Determination Number: CA 7/06
File Number: CEA 131/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Kenneth Rawlings (Applicant)
AND	Sanco NZ Limited (Respondent)
REPRESENTATIVES	Frank Wall, for the Applicant Shauna McClelland, for Respondent
MEMBER OF AUTHORITY	James Wilson
DATE OF DETERMINATION	26 January 2006

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] In May 2005 the applicant, Mr Kenneth Rawlings filed a statement of problem in the Authority seeking redundancy compensation from the respondent, Sanco NZ Limited. In their statement in reply, Sanco stated that Mr Rawlings' dismissal had been as a result of a genuine redundancy, that he had not raised his grievance within the required 90 day period and was not entitled to redundancy compensation.

[2] On 2 September 2005 the Authority member, Mr Philip Cheyne, convened a telephone conference with the parties' representatives i.e. Mr Frank Wall for the applicant and Ms Shauna McClelland for the respondent. Following that conference, Mr Cheyne issued a notice of direction which included the following:

> *[2] The Authority will interview Mr Rawlings on oath about the events of June/July 2002. This will take the form of a question and answer session. There is no need for Mr Rawlings to provide a written statement in advance. The advocates are invited to attend and Ms McClelland is entitled to ask questions if she wishes.*
>
> *[3] That interview will take place on Friday, 23 September 2005 at 2 p.m. at the Authority's offices…*

[3] At the time of the telephone conference Mr Wall did not object to this arrangement. However Mr Rawlings did not attend the scheduled interview. In his subsequent determination of Mr Rawlings application (determination CA127/05 26 of September 2005) the Authority records Mr Rawlings non attendance in the following terms:

> *[5] The day before the date scheduled for the interview, Mr Rawlings through his representative lodged and served a lengthy document. It starts with advice that a review is being sought in respect of the actions of the Authority regarding the separate proceedings between Mr Rawlings and Gabbett Machinery Ltd, includes a dissertation on Mr Wall's views of the law interspersed with abusive comments about several Judges of the Employment Court and Christchurch-based members of the Employment Relations Authority, demands that I stand down in these proceedings and any future proceedings involving Mr Wall and advises that neither Mr Rawlings or Mr Wall will be attending until such time as the Chief of the Authority has provided another member to deal with this matter.*

And:

> *[9] Good to their word, neither Mr Rawlings nor Mr Wall attended at the time scheduled for the interview. No good cause has been shown for this failure so I will determine the matter on the basis of the material currently available.*

[4] In its determination, dated 26 September 2005, the Authority found that Mr Rawlings had no grievance against Sanco. The question of costs was reserved with the proviso that:

> *The respondent may lodge and serve a memorandum with 14 days and the applicant may lodge and serve a reply within a further 7 days.*

On 5 October 2005 Ms McClelland wrote to the Authority advising that she had not initially received the Determination and requesting an extension time, until 14 October, in which to make a submission on costs. This extension of time was granted.

Application for costs

[5] Although required, as it transpired, to attend only a very brief Authority investigation/interview meeting (due to Mr Rawlings non-attendance), Sanco have requested that Mr Rawlings be ordered to make a contribution towards its costs. For Sanco, Ms McClelland has submitted that Sanco's costs (excluding costs associated with attending mediation) amounted to approximately $1300.00 plus GST. These costs include approximately 7½ hours of Counsel's time at a charge out rate of $175 in order to draft the statement in reply, participate in the teleconference, prepare questions for the applicant and attend the brief investigation interview. Ms McClelland suggests that a contribution of $1000 towards Sanco's costs would be appropriate.

[6] In response Mr Wall has written a 21 page letter to Ms McClelland in which, among other things, he opposes any order for costs. Although not addressed to the Authority, I have taken this letter to be in effect Mr Wall's submission on the question of costs.

[7] Much of Mr Wall's letter is not relevant to the question of costs and sets out his rather idiosyncratic view of New Zealand employment law. However the opening paragraph includes the following relevant comments:

> *…you will be aware of course that by its determination the Authority stipulated a timeframe of 14 days in which you were entitled to seek costs from my client. Fundamentally you are therefore outside the 14 day period and "per say" (sic) not entitled to wage your claim at law……Accordingly there is no obligation imposed upon for me to file a memorandum in reply and I refrain from doing so. I would advise however that my client, in the expectation that no costs have been incurred due to this stipulation as to time has altered his position by*

filing an appeal in this matter. Respectfully I will not spell out the Doctrine of Estoppel as no doubt you will be fully aware of its application at law.

[8] Mr Walls first objection, that Sanco's applications for costs is out of time, is clearly not correct. Ms McClelland requested, and was granted a two day extension of time and her submission was filed within this new deadline. Mr Wall's second objection, that the application for costs is estopped by his clients filing of an appeal, is also incorrect. On the contrary it is now well established practice that, where costs are requested the Authority will determine this question even if a challenge has been filed. Once an order for costs has been made the effected party is able to seek a stay of that order, either from the Court or from the Authority, pending the outcome of the challenge.

Discussion

[9] In a recently issued judgement [*PBO Ltd v Da Cruz*, AC2A/05 dated 9 December 2005] Employment Court, said:

[44] The costs principles which the Authority now applies are not necessarily as comprehensive or as prescriptive as those set out in Okeby and similar earlier judgments. The Authority is able to set its own procedure and has, since its inception, held to some basic tenets when considering costs. These include:

There is a discretion as to whether costs would be awarded and what amount.

The discretion is to be exercised in accordance with principle and not arbitrarily.

The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

Equity and good conscience is to be considered on a case by case basis.

Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

It is open to the Authority consider whether all or any of the parties costs were unnecessary or unreasonable.

That costs generally follow the event.

That without prejudice offers can be taken into account.

That awards will be modest.

That frequently costs are judged against a notional daily rate.

The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[45] We hold that these principles are appropriate to the Authority and consistent with its functions and powers. They do not limit its discretion and proper application of them should ensure that each case is considered in the light of its own circumstances. While these general principles are applicable also to the Court, the Authority is not bound by the Binnie principles which extend the range of costs which the Court may award beyond what could reasonably be labelled "modest."

[10] Mr Rawlings filed an application with the Authority which required a response from Sanco. Sanco, as they were perfectly entitled to do, sort legal advice to assist them in making that response. As it transpired Mr Rawlings was unsuccessful in his claims. Consistent with the principles endorsed by the Employment Court in the *Da Cruz* case, *costs should generally follow the event*, i.e. Mr Rawlings should expect to make a contribution towards Sanco's costs. Taking into account all of the circumstances of this case Ms McClelland's suggestion that her client be awarded a $1000.00 contribution towards its costs seems reasonable.

Determination

[11] Mr Rawlings is ordered to pay Sanco NZ Ltd $1000.00 as a contribution towards its costs.

James Wilson
Member of Employment Relations Authority