

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Justin Wylie (Applicant)
AND Matthew Bengé trading as Bencarri Farm (Respondent)
REPRESENTATIVES Karina Tifaga, Counsel for Applicant
Nicole Ironside, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
SUMMISSIONS RECEIVED 7 December 2005
23 December 2005
DATE OF DETERMINATION 1 February 2006

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 24 November 2005, the Authority resolved the employment relationship problem between these parties by determining to dismiss Mr Wylie's application in its entirety.

[2] Costs were reserved.

The claim for costs

[3] Matthew Bengé, through his counsel, as the successful party, seeks a contribution to his costs in the sum of \$5,000. On the basis of the respondent counsel's submission, that would represent about 50% of the costs actually incurred in defending Mr Wylie's claim.

[4] Mr Bengé contends that Mr Wylie's claim was completely without merit and that as the Authority found against Mr Wylie on each of the significant elements of his claim, the Authority should now take into account the question whether the proceedings ought ever to have been brought at all in determining the question of costs.

[5] Mr Bengé also contends that the applicant, Mr Wylie, caused him unnecessary additional expense in advancing another unmeritorious claim which he withdrew at the commencement of the investigation meeting. In particular, it is alleged by Mr Bengé that the prosecution of this particular unmeritorious aspect by Mr Wylie caused him to have briefed three additional witnesses whose evidence would not otherwise have been required.

[6] For his part, Mr Wylie says through his counsel that he had an arguable case, that he presented his case in a timely and concise manner and that costs should lie where they fall.

[7] In the alternative, Mr Wylie contends that as the hearing lasted a half day, a contribution of \$400 would be appropriate if the Authority was minded to award costs against him.

The legal principles

[8] The very recent decision of the Full Court in *PBO Ltd v. Da Cruz* AC2A/05 dated 9 December 2005 helpfully sets out the relevant principles.

[9] At para [34] of the judgment, Her Honour Judge Shaw, on behalf of the Full Court, sets out some of the basic tenets which the Authority has applied since its inception. In the following paragraph, Her Honour makes clear that the principles identified are *appropriate ... and consistent with (the Authority's) functions and powers*.

[10] In the following paragraph, the Court observes that *there is nothing wrong in principle with the Authority's tariff-based approach so long as it is not applied in a rigid manner without regard to the particular characteristics of the case*.

Discussion

[11] The applicant invites me to allow costs to lie where they fall while the respondent effectively seeks a recompense for the full amount of the costs he incurred in defending the applicant's claim. There is some issue as to exactly what the respondent's costs are. The respondent says through his counsel that he has incurred more than \$10,000 in costs but then identifies that a figure of \$5,000 would represent *reasonable* costs for dealing with the investigation meeting and appropriate preparation for it.

[12] I make the assumption (without having the benefit of the respondent's bills of costs from his counsel filed with the Authority) that the respondent has spent about \$5,000 in costs prior to the investigation meeting and another \$5,000 in anticipation of the investigation meeting and for the investigation meeting proper.

[13] The applicant contends that his claim was *arguable* and that it was presented in a timely and concise manner. The Authority's determination found for the respondent on each and every one of the particulars relied upon by the applicant in his statement of problem. Such a result suggests a less than arguable case was advanced.

[14] The applicant also persevered with a claim that he had been offered employment by the respondent not once but twice right up until the commencement of the investigation meeting at which point the applicant withdrew the contention that he had been offered employment on an earlier occasion by the respondent through an agent, namely the respondent's son.

[15] It is plain that the applicant's decision to persevere with that claim until the eleventh hour and then withdraw it put the respondent to additional expense because it caused the respondent to have to brief additional witnesses who would not otherwise have been called at all. Having said that, some of those additional witnesses were able to offer contextual evidence about the remaining issues which assisted the Authority to reach the conclusions that it did.

[16] Notwithstanding the applicant's conspicuous lack of success in his claim, it is not the role of the Authority to punish an unsuccessful party through costs nor is it appropriate for an unsuccessful party to be punished for the way in which they have chosen to run their case. However, a successful party is entitled to make a claim to recover part or all of their costs reasonably incurred in meeting an unsuccessful party's claim where the unsuccessful party's conduct has directly contributed to the successful party's costs. In the particular circumstances of this case, it is in my view entirely appropriate for the respondent to seek to recover a contribution to its costs from the applicant in respect of the applicant's late withdrawal of the claim to have been offered employment by the respondent's son on a different date and time from the claim to have been offered employment by the respondent himself.

[17] Because of the informal and inquisitorial nature of the Authority's proceedings, awards of costs have generally been more modest than have been the case in the more formal setting occasioned by a Court of record and the Authority has frequently awarded costs against a notional daily rate. However, it is important that the Authority continues to update its consideration of such a notional daily rate to reflect actual practice and reflect any movement in costs reasonably incurred by successful parties.

[18] To that end, it is illustrative that whereas in one of the earlier decisions of the Court frequently relied on by the Authority, *Harwood v. Next Homes Ltd* [2003] 2 ERNZ 433, average awards of costs for a one day investigation in the Authority, in that year of course, was held to be between \$1,000 and \$1,500, matters have now moved on somewhat and as the Full Court has pointed out in *PBO Ltd*, the figures for costs awards maintained by the Department of Labour suggest that for the six months to 30 June 2005, the majority of costs awards for one day investigation meetings are in the range between \$2,000 and \$2,500.

Conclusions

[19] I do not think this is a case where costs should lie where they fall. The respondent has been put to significant expense in defending a claim which, by virtue of the determination issued by the Authority on 24 November 2005, was found to be without merit.

[20] The applicant, of course, has every right to bring his claim to the Authority and have it considered by the investigative process set out in our governing statute, but in so doing, he, like other applicants in a similar position, must accept that the right to bring proceedings carries with it an obligation to contribute to the other party's costs in the event the other party successfully defends the claim.

[21] I have already referred to the uncertainty in the respondent's submissions about what the actual quantum of the respondent's legal costs is for the Authority proceeding. It is often useful to the Authority to have before it copies of bills of costs.

[22] However, the figure claimed of \$5,000 for the Authority proceeding proper is a reasonable figure in all the circumstances, given the number of heads of claim brought against the respondent by the applicant.

[23] I accept the respondent's argument that it is entitled to additional recompense by reason of the applicant's late withdrawal of a significant additional claim which the respondent says (and I agree) caused it to have to brief an additional three witnesses.

[24] The only gloss that I would put on the respondent's argument in that regard is that those additional three witnesses did help the Authority to reach its conclusions about the context in which the dispute between the parties originated.

Determination

[25] This was a matter which was dealt with in an investigation meeting commencing at 9.30 in the morning and finishing at 2.30 in the afternoon so in effect it was between a half day long and a full day long.

[26] I am disposed to require a payment by Mr Wylie to Mr Bengel in the sum of \$2,500. I award this sum on the basis of \$1,500 as a contribution to the respondent's costs for the elements of Mr Wylie's claim that proceeded to investigation and a further \$1,000 as a contribution to the respondent's additional costs in preparing for the claim which Mr Wylie withdrew at the beginning of the investigation meeting. I accept Mr Wylie could easily have withdrawn this claim earlier so as to save the respondent that additional expense.

[27] The parties may need to agree some form of time payment.

James Crichton
Member of Employment Relations Authority