

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA150A/09
5160117

BETWEEN DAVID MOORE
 Applicant

AND SEAVIEW CUSTOM
 ENGINEERING LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Rachelle Boulton, Counsel for Applicant
 Tim McGinn, Counsel for Respondent

Submissions received: 25 September 2009 from Respondent
 19 October 2009 from Applicant

Determination: 12 November 2009

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 4 September 2009, the Authority determined the employment relationship problem between these parties in respect of Mr Moore's substantive application and in an earlier determination concerning Mr Moore's application for interim reinstatement dated 29 June 2009, that issue was also dealt with. Mr Moore was unsuccessful in both determinations.

[2] Costs were reserved in both cases.

The claim for costs

[3] Counsel for the respondent employer (Seaview) indicates that total costs in relation to the defence of both proceedings amounted to around \$14,000 plus GST. A contribution to costs of \$8,400 plus GST is sought, representing two thirds of the total costs incurred less the costs involved with the initial mediation between the parties which is not normally included in the calculation of costs awards. Evidence is provided to the Authority of the bills of costs rendered by counsel for Seaview.

[4] Counsel for the unsuccessful applicant, Mr Moore, seeks a decision of the Authority to allow costs to lie where they fall or a very modest award at the lower end of the scale. Mr Moore resists the computation of two thirds of the reasonably incurred fees as a basis for fixing costs, claiming that the proper approach in the Authority is to look at the matter on a *notional daily rate* basis.

[5] Both parties accept the usual rule that costs typically follow the event and as Seaview was entirely successful, both in the interim application and in the substantive hearing in principle there is a liability against Mr Moore.

[6] There is dispute about whether Mr Moore contributed to Seaview's costs by the way in which he ran his case. Certainly it is true that during the course of the investigation meeting, Mr Moore made a number of intemperate and ill-judged observations about the quality and nature of the evidence of Seaview, claiming for instance that a Seaview witness was a *liar* and that certain diary entries of a Seaview witness were *forgeries*. There was, as the Authority found in the substantive determination, not a shred of evidence to support those extravagant claims but I do not accept Seaview's contention that by making those claims in the way that he did, Mr Moore somehow increased Seaview's costs. There is nothing in my judgment to support the contention that Seaview's costs of defending the proceeding were increased because Mr Moore chose to make intemperate and unworthy allegations during the course of the proceedings. I think the position is that both parties ran their case in the way that they thought appropriate, and each had an opportunity to be heard. That Mr Moore was completely unsuccessful was a function of the quality of his case and the care that Seaview took to refute it, but I do not accept that there was any unnecessary work done by Seaview as a consequence of the nature of Mr Moore's pleadings.

[7] Nor am I much attracted by Seaview's contention that by offering two *Calderbank* proposals during the course of the matter's progression through the Authority's system, Mr Moore also somehow contributed to Seaview's costs. I do not accept that Mr Moore's attempt to settle the matter with a *Calderbank* offer at the time the interim reinstatement application was being considered is somehow *disingenuous*. Both parties have an obligation to try and settle matters at any point, and Mr Moore cannot, in my opinion, be criticised for trying to settle the matter at that point.

[8] On balance then, I am not satisfied that Mr Moore did anything to materially and unreasonably increase the costs that Seaview was put to in defending Mr Moore's claims.

The legal principles

[9] The Employment Court in *PBO Ltd v. Da Cruz* AC2A/5 refers to the central principles traditionally used by the Authority in costs decisions and confirms that those principles are appropriate. The Court also confirmed the appropriateness of the *tariff-based approach* often adopted by the Authority as long as the particular circumstances of the individual case were taken into account as well.

[10] For my part, I have found it helpful to apply the approach suggested by the Authority in *Graham v. Airways Corporation of New Zealand Ltd* (ERA Auckland, Member Dumbleton, AA39/04, 28 January 20054) where the Authority postulated three steps in evaluating applications for costs. The first is to identify the actual legal costs and expenses of the successful party, then to determine the reasonableness of those actual costs, and finally to determine what proportion of those costs ought to be met by the other side.

Discussion

[11] I have already referred to the actual costs incurred by the successful party at around \$14,000. Those costs include time for mediation which must be deducted for our purposes, but bearing in mind that the costs referred to cover not just a substantive hearing but also an interim application for reinstatement, I think it appropriate to hold that those costs incurred by Seaview are eminently reasonable.

[12] The only real question is what proportion of those costs ought to be met by Mr Moore and, in that regard, Seaview seeks an amount of \$8,400 plus GST as two thirds of the reasonably incurred costs (exclusive of the costs of mediation).

[13] I accept Mr Moore's submission that the better view of costs fixing in the Authority is to look at the effect of the daily tariff approach rather than look at the percentage calculation which is a more common calculation in the adversarial system. On the tariff-based approach, the time taken for an interim application and a substantive hearing was effectively a day and a half and on that basis a figure of perhaps \$5,000 would be indicated.

[14] I have already made clear that I do not accept that Mr Moore's conduct of his two sets of proceedings materially added to Seaview's costs, and so were that the end of the matter, I should fix costs at a figure of \$5,000.

[15] However, Ms Boulton, for Mr Moore, submits that Mr Moore is impecunious and notes, amongst other things, that as well as having experienced ill health since the termination of his employment, is currently unemployed and to all intents and purposes has been since the termination of the employment with Seaview. She urges on me the proposition that *even a small contribution to costs would be difficult to meet*. The evidence before the Authority is that Mr Moore's mortgage obligations are currently over \$2,200 a month and I am told he has no savings left as a consequence of the period of unemployment he has suffered and his income from the benefit amounts to \$312.51 per week.

[16] On the face of it then, Mr Moore will have very considerable difficulty in meeting his mortgage obligations to say nothing of basic living expenses from that income base.

[17] In all the circumstances then, it seems to me inappropriate of the Authority to make anything other than a token order in respect of costs. I consider that, given Mr Moore's financial position, fixing costs at a realistic level would simply be punitive and while that disadvantages Seaview, it seems to me the reality is that Mr Moore is actually in no position to make any realistic contribution to the costs Seaview has incurred.

[18] That being the position, I fix the costs that Mr Moore has to pay to Seaview at \$1,000 and I direct that Mr Moore is to have time to pay that amount by periodical payments if he wishes to take advantage of that arrangement.

James Crichton
Member of the Employment Relations Authority