

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number
WA 107A /07
File Number 5045450

BETWEEN

David Balfour
(Applicant)

AND

Central Hawkes Bay Support
and Counselling Service Inc
(Respondent)

Member of Authority: P R Stapp

Submissions received: 23 August 2007 from Applicant
7 & 28 August 2007 from Respondent

Determination: 31 August 2007

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an outstanding issue on costs that the parties have not settled. The issue of costs was reserved by the Authority in a substantive determination dated 31 July 2007. That determination has been challenged by the Applicant.

[2] The Respondent is seeking 80 % of actual and reasonable costs submitted.

[3] The Applicant has asked that costs should lie where they fall at least until after the challenge to the Authority's determination in the Court.

Issues

[4] Should any costs lie where they fall at least until after the challenge to the Authority's determination in the Court? If not, should costs follow the event? If so how much is involved? The usual principles apply.

Comment

[5] The Applicant was unsuccessful in his claims before the Authority. In such circumstances costs would follow the event in favour of the Respondent which successfully defended the claim. I propose to do that here. I am not persuaded by the Applicant that costs should lie where they fall at least until after the challenge to the Authority's determination in the Court. My reason is that disposing of costs is the accepted practice to enable the Court to deal with all matters in a de novo challenge.

[6] Mr Calver has produced a Calderbank letter dated 2 May 2007 to support the application by the Respondent for 80% of its actual costs. Mr Balfour says that the letter does not meet the requirements of a Calderbank letter because Mr Calver as not part of the progressing of the matter by telephone conferences of the Authority leading to a decision that an investigation meeting was appropriate. The fact is that Mr Calver was properly representing the Respondent and formal notice of this was properly given by him on 24 April 2007 before the investigation meeting. He attended the investigation meeting as the Respondent's representative and has engaged in work for it on the Authority's investigation. Mr Calver has not included any earlier costs when he was not involved.

[7] Mr Balfour further says that the Authority's determination is an interim decision and highlights that the matter was far from clear cut without an investigation and far from being "doomed to failure". The Authority's determination covered the substantive issues and is enforceable until any challenge is dealt with under the Employment Relations Act. There were arguable issues raised and the Respondent was always very clear about what it thought the outcome would be.

[8] Also, Mr Balfour has submitted that the costs have not been substantiated and he should not have to pay for the Respondent's earlier Counsel's involvement that involved that person withdrawing because of a conflict of interest. He submitted that mediation costs cannot be included. Also, he says the status of the Respondent as a voluntary organisation, which was raised by Mr Calver, should have no relevance and the Respondent's action should be taken into account against it for any costs as claimed. Mr Calver provided an invoice of his costs. He has indicated that the costs are for his fee and do not include the previous Counsel's costs and do not include mediation. Whatever the status of the Respondent is the main consideration is whether or not it has incurred costs and been put to unnecessary cost.

[9] I have not summarised fully the Respondent's submissions because my approach to this matter will become apparent.

Conclusion

[10] It is my conclusion that I am permitted to proceed in the matter notwithstanding that the Authority's substantive determination has been challenged by the Applicant. Costs follow the event as is normal practice where a party has been put to expense and incurred costs. The Respondent is entitled to costs in this matter because it has been put to the expense of defending the claims, and was successful.

[11] I accept that a pragmatic offer was made to settle the matter by the Respondent on 2 May 2007 or it would seek full indemnity costs from Mr Balfour up to and including the investigation meeting. However, it has not claimed full indemnity costs. There was plenty of time before the Authority's investigation meeting for the offer to be considered by Mr Balfour. I am satisfied that he put the Respondent to the expense of an investigation but could be excused for doing so since he was pursuing a matter of principle that was not addressed in the Calderbank offer. The Calderbank offer tried to avoid the publicity of the matter for the Respondent but made no recognition of the matter of principle for Mr Balfour. There is nothing that I can find that makes this an exceptional case to base a claim on indemnity costs. Since costs follow the event for the Respondent, I have considered the Calderbank letter, but I have put it to one side because the usual principles apply in the Respondent's favour for an award of costs. Indeed the Respondent's claim for costs differs from the approach the Calderbank letter signalled would be taken to seek full indemnity costs from Mr Balfour.

[12] The Respondent is entitled to make a claim for some of Mr Calver's cost. Mr Calver formally declared that he was acting for the Respondent on 24 April 2007. He filed a second brief of evidence from Mrs Petersen on 28 May 2007 as a reply. An earlier brief had been filed by previous Counsel representing the Respondent. The Authority's investigation meeting was then held on 12 June 2007 with Mr Calver in attendance. I am satisfied that the Respondent properly incurred costs using Mr Calver as its representative and it is entitled to claim a contribution to reasonable costs for the investigation.

[13] Mr Calver submitted that his fee, including GST, and including disbursements, was \$7,225 to receive the file, take instructions, give advice and prepare for the Authority's investigation and report on the Authority's determination for the Respondent.

[14] The parties both understood what the issues would be prior to the Authority's investigation meeting. Indeed the evidence was organised in advance of the investigation meeting and affidavits and replies supplied. There was nothing complex or unusual about the matter. The investigation meeting lasted a full morning including time for submissions.

[15] I have to determine what fair and reasonable costs would be. They are not \$7,225.

[16] Twenty five dollars for disbursements is a reasonable sum that I accept.

[17] The costs have to be discounted for the hand over of the file between Counsel, taking instructions and reporting on the Authority's determination. These are matters that the Respondent should reasonably be expected to meet. Without being able to see the particulars of the invoice I have reached my own conclusion that reasonable costs for preparation and attendance at a half day investigation meeting would be in the order of \$3,520. I have calculated this by using \$220 for an hourly fee, multiplied by 4 hours for the Authority's meeting. I have allowed for one and one half days (12 hours) in addition for preparation that includes scrutiny of the documents and the time and preparation of the second brief and preparation and research for making submissions. Of this I am prepared to give the Respondent 60% of reasonable costs for an Authority investigation. Therefore, it is my decision that David Balfour is to pay a contribution of \$2,112 costs and \$25 disbursements to Central Hawkes Bay Support and Counselling Service Inc.

Order of the Authority

[18] I order David Balfour to pay a contribution of \$2,112 costs and \$25 disbursements to Central Hawkes Bay Support and Counselling Service Inc.

P R Stapp

Member of the Employment Relations Authority

