

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Kerry Paul (Applicant)
AND Waikato Honey Products Limited (Respondent)
REPRESENTATIVES Chris Gudsell for applicant
Agnes McKay for respondent
MEMBER OF AUTHORITY Janet Scott
SUBMISSIONS RECEIVED 1 May, 20 & 26 June 2006
DATE OF DETERMINATION 19 September 2006

COSTS DETERMINATION OF THE AUTHORITY

Background

The problem between the parties has been the subject of two determinations by the Authority. The original determination settled (in the applicant's favour) a claim brought by him that the respondent had failed to pay him an agreed sum of \$200,000 to settle his rights to a shareholding in the respondent company, any rights to a cash bonus he was entitled to and to settle any potential claims that might have arisen over the termination of his employment.

The second determination addressed the respondent's application to re-open the hearing on the basis of its submission that new evidence had come to light which impacted on the original determination of the Authority. The respondent was unsuccessful in its application.

The matter is not finally settled and has been the subject of a de novo challenge to the first determination of the Authority (AA 109/06 dated 4 April 2006, Member Ken Anderson).

The parties have been unable to settle the matter of costs in the Authority between them and they now fall to be determined.

It is submitted for the applicant he has incurred costs up to receipt of the original determination in the sum of \$35,269 including GST. This amount includes the costs incurred by the applicant's previous legal representatives. It is also submitted for the applicant that he incurred costs in the sum of \$9,550 in respect of defending the application to re-open the investigation. The applicant has, therefore incurred costs in the Authority in the total sum of \$44,819.56. Submissions for the applicant focussed on relevant case law and argued that the circumstances of the case warranted a substantial award of costs in the applicant's favour.

Advocate for the respondent notes that even given a charge out rate of \$280 - \$300 the respondent's costs are significantly below those incurred by the applicant. It is noted that while the hearing

spanned three days it occupied only 1.5 days in total hearing time. Relevant case law was argued and it was submitted that the totality of the circumstances of the case supported an award in line with the Authority's usual award of \$2000-\$3000 per hearing day.

Legal Principles

In *PBO Ltd v Da Cruz* AC 2A/05 the Employment Court held that the principles guiding the Authority's approach to costs are different to those that apply to the Court because the institutions function according to different procedural structures and standards. It held that the Authority must judge the reasonableness of the parties' costs in light of whatever procedure it has adopted be it formal, informal, inquisitorial or adversarial.

The Court has held that the following principles are appropriate where the Authority is exercising its discretion in relation to costs:-

- *There is discretion as to whether costs should 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 an unsuccessful party's conduct although conduct which increase 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."*

Discussion and Determination

In setting costs in this matter I have had regard to the submissions of the parties and to relevant principles to be applied in a costs setting in relation to hearings in the Authority.

On the submissions it appears the applicant is seeking costs that go well beyond the principle of awarding costs associated with the preparation and attendance at an investigation meeting. It is also hard to see how costs in excess of \$9,000 could be reasonably incurred for the application to re-open the investigation – an application which was dealt with on papers.

The only thing notable about this case is the fact that it is clearly of significant importance to both parties. Otherwise it was a straightforward interpretation of an agreement reached between the parties. Costs incurred should have reflected this and it influences my determination in the matter.

Costs, I find, should be settled now to dispose of all matters in relation to hearings in the Authority so that ultimately the matter between the parties can be finally disposed of in the Court. In all the circumstances costs should be awarded to the applicant who has been the successful party in both applications heard and determined by the Authority on the basis of a reasonable contribution to costs appropriately incurred.

Determination

The respondent is directed to pay to the applicant the sum of \$5,000 to compensate him for costs incurred in pursuing and defending the applications made in this matter.

Janet Scott
Member of Employment Relations Authority