentation.

[3] I am told that the respondent's costs for the Authority proceedings (excluding mediation) are \$13,475.00 (excluding GST and disbursements). I am asked to order costs of \$3,000.00 on a daily tariff basis and a further \$3,589.65 (includes GST) being actual preparation costs incurred after Mr McFall apparently resiled from a settlement

agreement that had been reached between counsel a week or so before the investigation meeting and before Mr McFall's counsel withdrew. I have been provided with the correspondence between counsel which constitutes the settlement agreement.

[4] In reply Mr McFall says that he was unaware of the settlement proposal offered on his behalf in a letter dated 21 January 2010 from his solicitor to the respondent's solicitor and accepted in a reply letter dated 25 January 2010. I have no information about what occurred between Mr McFall and his solicitor except that in an email dated 26 January 2010 his solicitor advised the respondent's solicitor that she was no longer instructed by Mr McFall and that he intended to continue with and represent himself at the forthcoming hearing. There is nothing to indicate that the respondent could not rely on counsel having proper authority to make a binding settlement offer. It is unfortunate that the Authority was not told of the correspondence between counsel before or during the investigation meeting. Based on that correspondence I would have had no hesitation in determining that a binding settlement had been reached bringing Mr McFall's personal grievance claim to an end.

[5] The current difficulty is what to do about costs including the additional costs incurred because Mr McFall did not honour the settlement. Mr McFall is now subject to a summary instalment order under s.343 of the Insolvency Act 2006. It appears that he has no assets and he must pay \$120.00 per fortnight for nearly four years to meet debts of approximately \$11,200.00. He says that he has no idea how he could pay any costs order made against him.

[6] In the ordinary course I would have ordered costs of about \$2,500.00 on a daily tariff basis for this matter to reflect that fact that less than a full day was required. There is also considerable merit in the idea that the respondent should be fully indemnified for the additional costs caused by Mr McFall not complying with the settlement agreement. The relevant figure is the GST exclusive sum (approximately \$3,190.00). The question then is whether there should be any reduction in either of those amounts to recognise Mr McFall's poor financial position. In this jurisdiction there have been many cases where tribunals and Courts have moderated cost's awards to reflect capacity to pay, exercising the equity and good conscience jurisdiction. Mr McFall's situation fits squarely within such cases. To

reflect Mr McFall's capacity to pay I will reduce the daily tariff amount to \$1,000.00 but he must still meet the full amount of the extra costs caused by his failure to comply with the settlement. No doubt the respondent will have to make appropriate arrangements with the supervisor appointed under the Insolvency Act 2006.

Conclusion

[7] Mr McFall must pay costs of \$4,190.00 to the respondent.

Philip Cheyne
Member of the Employment Relations Authority