

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Leslie Hunt, Lyle Drysdale, John Rusden (Applicants)

AND Transportation Auckland Corporation Limited t/a Stagecoach
Auckland (Respondent)

REPRESENTATIVES Stephen Corlett, Counsel for Applicants
David France, Counsel for Respondent

MEMBER OF AUTHORITY Robin Arthur

SUBMISSIONS 2 June 2006 (Respondent) and 6 June 2006 (Applicant)

DATE OF DETERMINATION 22 November 2006

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination AA119/06 (6 April 2006) dismissed the personal grievance applications of Mr Hunt and Mr Drysdale. Their dismissals for redundancy were found to have been for genuine commercial reasons and conducted in a procedurally fair way.

[2] Mr Rusden did not attend the investigation meeting due to a family emergency. After closing submissions had been filed by both parties, the applicants asked the Authority to hear evidence from Mr Rusden. That application was declined for reasons given in the determination. While Mr Rusden's employment agreement has a different definition of redundancy, his circumstances and the events surrounding this redundancy were the same as those of Mr Hunt and Mr Drysdale which were investigated by the Authority. His application would more than likely have had the same result as that of the other two applicants.

[3] The parties were encouraged to agree costs between themselves but were unable to do so. Their counsel filed costs submissions and seek a determination.

Respondent's submissions

[4] The respondent acknowledges the usual principles for costs in the Authority and the commonly applied tariff.¹ It seeks a greater than usual award of costs for these reasons:

- (i) On 26 October 2005 – shortly after arrangements for an investigation meeting were made and a notice of meeting was issued – the respondent made an offer without prejudice (save as to costs) to settle this matter. The applicants were offered \$3000 towards their legal costs and an individual payment of \$1000 each. This was not accepted by a given deadline and the respondent then incurred costs of defending the claim through a full investigation over one-and-a-half days.

¹ *PBO Limited v Da Cruz* (unreported, EC Auckland, AC2A/05, 9 December 2005)

- (ii) Detailed evidence was required of the restructuring process, the arrangements for both roles made redundant and subsequent roles established and collective bargaining negotiations in 2005.

[5] The respondent says actual legal fees incurred following rejection of its settlement offer were \$27,472.50. It seeks a contribution of \$10,800 based on three days preparation and a one-and-a-half day meeting, that is a total of 36 hours at counsel's hourly rate of \$300. Alternatively it seeks 80 per cent of those costs, or \$8640. It also seeks disbursements of \$348.08 supported by invoices provided.

Applicants' submissions

[6] The applicants argue that they pursued their grievances in good faith and rely on a passage from the Brookers *Employment Law* commentary that the existence of a settlement offer should not ordinarily be regarded when a plaintiff loses as he or she was at risk of a cost award in any event.

[7] The initial Authority investigation meeting date was delayed by the filing of additional evidence by the respondent outside the timetable and was conduct noted by the Authority at the time as a factor that may affect any subsequent costs award. An additional witness statement for the applicants was filed only after seeking the Authority's consent and was limited to a narrow evidential point.

[8] The Authority's "daily rate" ranges between \$1500 and \$3000 and the hourly counsel's rate sought in the respondent's calculations was higher than usually allowed in the Authority.

[9] Mr Rusden's application to be heard later arose from unforeseen and tragic family circumstances – his daughter-in-law was seriously injured in an accident – and his claim was not determined so any costs to the respondent could not be claimed.

[10] Mr Hunt was retired and Mr Drysdale only did casual work so anything more than a "modest" award would unfairly punish the applicants. They accept an award of up to \$3000 is appropriate.

Discussion

[11] Principled exercise of the discretion to award costs in this particular case starts with considering the application of the usual notional daily rate ranging from \$1500 to \$3000. The nature of each case influences costs. Particular factors I take account of here are:

- (i) the existence of a without prejudice offer was not accepted by the applicants and the respondent was subsequently successful in justifying the dismissals for redundancy.
- (ii) delay of the initially scheduled investigation meeting due to unexpected late filing by the respondent of an additional witness statement containing material which could have been filed earlier.
- (iii) the means of the applicants, although not the subject of any detailed evidence or submissions, may be assumed to be moderate after longer service with the respondent on relatively modest salaries.
- (iv) The issues and evidence relating to the dismissals for redundancy of the three applicants involved the same witnesses giving evidence on the same series of meetings. Relatively little more was required from the respondent in replying to the three applications than if only one applicant had challenged his dismissal. Similarly, although not formally determined, the investigation dealt with the circumstances of Mr Rusden's dismissal and would almost certainly have had the same outcome.

[12] Costs follow the event and the respondent is entitled to an award of costs. Considering the evidence heard and the scope of the investigation, the parties' subsequent submissions on costs, and the particular factors identified above, I do not consider this is a matter than warrants going beyond the usual notional daily rates. However I accept that the settlement offer made to but not accepted by the applicants warrants, in light of the outcome, an award at the higher end of those daily rates – that is \$3000 a day. From an award of \$4500 for a one-and-a-half day investigation meeting, I deduct \$500 for the respondent's conduct in delay of the investigation meeting. That conduct delayed the Authority's investigation and rescheduling used dates otherwise available for other matters.

[13] There is a question of liability for costs – that is whether Mr Rusden should be liable along with Mr Hunt and Mr Drysdale for any award. I consider that, as a matter of equity and good conscience, the applicants should be jointly and severally liable for the costs. The respondent's legal costs were incurred in response to all three claims. The outcome in reality determined all three. Mr Rusden should fairly bear the burden with his two former colleagues. The costs award to the respondent would also have been of a similar level – given the near identical scope of evidence – if there had been one applicant only so the three are effectively liable in total for the costs of only one application, which they can share three ways, or face the total amount if one of the three cannot or will not pay.

Determination

[14] The applicants are ordered to pay to the respondent within 56 days of this determination:

- (i) the sum of \$4000 as a reasonable contribution to its costs; and
- (ii) a further sum of \$348.08 in disbursements.

Robin Arthur
Member of the Employment Relations Authority