

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 183/09
5101911

BETWEEN TERRY SAGE
 Applicant

AND N.Z. UNDERWATER WORLD
 INC.
 Respondent

Member of Authority: James Wilson

Representatives: Tony Savage for the applicant
 Jenni-Maree Trotman for the respondent

Submissions received: 11 May 2009 from the applicant
 14 March 2008 from the respondent

Determination: 15 June 2009

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] In a determination dated 29 February 2008 (AA 68/08) I found that Mr Sage was not an employee of the New Zealand Underwater Association (NZUA) and that the Authority therefore had no jurisdiction to investigate or determine the dispute between them. In that determination I reserved the question of costs to allow time for the parties resolve this issue between themselves. I also indicated that, should they not be able to do so NZUA should file and serve submissions within 28 days of the date of that determination. On 14 March 2008 Ms Trotman, on behalf of NZUA, filed a submission seeking a contribution towards the client's costs of \$3000 plus disbursements of \$649.80.

[2] Regrettably Ms Trotman submissions appear to have been placed on the Authority's file and no action taken. Fortunately Ms Trotman contacted the Authority in early May 2009 seeking clarification as to why a determination had not been issued. At that point the Authority contacted Mr Savage and he, on 11 May 2009 filed submissions on behalf of Mr Sage. I accept full responsibility for this delay and apologise unreservedly to the parties for the inconvenience this has caused.

The legal principles

[3] In *PBO Ltd v. Da Cruz* (AC2A/05, 9 December 2005) a full bench of the 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.

The respective submissions

[4] Ms Trotman says that NZUA's costs in this matter amounted to a total of \$4338.00 plus GST plus office disbursements of \$649.80. She has provide a full breakdown of these costs. Ms Trotman says that the various aspects of responding to Mr Sage's application including correspondence, drafting a statement in reply, preparing submissions, reviewing the Authority's determination and preparing cost submissions occupied some 14 hours of Counsel's time.

[5] For Mr Sage, Mr Savage says that his client made a preliminary application to establish whether there was jurisdiction in the Authority or whether his client should pursue the matter in the District Court/Disputes Tribunal. He says his client acted reasonably in the circumstances and there was no behaviour on the part of Mr Sage that was reprehensible or caused unnecessary time to be spent by NZUA. He points out that the matter was dealt with by submissions to the Authority and that there was no hearing time and only one short timetabling telephone conference.

Discussion

[6] As the Employment Court said in *da Cruz*, cost awards in the Authority are modest and are often judged against a notional daily rate. A review of recent awards suggests that following a one day investigation meeting, with the attendant preparation, attendance and submissions, the usual award of costs would be in the vicinity of between \$2000.00 and \$3000.00. In this case there was no investigation meeting and no witness statements to be prepared. Certainly NZUA's counsel was required to take part in a brief telephone conference and to prepare submissions on behalf of her client. NZUA successfully defended the assertion that Mr Sage was not an employee and costs, if awarded, *should follow the event*. However to award the level of costs that Ms Trotman has suggested would be grossly out of line with other awards.

Determination

[7] NZUA are entitled to a contribution towards their costs. Taking into account the principles set out in *da Cruz*, the appropriate award is \$750.00 plus GST. This award includes a contribution towards disbursements. **Mr Sage is ordered to pay New Zealand Underwater Association Inc \$750 plus GST as a contribution towards their costs.**

James Wilson

Member of the Employment Relations Authority