

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Martin Brian Sherwin (Applicant)
AND Fletcher Challenge Forests Limited (Respondent)
MEMBER OF AUTHORITY Dzintra King
MEMORANDA RECEIVED 26 October and 16 December from Applicant
9 November and 22 December from Respondent
DATE OF DETERMINATION 17 February 2005

COSTS DETERMINATION OF THE AUTHORITY

The applicant was originally represented by Mr Lance. He then instructed Ms Fitzgibbon who sought permission to file an additional memorandum. A further memorandum was also received from the respondent.

The applicant's total costs were \$12,490.00. Counsel's charge out rate is \$200.00 per hour. A substantial portion of these costs - approximately 50% - was incurred prior to the investigation and related to mediation. The applicant submits that that preparation was necessary to progress the matter and to assist in preparing for an investigation. It is also submitted that an important consideration is that prior to the applicant instructing counsel he himself attempted to negotiate a satisfactory resolution with his employer but the employer's attitude was dismissive.

During the negotiation the applicant offered to settle with a total sum including all costs of \$10,000.00. Given the above, the full amount of costs incurred by the applicant should be awarded.

The respondent submits that costs' awards in the Employment Relations Authority differ significantly for those in the Employment Court or Court of Appeal. *Harwood v Next Homes* (unreported, EC, Auckland, 19 December 2003, AC70/03, Travis J); *Graham v Airways Corporation of NZ Limited* (unreported, ERA, Auckland, 28 January 2004, AA39/04). The Employment Court in *Harwood* (supra) stated at para 32:

I accept Mr Wackrow's submission that the Authority in carrying out investigative role operates differently to conventional Courts that there is nothing in the Binnie decision which suggests that its guidance on the principles to be applied for costs should extend to such an institution.

The respondent submits that Authority should consider the actual legal costs and associated expenses of the party entitled to an award, then examine whether or the expenditure incurred was reasonably incurred and then determine what proportion of the costs reasonably incurred will be awarded to the successful party. An average award in the Authority for a one day hearing would normally be between \$1000.00 and \$1500.00, up to \$2000.00.

The respondent submitted that while Mr Sherwin was the successful party the manner in which he conducted his personal grievance led to a major increase in the amounts expended for all involved. The respondent was required to defend itself against a number of claims which were not well founded and should not be penalized because Mr Sherwin adopted a scattergun approach to his personal grievance.

Mr Sherwin pursued a number of unmeritorious points. He was ultimately awarded \$5000.00 under s.123 (c) (1), but the larger part of his personal grievance was unsuccessful. He sought monetary awards under six different heads and succeeded in only one of those, and recovered less than one tenth of the damages he claimed.

Ms Fitzgibbon has argued that the Authority should apply *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438. I do not accept this argument. Neither do I accept that Mr Sherwin should receive a costs award for mediation,

Neither Mr Sherwin's offer to settle for \$10,000 (double than the amount actually ordered) nor the respondent's Calderbank offer of \$3000 (less than the amount ordered) are relevant.

Given the charge out rate of \$200 per hour, an 8 hour day would cost \$1,600. Allowing 16 hours for preparation would add an additional \$3,200. The total of reasonably incurred costs would therefore be \$4,800. Mr Sherwin is entitled to a reasonable contribution towards those costs. I accept that there was a scattergun approach adopted by Mr Sherwin. This did increase the work required.

The respondent is to pay the applicant the sum of \$2000.00.

Dzintra King
Member of Employment Relations Authority