

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Eastern Bay Independent Industrial Workers Union Incorporated
AND Carter Holt Harvey Limited (Tasman Mill)
REPRESENTATIVES Lou Yukich for Applicant
Rob Towner for Respondent
MEMBER OF AUTHORITY Vicki Campbell
SUBMISSIONS RECEIVED 1 November 2006 from Respondent
13 November 2006 from Applicant
DATE OF DETERMINATION 30 November 2006

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] In 2004 Mr Marc Butler and 38 others filed an employment relationship problem in the Employment Relations Authority seeking compliance with a mediation settlement reached between EBIIW, the Manufacturing and Construction Workers' Union and CHH (AEA 958/04). The settlement agreement required Carter Holt Harvey ("CHH") to set up a working party to discuss and agree on recommendations to be made regarding a new performance recognition scheme. The working party was never established.

[2] I declined to order compliance with the settlement agreement and that determination was challenged in the Employment Court. The challenge was limited in scope to a very narrow point of whether or not there was "*...no performance to recognise.*" In a decision dated 14 October 2005 (AC57/05), Judge Couch held that there was work done from 1 July 2004 until at least 7 September 2004 by the applicants in ARC95/04 to which a performance recognition scheme could apply.

[3] The parties met in mediation in February 2006. That mediation was unsuccessful. On 21 March 2006 the respondent provided a calderbank offer to settle the employment relationship problem. That offer put the union on notice that in the event of the offer not being accepted it would seek the recovery of full solicitor/client costs if proceedings were brought in the Authority.

[4] On 20 July 2006, EBIIW filed a statement of problem claiming penalties for various breaches of the settlement agreement and collective employment agreement. In an amended

statement of problem filed on 16 August 2006, in addition to the penalties, the union sought an order for compliance with the mediated settlement agreement.

[5] During the telephone conference call to discuss a timetable for the investigation meeting I raised various issues with the union relating to its statement of problem. As a result of raising those issues Mr Yukich, on behalf of the union file a second amended statement of problem with the heading "application for re-opening".

[6] On 31 August 2006 Mr Towner wrote to Mr Yukich on behalf of the respondent and made a further offer to resolve the matter. In his letter Mr Towner advises Mr Yukich:

Your claim in the Authority is clearly fraught with difficulty. You have now abandoned the claims based on breach of good faith and for penalties. Your second amended statement of problem faces new obstacles which I will set out in the amended statement of reply; but in brief you are not really seeking the Authority's 2004 investigation to be re-opened, and it is entirely inappropriate for a compliance order to be granted. I am well aware that you have only ever wanted a working party to be set up as a means to obtain a further one-off payment for your members.

The company's offer fully recognises the performance of the 39 employees for the short time in question, without going through the nonsense of trying to set up an incentive scheme which is already redundant and when there are no employees to whom it might apply.

I am serious about seeking full solicitor/client costs if you remain obstinate and continue but fail with this claim. The company has been put to considerable, unnecessary expense, and given the warning on costs which you have previously received, I believe that the company will be in a strong position to be awarded a unusually large award of costs if you persist. I hope that you will be sensible and that this dispute can finally be resolved without incurring further costs.

[7] In my determination dated 18 October 2006, after considering the tests for re-openings and taking into account the principle of res judicata and issue estoppel, I declined to re-open the matter. I reserved the question of costs and invited the representatives to resolve the matter of costs between them. They have been unable to do so and I am now in receipt of memorandum from both representatives.

[8] The respondent has incurred costs of \$37,951 for a hearing which lasted less than one day and it seeks indemnity of costs. The costs are somewhat higher than would normally be the case. I accept Mr Towner's submissions that this is due to the need for the respondent to reply to three statements of problem. The statements included a complexity of claims ranging from limitation periods, misrepresentation under the Contractual Remedies Act 1979, damages claims and compliance orders. While a number of the original claims were withdrawn when the Union filed the second amended statement of problem the respondent had been obliged to provide statements in reply addressing each claim and then each amended claim.

[9] There is nothing in this case to derogate from the principle that costs follow the event and that the successful respondent should receive a contribution to reasonably incurred costs.

[10] The following principles are appropriate where the Authority is exercising its discretion in relation to costs (*PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, [2005] 1 ERNZ 808):

- There is a discretion as to whether costs should be awarded and what amount;
- The discretion is to be exercised in accordance with principle;
- 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 an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to 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.

[11] I have considered the submissions made by the representatives and I am satisfied that the discretion under clause 15 of Schedule 2 of the Act ought to be exercised in favour of Carter Holt Harvey Limited.

[12] This is not an appropriate case for the awarding of indemnity costs. However, the calderbank offer made to the Union before this matter was filed in the Authority, combined with the offer made on 31 August 2006 and the consequent warnings contained within that letter, are significant factors in assessing a reasonable contribution to costs. Both offers were reasonable in the circumstances.

[13] The respondent has incurred significant costs as a result of the union's refusal to accept either of the offers to settle the employment relationship problem. Both offers were, in my view, reasonable offers to settle the problem. It follows that there is an obligation on the applicant to contribute significantly to the post-offer costs of the respondent.

[14] Taking into account the offers of settlement and in adopting the approach taken by the Chief Judge in *David Watson v New Zealand Electrical Traders Limited t/a Bray Switchgear*, unreported, 24 November 2006, AC 64/06), the applicant is to pay the respondent \$10,000 as a contribution to its costs.

Vicki Campbell
Member of Employment Relations Authority