

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011]NZERA Christchurch 193
5279361

BETWEEN STEPHEN WILLS and 82
 OTHERS
 Applicants

AND ALLIANCE GROUP LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Greg Lloyd, Counsel for Applicants
 Kerry Smith, Counsel for Respondent

Submissions Received 29 September 2011 from Applicants
 16 September 2011 and 21 October 2011 from Respondent

Determination: 2 December 2011

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 29 June 2011, the Authority resolved the employment relationship problems brought by the 83 grievants in this matter in determining that none of the applicants had personal grievances.

[2] Costs were reserved.

The claim for costs

[3] Alliance, as the successful respondent, seeks a contribution to its costs in the sum of \$15,000 which it tells the Authority is less than half of the actual costs incurred.

[4] In commenting on the nature of the claim made, submissions for Alliance suggest the application of a daily tariff of \$5,000 for a total of three days, one of which was the day of the fixture itself and two for preparation of evidence and submissions. Travel costs of \$348.45 are also sought.

[5] Conversely, in submissions filed for the applicants by their Union (the EPMU), it is suggested that the figure claimed is “*entirely unrealistic*”. It is alleged that Alliance has acted in bad faith in the course of the proceedings and that the claimed sum sought for costs for “*a relatively simple one day investigation meeting*” is “*outrageous*”. The EPMU suggests also that Alliance was not active and communicative in the course of the proceedings and that it is not the applicants’ fault if Alliance has over-engineered its response to this simple matter.

The legal position

[6] Both parties refer to the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. In giving the decision of the Full Bench of the Employment Court, Judge Shaw makes clear that the principles usually identified by the Authority in making costs awards are consistent with the Authority’s functions and powers and further that there is nothing objectionable about the Authority’s tariff-based approach to costs fixing, provided that the approach is not applied too rigidly and without regard to the particular circumstances of the case in question.

[7] A number of principles are commonly derived from this and other like decisions such as the general rule that costs will follow the event, the principle that costs in the Authority setting will generally be lower than would be the case in a traditional adversarial environment, that the application of a costs award is a function of judicial decision-making, that costs are not a punishment, and that the Authority ought to consider whether there are any factors which would encourage a departure from, for instance, the daily tariff approach.

Discussion

[8] The central question for determination in relation to the exercise of the Authority’s discretion in the instant matter, is whether there are factors in the present case which entitle the Authority to conclude that a higher than usual award is justified. Looked at in simplistic terms, this was a matter dealt with by the Authority in less than one day and accordingly, without more, it could be argued that the application of the daily tariff approach is all that is required. Certainly, that is the approach taken by the EPMU which says that the matter was simple, was dealt with crisply by both parties, and the fact that Alliance spent a great deal of money on legal costs is not

something that ought to be visited on the applicants, notwithstanding that the applicants were unsuccessful.

[9] Conversely, Alliance says that it faced 83 personal grievances raising fundamental issues about the right to manage which, had the EPMU been successful, would have resulted in, at the very least, a dramatic change in the way in which the Alliance Group managed its business and dealt with its thousands of employees.

[10] Furthermore, counsel for Alliance argues that there is judicial support for first, the principle that the \$3,000 daily tariff is a starting point rather than a finish point, second, movement upwards reflecting complexity and third, the sheer number of personal grievances and the range of issues which required to be responded to all justify a movement away from the norm.

Determination

[11] The Authority considers it convenient to apply the principles enunciated in *Graham v. Airways Corporation of New Zealand Ltd* 11 April 2003, AA 99/03 wherein Member Dumbleton identified three questions which the Authority must ask in fixing costs:

- (a) What are the costs sought;
- (b) Are those costs sought reasonably incurred; and
- (c) What percentage of those costs ought to be borne by the unsuccessful party?

[12] The quantum sought is plain and the next question for the Authority to decide is whether those costs are themselves reasonably incurred. The Authority considers that those costs are reasonably incurred. In reaching that conclusion, it is accepted that this was a case where, notwithstanding the EPMU's efforts to minimise its importance, there were fundamental issues about the right to manage which needed extensive response to say nothing of the sheer number of grievants and the range of allegations made on their behalf. This was not a straightforward matter involving a single grievant with an ordinary run of the mill claim about an unjustified dismissal or a straightforward disadvantage claim. This was a wider based attack on a decision made in a measured and determinative way by a large employer seeking to

differentiate between different groups of employees and using longstanding custom and practice to achieve those differentiations. In the Authority's opinion, it greatly oversimplifies the matter to say, as the EPMU does, that this was a straightforward situation which could have been dealt with by a competent employer on the basis of a single day's investigation meeting and a contribution to costs of the standard daily tariff.

[13] Having accepted that this was a more complex and more broad-based matter than is the common experience of the Authority, the final question the Authority must determine is what percentage of the costs found to have been reasonably incurred ought to be met by the unsuccessful party. Alliance claims \$15,000 as a reasonable contribution to its costs of \$31,000. I have already determined that I am satisfied that in the particular circumstances of this case the costs incurred by Alliance were reasonably incurred.

[14] I am not especially attracted by Alliance's reliance on inflating the daily tariff to achieve the figure claimed. I prefer to look at the matter in the round and taking into account Alliance's total costs of around \$30,000 I think the appropriate figure for the applicants to contribute to that sum is \$10,000 being around one third of the total costs incurred. That approach is consistent with principle both in the Authority in more complex cases and in civil litigation law generally.

[15] Accordingly, the Authority directs that the applicants are to pay to Alliance the sum of \$10,000 jointly and severally as a contribution to the costs incurred by Alliance in successfully defending itself against the 83 personal grievance claims that were the subject of this litigation.

James Crichton
Member of the Employment Relations Authority