

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Dianne Murray (Applicant)
AND Access Homehealth Limited (Respondent)
REPRESENTATIVES Christine French, Counsel for Applicant
Richard Cunliffe, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
SUBMISSIONS RECEIVED 31 March 2006
12 April 2006
21 April 2006
DATE OF DETERMINATION 18 May 2006

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] In a determination issued to the parties on 1 March 2006 I upheld the applicant's claim that she had been unjustifiably dismissed from her employment. However, I dismissed her claim of unjustifiable disadvantage. Mrs Murray sought reimbursement of earnings she claimed to have lost as a result of the dismissal and compensation for hurt and humiliation in the sum of \$30,000. In the substantive determination I awarded Mrs Murray the sum of \$8,000 for hurt and humiliation and invited the parties to attempt to resolve the matter of costs between themselves. It is clear from Miss French's memorandum that a genuine attempt to resolve costs has been made although this has not resulted in success. It therefore falls to the Authority to determine the issue.

The claim for costs

[2] On behalf of Mrs Murray, Miss French sought a contribution of \$7,000 towards her client's actual costs of \$14,000 plus GST together with disbursements of \$600. Counsel acknowledged that while the applicant had won the case she had not won on all aspects of her claims. It was in recognition of that fact that counsel proposed a 50 per cent rather than a 75 per cent contribution to costs. Further, counsel submitted that without a contribution to costs the applicant's victory would be a pyrrhic one and that the Authority should not countenance such an outcome for her client.

[3] Mr Cunliffe in his submissions took issue with opposing counsel's assertion that her client had won the case and opined that she had won only part of her case. He further submitted that it could be argued that the consequences would ordinarily be that costs lie where they fall. Counsel submitted that in this particular case there were reasons why costs ought to be awarded in favour of the respondent.

[4] Mr Cunliffe has urged the Authority to consider two offers of settlement made by the respondent to Mrs Murray. One offer was made on 2 March 2004 and offered the sum of \$8,000. That offer was declined by the applicant and after correspondence between the parties' counsel a further offer was made to settle Mrs Murray's claim on 24 November 2004. That offer for \$12,000 inclusive of costs and disbursements was also declined by the applicant. Mr Cunliffe submits that in such circumstances where an offer exceeding the quantum awarded by the Authority has been declined, the additional cost to which the respondent has been exposed in order to prepare its defence warrants serious consideration. Mr Cunliffe states that costs of approximately \$28,000-\$30,000 plus GST and disbursements were incurred by the company following the declining of the second offer. Further, he submits that a considerable amount of that cost was incurred in defending the allegation of disadvantage in which the applicant was unsuccessful. On behalf of this client Mr Cunliffe seeks an award of costs in the \$4,000 to \$5,000 range.

Discussion

[5] Mr Cunliffe refers me to the decision of the Full Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz* 9/12/05, Colgan CJ, Travis and Shaw, JJ, AC 2A/05 in which the Full Court outlines the principles the Authority is to consider when dealing with costs. I do not intend to traverse this submission in detail except to say that I have been mindful of these principles in coming to this determination. On the other hand, in her reply to the respondent's submissions, counsel for the applicant makes the valid point that *PBO Limited* is not authority for the proposition that the Authority must never use a percentage approach.

[6] In coming to this determination I have considered Kerry Smith's first *calderbank* offer of 2 March 2004. In that letter Mr Smith analyses the potential risk to which the respondent might be exposed in the proceeding and, it strikes me, he was very close to the mark.

[7] Miss French, in her reply, drew my attention to the fact that attempts to settle the matter without recourse to the Authority were made by both parties and the correspondence now available to me confirms that the attempts were certainly genuine.

[8] I have considered allowing costs to lie where they fall but having weighed the issues, I think in all the circumstances it is just to award Mrs Murray a modest contribution to her costs without adding unduly to the costs already borne by the respondent. In the last analysis, I found that Mrs Murray had a personal grievance and on the principle that costs follow the event believe she is entitled to some contribution. I have also taken into account the fact that the respondent had some success in defending its position and therefore have resisted the submission to provide a substantial contribution to the applicant's costs.

Determination

[9] I direct the respondent to pay the applicant a contribution to her reasonably incurred costs in the sum of \$2,000.

Paul Montgomery
Member of Employment Relations Authority