

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Darren Peter Cotes (Applicant)

AND PR Driving Services and Lahore Transport Contractors Ltd
(Respondents)

REPRESENTATIVES James Parlane for Applicant
Simon Menzies for Respondents

MEMBER OF AUTHORITY James Wilson

INVESTIGATION MEETING 29 March 2006
DATE OF DETERMINATION 17 July 2006

COSTS DETERMINATION OF THE AUTHORITY

[1] In a Determination dated 15 May 2006 (Determination Number AA172/06) I found that Mr Cotes had not been unjustifiably dismissed by either of the respondents. In that determination I reserved the question of costs and urged the parties to settle this issue themselves. Unfortunately they were unable to do so and Mr Menzies has filed a submission requesting that his clients, PR Driving Services Ltd and Lahore Contractors Ltd, be paid a contribution towards their costs by Mr Cotes.

[2] Mr Menzies argues that Mr Cotes' claim was doomed to failure from the start. He suggests that while under usual circumstances an award of \$1500 might appear appropriate there are factors in this case that would suggest a significantly higher award. In addition to pursuing a claim doomed to fail Mr Menzies says the fact that Mr Cotes pursued his claim against two respondents meant that additional costs were incurred. Mr Menzies says that the total costs to the respondents exceeded \$8,000 of which approximately \$1500 would have related to the period up to and including mediation. He seeks a total contribution of \$5,000.

[3] In his submissions in response Mr Parlane, on behalf of Mr Cotes, has raised a number of issues which, he says, suggests that costs should be allowed to lie where they fall. In fact, Mr Parlane says, costs should be ordered to his client. In support of his argument Mr Parlane suggests:

- The respondents had *not acted responsibly in this matter and have not produced the best evidence of their defence available to the Authority. and the general attitude of the respondents should be taken into consideration when considering costs in this case (and) it was below a reasonable standard*
- The respondents failed to properly participate in the mediation process, sending only their representative.

- No proper or formal notice of dismissal was given and the employer(s) should be paying a penalty to the crown as they are in breach of the legislation.
- The Authority failed to give credit to the applicant for reliance on one of the respondents' senior employees.
- Counsel (Mr Menzies) should not have acted for both respondents as this ran the risk of breaching the rules of professional conduct and he had a potential for a conflict of interest.
- The investigation meeting lasted half a day and costs should therefore not to be excessive.
- The attitude of Mr Allen (the principal of PR Driving Services) was “cocky” and “arrogant” and that this should be taken into account when costs are considered as he made matters more difficult.
- Mr Cotes did all he could to be available for work and without proper notice he was “stood down” and never properly “sacked”.

Legal principles

[4] The award of costs in matters before the Authority is discretionary. The principles generally applied to the use of this discretion where set out and endorsed by the Employment Court in *PBO v Da Cruz* unreported, AC 2A/05, 9 December 2005. The Court listed these principles as:

- *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.*

Discussion

[5] Unfortunately, with the exception of the length of the investigation meeting, Mr Parlane has not addressed the various considerations the Authority must take into account when considering the question of costs. On the other hand there appears to be little in this case which would justify a greater, or lesser, award than is usual. The fact that Mr Menzies acted for both respondents was perfectly appropriate and, under the circumstances contributed to the efficiency of the Authority's investigating. In the light of Mr Parlane's

comments it is important to record that Mr Menzies' behaviour was entirely professional and appropriate throughout this process.

[6] Mr Cotes chose, through his representative, to cite two separate respondents. Under the circumstances this was probably necessary given the nature of Mr Cotes' "employment". The investigation process would almost certainly have required the involvement of most, if not all, of the witnesses even if only one of the two respondents had been cited.

Determination

[7] Mr Cotes it is to pay PR Driving Services and Lahore Contractors Ltd the sum of \$1500.00. No doubt Mr Menzies, in consultation with the respondents, will be able to calculate the correct proportions as to how this amount is to be applied as between the respondents.

James Wilson
Member of Employment Relations Authority