

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Tom Foster (Applicant)
AND Chief Executive of the Department of Corrections (Respondent)
REPRESENTATIVES Mark Ryan, Counsel for Applicant
Roanna Chan, Counsel for Respondent
MEMBER OF AUTHORITY Y S Oldfield
SUBMISSIONS 3 April 2006, 4 April 2006
DATE OF DETERMINATION 6 April 2006

DETERMINATION OF THE AUTHORITY AS TO COSTS

- [1] On March 1 2006 I issued a determination in which I concluded that certain actions of the respondent exacerbated a pre-existing condition of the applicant. However that condition and its on-going effects were the results of personal injury by accident for which the applicant has been compensated, and there can be no award of compensation pursuant to s.123 for the direct or indirect consequences of personal injury by accident. I also found that (given the nature and severity of the pre-existing condition) the work environment was not a safe place for Mr Foster. However I was not satisfied that the harm to Mr Foster was foreseeable and hence I considered there could be no question of any breach of duty by the respondent.
- [2] I concluded therefore that there was nothing more the Authority could do to assist Mr Foster with his employment relationship problem.
- [3] The respondent, as successful party, now seeks costs. Ms Chan referred me to the recent full Court decision in *PBO Ltd v Da Cruz, Unreported, 9 December 2005, ARC 87/04* and submitted that I should take the following points into consideration in assessing the claim for costs:
- in the statement in reply it was asserted that the applicant's claim (being a claim in respect of bodily injury) was statute barred. This matter was discussed in telephone conference however the Authority directed that this argument, along with other limitation defences, should be heard as part of the substantive matters. Ms Chan submits that the claim was untenable;
 - On 31 May a Calderbank offer (a contribution to Mr Foster's costs of \$2,500.00) was made but not accepted.

[4] Ms Chan has told me that the respondent's costs came to \$19,621.50 plus disbursements of \$1,433.96 (inclusive of GST.) She says that these are reasonable, and submitted that a reasonable contribution to those costs would be \$10,000.00 plus full disbursements.

[5] For Mr Foster, Mr Ryan has responded that the Respondent's claim for costs and disbursements is not reasonable because:

- The matter was not complex and the costs are "surprisingly large" given that there were only three witnesses for the respondent;
- In considering costs the Authority should bear in mind the comparative financial resources of the parties. An award of costs of the level sought would be oppressive;
- The applicant does not accept the Respondent's assertion that his claim was untenable;
- The disbursements include the cost of flying Counsel from Wellington when the respondent could have instructed Auckland Counsel, as it has done on other occasions;

Determination

[6] As Ms Chan has pointed out, the defence that the applicant's claim was statute barred was raised at the outset of these proceedings. However, at the very first telephone conference in this matter Mr Ryan disputed that the disadvantage for which his client sought compensation was a consequence (even indirectly) of his personal injury by accident. In order to establish whether he was correct I needed to hear essentially all the evidence about what had led to the employment relationship problem. Although as it has turned out, I have concluded that Ms Chan was correct, there was in my assessment no alternative to a full inquiry into Mr Foster's employment and medical histories. For this reason, I proceeded with a full investigation of all the substantive matters.

[7] While not overly complex from a legal point of view, that investigation did require all concerned to come to grips with a significant amount of material before the two day investigation meeting. I accept that preparation for the meeting was likely to have been a little more extensive than for some two day matters.

[8] As Ms Chan has reminded me, a full bench of the Employment Court has recently issued a decision (*Da Cruz*) which clarifies the principles governing costs awards in the Authority. Having had regard to the principles in that case I consider it appropriate to set costs in this matter at what might be described as the upper end of the normal range for a matter that required a two day investigation meeting.

[9] As for disbursements, I accept the argument that the applicant should not have to meet the cost of flying Wellington Counsel up to Auckland. On that basis I make an award for the balance of the disbursements claimed, exclusive of Counsel's travel costs.

[10] I therefore order that the applicant pay to the respondent the sum of \$5,000.00 contribution to costs, plus disbursements of \$375.81 inclusive of GST.