

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN John Tairi (Applicant)
AND Bay of Plenty District Health Board (Respondent)
REPRESENTATIVES David Bruce, Advocate for Applicant
Mark Beech, Counsel for Respondent
MEMBER OF AUTHORITY Janet Scott
SUBMISSIONS RECEIVED 21 August, 22 & 28 September 2006
DATE OF DETERMINATION 3 October 2006

COSTS DETERMINATION OF THE AUTHORITY

The applicant lodged a personal grievance with the Authority on 23 November 2005 having raised a personal grievance with his former employer on 2 December 2002 in relation to the termination of his employment on 21 November 2002.

The respondent lodged an application to strike out the applicant's problem on the grounds that it had reached an agreement in accord and satisfaction in full and final satisfaction of all employment related issues between the applicant and the respondent and the respondent had complied with that agreement in full.

The Authority determination dealt only with the preliminary question as to whether or not the parties had reached an agreement in accord and satisfaction in relation to the termination of Mr Tairi's employment by the Board.

In the event the Authority determined (AA 252/05) that the agreement reached between the Board and Mr Tairi on the termination of his employment on 21 November 2002 was an agreement in accord and satisfaction in relation to all matters relating to Mr Tairi's employment and the termination of that employment. As a result the Authority declined to consider further Mr Tairi's claim that he had been unjustifiably dismissed from his employment.

The Authority invited the parties to attempt to resolve the question of costs between them. They advise they cannot reach agreement and having received submissions on the subject costs will now be determined.

Submissions for the Board focus on relevant case law and it is submitted that this is a case where a higher than usual award of costs is called for given the delay in the applicant progressing his claim, the costs incurred by the respondent in responding to the applicant's claim which involved redrafts to the Statement of Problem and which called on the respondent to respond to a significant amount

of historical evidence relating to the substantive claim as well as the preparation of submissions in respect of the strike out application.

As a result it is submitted the respondent has incurred costs in the sum of \$7,000. It was submitted this is a case where it would be appropriate for the Authority to send a message to applicants with marginal cases to avoid further spurious claims. It was noted that the Board had, since it was first advised of Mr Tairi's claim, attempted to resolve the matter by explaining to Mr Tairi through his solicitors that a full and final agreement had been reached.

The respondent asks the Authority to exercise its jurisdiction in equity and good conscience and make an award of costs in the respondent's favour of \$2500.

The advocate for Mr Tairi submits there is nothing about the case that calls for an award of costs substantially outside those usually awarded by the Authority - particularly given that preparation was required for the preliminary matter only and the issue was not complex.

He also submitted that Mr Tairi has failing health and that this has forced him into early retirement. He supports his wife who is unable to work due to poor health and they have a mortgage to pay. He has very limited means to pay any award of costs and the Authority is asked to exercise its jurisdiction in equity and good conscience to order that costs be allowed to lie where they fall.

Legal Principles

In *PBO Ltd v Da Cruz* AC 2A/05 the Employment Court held that the principles guiding the Authority's approach to costs are different to those that apply to the Court because the institutions function according to different procedural structures and standards. It held that the Authority must judge the reasonableness of the parties' costs in light of whatever procedure it has adopted be it formal, informal, inquisitorial or adversarial.

The Court has held that the following principles are appropriate where the Authority is exercising its discretion in relation to costs:-

There is discretion as to whether costs should 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 an unsuccessful party's conduct although conduct which increase costs unnecessarily can be taken into account in inflating or reducing an award.

It is open to the Authority to 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.”

Discussion

This was a somewhat unusual case in that the applicant had a genuine, albeit mistaken belief that he was entitled to raise a personal grievance with the respondent notwithstanding the fact that a settlement was reached with him in relation to the termination of his employment. He did not understand that the expression of the monetary sum paid to him in “full and final settlement of all employment related issues” precluded him from having his claim progressed in the Authority. In holding to his belief that he was entitled to have his claim heard and determined he was relying on the advice of his representative, Mr Roberts of the NZ Building Trades Union, that the Union had done all it could do and he was free to take a grievance against the Board. It is no wonder that Mr Tairi held to this belief because it was reiterated in writing by Mr Roberts before his death towards the end of 2005.

The case was of high importance to both parties and it was appropriate for the preliminary question to be heard and determined by the Authority – particularly for Mr Tairi who needed an independent assessment of his rights in the matter. In the event the matter was decided by reference to the facts in light of statutory principles and relevant case law. While it might have been blindingly obvious to the respondent where the merits of the case lay that was not the case for Mr Tairi.

I have carefully weighed all the submissions made to me in this matter. One matter that has been overlooked in the submissions is the fact that the determination called for a statement of the good faith principles that must guide parties to employment relationships - not only those between employers and employees but also those between employers and unions and unions and their members. Given the statement of principals with wide application and the stated circumstances of the applicant as advised by Mr Bruce (whose word I accept) I am minded that this is one of those relatively rare cases where justice would best be served by allowing costs to lie where they fall.

Determination

It is my determination that costs in this matter will be allowed to lie where they fall.