

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Yolande Thom (Applicant)
AND New Zealand School of Travel and Tourism Limited (Respondent)
REPRESENTATIVES Phil Butler and Sam Kirk, Advocates for Applicant
Philip James, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
SUBMISSIONS RECEIVED 18 March 2006
5 April 2006
DATE OF DETERMINATION 10 May 2006

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

- [1] By determination dated 9 March 2006, the Authority resolved the employment relationship problem between these parties by determining to dismiss Ms Thom's application in its entirety.
- [2] Costs were reserved.

The claim for costs

- [3] The respondent (NZSTT) seeks a contribution to its costs of between 60% and two thirds of the reasonable costs it actually incurred being \$15,000 plus GST and disbursements.
- [4] The disbursements are not scheduled and of course GST is not normally accounted for in costs awards before the Authority.
- [5] NZSTT claims that the costs it incurred were reasonable and its argument in this regard revolves particularly around the nature of the claim that it had to meet.
- [6] As the successful party, NZSTT indicates that it was required to deal with a range of allegations brought by Ms Thom which, by implication anyway, I am invited to conclude were not necessarily germane to Ms Thom's personal grievance.
- [7] For her part, Ms Thom accepts it is proper for her to meet a proportion of the costs reasonably incurred by NZSTT, but considers that the actual quantum is excessive, that is, that the reasonableness of the total amount claimed to be spent by NZSTT is in fact unreasonable.

[8] Through her representative, Ms Thom correctly notes that NZSTT has not broken down the global figure of \$15,000 into constituent parts and in particular has not identified the proportion which might apply in respect of mediation.

[9] Next, Ms Thom argues that all that NZSTT can reasonably expect to recover against is the cost it reasonably incurred in assisting the Authority in the conduct of its investigation. In that regard, Ms Thom draws a distinction between the kind of preparation reasonably necessary for an adjudicative body such as a Court of record and the kind of preparation required in an investigative forum such as the Authority.

[10] Ms Thom then makes a number of observations about the nature of the conduct of the hearing by NZSTT and its counsel and as to the drafting of the various documents required for the hearing.

The legal principles

[11] The recent decision of the Full Court in *PBO Ltd v. Da Cruz* AC2A/05 helpfully sets out the relevant principles.

[12] In giving the judgment of the Full Court, Her Honour Judge Shaw observed 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.*

[13] 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, the successful party is entitled to make a claim to recover part 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. That latter principle is certainly a factor in the present case and I will consider that shortly.

[14] In relation to the notional daily rate already referred to, it is important to note that that rate must reflect actual practice together with any movement in costs reasonably incurred by successful parties.

[15] 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 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 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 of \$2,000 and \$2,500.

Discussion

[16] Without a more detailed breakdown of the reason for which particular items of costs were incurred by NZSTT, it is difficult for me to make any judgment about what portion of those costs could, for instance, appropriately be attributed to mediation processes. In that regard, I accept the submissions made by Ms Thom that it is not appropriate, in a case of this kind, for costs incurred in mediation to be recovered against an unsuccessful party.

[17] I also accept there is some force in the argument that the way NZSTT chose to conduct its case may well have added to the costs overall by perhaps adding to the length of the hearing.

However, I think the more important determinant of the complexity of the hearing and its length was the diverse nature of the matters which Ms Thom wished to include in her claim. In that regard, I accept NZSTT's submission that it was put to an additional cost in dealing with a number of matters which were certainly not central to Ms Thom's claim that she had been constructively dismissed from her employment.

[18] I also must agree with NZSTT's submission that its costs must have been affected adversely by the extraordinarily detailed closing submissions totalling 53 pages to which NZSTT was obliged to reply. Of course, it is fair to say that those submissions from both parties simply reflected the shape of the case initially mounted by Ms Thom, but nonetheless I accept the validity of the point NZSTT makes.

Conclusions

[19] This case was heard in a day and a half and while there may be criticism directed at each party for the way in which they chose to conduct themselves at the investigation meeting, on balance I am inclined to the view that by reason of Ms Thom's decision to argue her case on a relatively diffuse sort of basis with a significant number of subsets, any criticism of the far-ranging nature of the matter must be sheeted home to Ms Thom rather than to NZSTT which, in the end, was simply having to respond to the allegations that Ms Thom made.

[20] However, as I have already made clear, as I am not provided with a breakdown of the costs which NZSTT has incurred in this matter, it is difficult for me to separate out the costs of mediation and I do not think it appropriate that Ms Thom should contribute to those.

[21] It follows that the only way I can usefully proceed is by looking at the matter on the basis of a notional daily tariff and to that end, given a day and a half meeting, the starting point must be somewhere in the range of \$3,000 to \$3,750.

[22] There needs also to be an allowance for the scope of the claim which the respondent party had to reply to and in this regard I apply the principle that the way an unsuccessful party conducts their case may sound in costs if the successful party is put to extra expense in consequence.

[23] I am inclined to the view, without wishing to be precise, that perhaps as much as a third of the hearing was taken up with matters which, on a dispassionate construction of the matter, were not strictly germane to the central issues, but by reason of the fact they were raised by Ms Thom, they were of necessity dealt with by NZSTT.

[24] That being the position, I propose to add a further sum to the starting figure.

[25] It is difficult for the Authority to be absolutely satisfied it understands the basis for NZSTT having expended \$15,000 in legal costs on this matter without more information about how that total sum is broken down. It follows that the reasonableness or otherwise of those costs is also difficult to properly assess. In the normal course, one would want to satisfy oneself that the costs charged were reasonable in all the circumstances (after considering the information to which I have just referred), and then identify a proper basis on which the unsuccessful party can make a contribution to the successful party by way of costs.

[26] In the present circumstances, I am left with having to make an assessment purely on the basis of the time taken in the hearing and the notional daily rate at which the Authority often uses for apportioning costs.

Determination

[27] I order Ms Thom to pay to NZSTT the sum of \$5,000 as a contribution to the latter's costs in successfully defending her claim.

James Crichton
Member of Employment Relations Authority