

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Brandon Thomas Jackson (Applicant)
AND Enterprise Motor Group (North Shore) Limited (Respondent)
REPRESENTATIVES Matthew Young, Advocate for Applicant
Shan Wilson, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
SUBMISSIONS RECEIVED 14 April 2005
18 May 2005
DATE OF DETERMINATION 24 May 2005

DETERMINATION OF THE AUTHORITY AS TO COSTS

The Application for Costs

[1] By a Determination dated 13 May 2005¹, the Authority resolved the employment relationship problem between these parties by determining that the applicant Mr Brandon Jackson (“Mr Jackson”) had been unjustifiably constructively dismissed and additionally, that he had contributed to the situation that gave rise to that personal grievance. After taking into account the extent of Mr Jackson’s contributory conduct, the Authority made an order that the respondent Enterprise Motor Group (North Shore) Limited (“Enterprise”) pay to Mr Jackson the sum of \$250.00 as compensation under section 123(c)(i) of the Employment Relations Act 2000 (“the Act”).

[2] The parties were invited to resolve costs between them but they were unable to agree. The representatives have lodged memoranda to assist me in the exercise of the Authority’s discretion. The application is assigned to me following the former investigating Member’s appointment as Chief Mediator.

Costs in the Authority

[3] It was said in *Harwood -v- Next Homes Limited*² and *Graham and Airways Corporation of New Zealand Ltd*³ that average awards of costs fall between \$1,000.00 and \$1,500.00 for a one-day investigation meeting by the Authority. There was agreement too in those decisions of a trend towards a higher figure of between \$2,000.00 and \$3,000.00. It has also been held that generally, awards of costs in the Authority are modest consistent with the Authority’s approach to

¹ AA166/04, Ken Raureti

² unreported, AC70/03, 19 December 2003, Travis J

³ unreported, AA39/04, 28 January 2004, Alastair Dumbleton

Investigations. That approach is as described in *Wilson and Grey Power Publishing Co Ltd*⁴.

[4] The principles and rules conventionally applied to applications for costs in traditional adversarial or trial litigation do not fit with the Investigative role of the Authority and the objects of the legislation which establishes it⁵. Those principles and rules continue to remain relevant however and the overall question is to determine what is a fair and reasonable contribution as between the parties. The Authority adopts a principled approach taking into account relevant matters and taking no account of irrelevant ones.

The claims for costs

[5] Ms Wilson advises that Enterprise's actual costs exceed \$35,000.00 (including GST). It is the GST exclusive portion which is relevant for present purposes in the sum of \$31,111.11. Enterprise seeks a contribution in the sum of \$11,340.00 to its actual costs and disbursements of \$323.55. The basis for that contribution is articulated by Ms Wilson as total preparation time of twenty-four hours at Counsel's hourly charge-out rate of \$420.00. The preparation time is calculated applying a multiplier of 3 to the Investigation Meeting duration of 8 hours.

[6] Mr Young advises Mr Jackson's costs are \$26,032.00 excluding GST calculated at 87.5 hours @ \$250.00 per hour. I take from that they are the actual costs Mr Jackson has paid or must pay for which he now seeks a contribution to. It is the GST exclusive portion of those costs that is relevant. In addition, there are disbursements of \$4,157.00. These amounts are made by bare statement and are not verified by copies of invoices or other evidential detail. Mr Young initially sought a contribution of \$9,000.00 but that is now revised to \$4,832.00 on a "pragmatic basis". In the result I do not concern myself with the veracity of the advised costs and I say only that they are exorbitant and outrageous.

The Calderbank letter

[7] By letter dated 12 December 2003, Enterprise made of an offer of \$4,000.00 to Mr Jackson in settlement of the employment relationship problem ("the offer"). That letter operates as what lawyers call a Calderbank letter and I shall refer to it as that from here. The offer set out in the Calderbank letter was open to be accepted until 19 December 2003.

[8] Enterprise subsequently amended its statement in reply which averred materially dissimilar responses from its originally lodged statement in reply. Mr Jackson argues that the Calderbank letter ought not operate as one because of that amended statement in reply.

[9] The altered grounds of Enterprise's defence to Mr Jackson's claim were signalled to Mr Jackson's advocate in a telephone conference the representatives held with the Authority on 17 December 2003 and as confirmed in the Authority's directions on 19 December 2003.

[10] I conclude that Mr Jackson considered the offer of settlement as setout in the Calderbank letter with knowledge of Enterprise's amended defence. Regardless of Enterprise's contended defence, Mr Jackson guided by his advocate, must be taken to have been confident that he would ultimately secure a Determination in his favour as well as orders more financially beneficial than the offer made to him to settle on the basis of Mr Jackson's instructions and advice to the advocate.

⁴ unreported, AA58/03, 4 March 2003, Alastair Dumbleton. See also the Authority's Determinations in *Beardsley and Campac International Limited* AA39A/01, Yvonne Oldfield and *Henry and Youth Horizons Trust* AA107A/02, Ken Anderson.

⁵ *Harwood and Koia -v- Attorney-General*, unreported, AC8/04, 23 February 2004, Colgan J.

[11] The Calderbank letter now operates to disentitle Mr Jackson from seeking costs against Enterprise. That is because he was granted an award which was in financial terms less than the offer. The Authority's investigation meeting did not need to proceed and both parties incurred legal costs which they need not have.

[12] I do not consider that in this investigation it was particularly known that Mr Jackson was motivated by a strong sense of injustice and the need for vindication as would be sufficient to render the Calderbank offer ineffective.

[13] It is not open to Mr Jackson to now seek his costs from Enterprise. Although it is conventional that costs follow the event, because of the operation of the Calderbank letter, costs in this matter will not.

[14] Enterprise has incurred costs it should not have as a result of Mr Jackson's conduct - that is - he proceeded to an investigation meeting when he should not have. I accept Enterprise made a genuine effort to settle the matter by an offer which was worthy of serious consideration. Because the offer was not accepted, Enterprise had little choice but to defend Mr Jackson's claims.

[15] Mr Jackson's costs as advised by Mr Young are \$29,286.00 and I have made very clear my view of that quantum. Those costs are incurred against this background. Mr Jackson's claim for reimbursement was never realistic because he secured new employment during the notice period. That meant his principal remedy would have been compensation. The amount of compensation he would likely obtain from the Authority was always unlikely to defray costs amounting to \$29,286.00. Nor, I am convinced, would a compensation award have approached the \$50,000.00 sum he specified in his statement of problem. Such exaggerated claims serve only to polarise the parties and can impede prospects of settlement. It would also have been apparent to Mr Jackson and his advocate that there would likely be a finding of contribution and to a significant extent. Having regard to all these matters which in my view sound advice would have had regard to, it is unfortunate if not outrageous, that Mr Jackson was permitted to incur the substantial costs it is advised he did.

[16] I have concluded that the conventional rule that costs follow the event will not apply in this matter. That would ordinarily mean that costs are left to lie where they fall. However, I consider that in equity and good conscience and having regard to the matters set out in the immediately preceding paragraphs, it is right and just that Enterprise, although not successful, ought to have a contribution to its costs.

[17] I do not accept that such a contribution should be the sum Ms Wilson seeks. I consider what costs are reasonably incurred. I disagree that a multiplier of 3 should be applied. At most, a multiplier of 2 is appropriate to arrive at total professional time involved of 16 hours⁶. Nor do I accept an hourly charge-out rate of \$450.00 is reasonable in this forum and instead substitute a rate of \$250.00, the upper bound of what I consider a reasonable hourly rate. That leads in my assessment to notional reasonable costs of \$4,000.00. Mr Jackson ought to contribute to that sum.

[18] It is most unfortunate that I am not assisted by way of information as to Mr Jackson's ability to meet any costs award against him. Effective representatives will be of most assistance to clients in the position Mr Jackson now finds himself, by assisting the Authority to see that client's means and ability to meet an award of costs. That assistance is preferable to submissions which restate long established costs principles applicable under the previous legislation and already well-known to the Authority.

⁶ *Okeby v Computer Assocs (NZ) Ltd* [1994] 1 ERNZ 613.

[19] In considering costs, the Authority exercises its equity and good conscience jurisdiction as a matter of discretion. To exercise that discretion according to the equities of the matter in good conscience is a difficult exercise without the relevant assistance.

[20] All that I am advised is a bare statement that Mr Jackson is impecunious. If he has paid the advised actual costs of \$29,286.00 I would not accept that he is impecunious.

[21] I now fix liability by determining that Mr Jackson shall contribute to Enterprise's costs which I have notionally fixed as reasonable at \$4,000.00. Mr Jackson shall contribute to that sum in the amount of \$2,000.00. I regard that contribution as neither illusory for Enterprise nor punitive of Mr Jackson. Exercising my discretion on a principled basis, **Brandon Jackson is ordered to pay to Enterprise Motor Group (North Shore) Limited the sum of \$2,000.00 as a contribution to costs.**

Leon Robinson
Member of Employment Relations Authority