

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Michalene Smith (Applicant)
AND New Zealand Post Limited (Respondent)
REPRESENTATIVES Jills Angus Burney, Counsel for Applicant
Paul McBride, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
SUBMISSIONS RECEIVED 18 January 2006
7 February 2006
DATE OF DETERMINATION 28 February 2006

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 26 October 2005 I found in favour of the respondent and I reserved the issue of costs.

[2] Mr McBride on behalf of the respondent and Ms Angus Burney on behalf of the applicant attempted to resolve the matter of costs but were not able to reach agreement. They provided submissions to the Authority to enable a determination to be made with respect to costs.

[3] The respondent incurred actual solicitor/client costs in the sum of \$12,000 plus GST and disbursements of \$1251.52.

[4] The respondent claims full solicitor/client costs but if the Authority does not consider that appropriate then it seeks two thirds of the costs incurred. It does so on the basis of the following:

- Its complete success.
- The wide ranging nature of the applicant's claim.
- A Calderbank letter.
- The conduct of the case by the applicant.

[5] The applicant submits:

- Any award of costs should reflect the principle that costs in a speedy low level informal tribunal should not be set at a level to discourage litigants from bringing their cases.
- What is required is a fair and reasonable contribution to costs in the circumstances of the case.
- Efforts were made by the applicant to attempt to resolve the matter.

- This was not a vexatious or frivolous application.
- The applicant's conduct of the case did not result in significant or unnecessary costs being incurred by the respondent.
- Taking those matters into account the sum of \$2500.00 is an appropriate contribution to costs.

Determination

[6] The full Court of the Employment Court considered the issue of costs in a challenge against a cost determination from the Employment Relations Authority in *PBO Limited (formerly Rush Security Limited) v Da Cruz* (unreported) 9 December 2005, AC2A/05.

[7] It was held in that case that the following principles are appropriate to the Authority and consistent with its functions and powers:

- *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.*

[8] The full Court also emphasised that each case is to be treated on its own facts by the Authority in the exercise of its discretion.

[9] I have to consider the legal costs and disbursements of the respondent and whether all of the expenditure was reasonably incurred and if not, what proportion was reasonable. I then need to consider what would represent a fair contribution to the actual costs reasonably incurred.

[10] This was a matter that took a day to investigate. It was an important case to both parties and that contributed to the time and effort put into preparation. There were no particular elements of complexity in the case.

[11] I find that the legal costs and disbursements were reasonably incurred. The respondent was facing a significant claim and put its resources into defending it accordingly. The disbursements which include airfares, travel by car and photocopying costs are reasonable. No costs were separately claimed in terms of counsel engaged before Mr McBride was instructed. There was also discounting of time and no claim for junior counsel's time. I am not of the view that this is a case that calls for a full award of actual solicitor/client costs so I now turn to consider what would be a fair contribution to the actual costs that I have found were reasonably incurred.

[12] There had been a restructuring at the respondent organisation and the applicant's position was disestablished. The applicant was offered re-deployment to a position that I found in accordance with the relevant provisions of the collective employment agreement was both practicable and appropriate. The applicant believed that she was entitled to a redundancy payment and that another employee had received a severance payment in similar circumstances to her own. The applicant's claim was not upheld.

[13] The applicant had worked for the respondent for 24 years. Her severance package would have been more than \$40,000.00 if she had been successful. Mr McBride attached a letter dated 16 June 2005 letter to submissions. It was headed *without prejudice save as to costs* and offered the applicant \$1,500.00. As the applicant was entirely unsuccessful costs fall to be determined in the ordinary way and the Calderbank offer is not a special factor to be considered in these circumstances. I am not of the view that it can, as submitted, be the basis for a substantial award of costs when viewed against the nature of the claim. I accept that some attempt was made by both parties to sensibly try to resolve the matter. I take that into account in assessing a fair contribution to costs.

[14] The conduct of the case can have some bearing on costs if it results in an unnecessary increase in costs for a party. In this case a request for an extension was made for lodging and serving the applicant's statements of evidence from Friday 29 July until Monday 1 August. The delay was because one of the witnesses was unavailable until 4pm on 29 July 2005. The request was agreed to by the Authority and the respondent's representative who noted that the delay was minimal. The Authority also granted the respondent additional time in the circumstances to complete and lodge its evidence. I am not satisfied that that small delay increased costs unnecessarily to the respondent.

[15] The other matter relied on was that after the statements had been lodged Ms Angus Burney indicated that there would be one further witness statement. Mr McBride at the time asked that the Authority rely only on the evidence lodged to date. In a response to the parties I indicated that whilst late lodging of evidence outside of the timeframe was undesirable I wanted to see the evidence of the witness. I also pointed out the investigative role of the Authority and the requirement for the Authority to establish the facts in an employment relationship problem. I indicated that the matter could be dealt with in a cost setting. I accept there was some inconvenience to the respondent but the Authority would have needed to hear from that witness in any event. I do take this matter into account in favour of the respondent in my assessment of a fair contribution to costs.

[16] The respondent also submits that there was a late request by the applicant for discovery of documents. In considering whether this contributed to an increase in costs I note there was agreement to an agreed bundle being prepared during the telephone conference held on 17 June 2005. I do not find anything particularly unusual about there being some dialogue about the contents of that bundle up to the time scheduled for that bundle to be lodged with the Authority on 19 August 2005. I am not satisfied that this contributed to any unnecessary costs. This was not a case where the requested documents were unnecessary or did not assist the Authority. The

documents were well presented in an agreed bundle and accordingly they assisted in the smooth running of the investigation meeting.

[17] I am not satisfied that the claim was as wide ranging as was submitted. The claim concerned the applicant's contractual entitlements in a restructuring of which redeployment was a prescribed part of the contractual process, and disparity in terms of the payment of redundancy to another employee. It was confirmed by 5 August that the applicant's claim of disparity would be limited to comparison with one other employee and not two as previously indicated.

[18] There was an agreed statement of facts and whilst agreement was confirmed at a rather late stage by the applicant's representative it did narrow some of the issues. It seemed clear that the statements of evidence had been provided on the basis that there was agreement to some of the fundamental matters.

[19] The applicant also made it clear that she was not challenging the genuineness of the redundancy from the time the proceedings were lodged. The issues were therefore the process of the restructuring which took place over a relatively narrow timeframe and the disparity. Balancing this matter against others that come before the Authority it was not an unusually wide ranging claim so as to have a substantial impact on any costs award.

[20] There was no indication as to the applicant's ability to pay.

[21] In all the circumstances of this case I am of the view that a fair contribution to the actual costs incurred by the respondent would be \$3000.00 together with disbursements in the sum of \$1,251.52.

[22] I order Michalene Smith to pay to New Zealand Post Limited the sum of \$3000.00 costs and disbursements in the sum of \$1,251.52.

Helen Doyle
Member of Employment Relations Authority