

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 79A/08
5110781

BETWEEN Roland Smith
 Applicant

AND Danaflex Packaging
 Corporation Limited
 Respondent

Member of Authority: Denis Asher

Representatives: Graeme Ogilvie for Mr Smith
 Darren Mitchell for the Company

Submissions received: Submissions received by 27 August 2008

Determination: 2 September 2008

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 4 June 2008 I found against Mr Smith's claims in respect of the Company. As agreed, costs were reserved.

Summary of Company's Costs Claim

[2] The Company has unsuccessfully attempted to seek agreement with Mr Smith as to costs.

- [3] The Company's application for costs relies on the Employment Court decision of *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.
- [4] Mr Smith's original dispute action filed with the Authority in a statement of problem on 14 February 2008 lacked reasonable specificity. As a result the Company incurred unnecessary costs as a result of having to file a substantive statement in reply.
- [5] An investigation was set down for 10 April 2008: on 6 April the applicant raised a personal grievance. An amended statement of problem was then filed: the Company was required to amend its statement in reply and a witness statement at further cost to itself.
- [6] In determining costs, and consistent with *Da Cruz* (above), the Authority should take into account conduct which unnecessarily increases costs.
- [7] The Company offered to settle this matter via a Calderbank offer dated 9 May 2008. The offer was for \$2,000: it was rejected by the applicant via a letter of the same date (see attachments to the respondent's submissions). Consistent with *Beck v Edge Real Estate Ltd*, unreported, 22 March 2006, Doyle H, CA 47/06, the Authority should now similarly find that Mr Smith should bear some responsibility for costs incurred after the Company's realistic offer was made.
- [8] The Company's total Authority-related costs amount to \$9,729.15 plus GST (see the particulars attached to the respondent's submissions).
- [9] Mr Smith response of 2 July 2008 made no offer toward the respondent's costs.
- [10] The Company submits that its costs were reasonable and necessary and seeks a contribution of \$6,000 towards its costs.
- [11] If awarded costs the Company is prepared to accept payment in instalments from Mr Smith.

- [12] The Company has not enjoyed any windfall from Mr Smith's dismissal as another employee was redeployed into his position.

Summary of Mr Smith's Costs Claim

- [13] The original dispute developed into a grievance as a result of the Company refusing to await the outcome of the former. The respondent then refused to allow the dispute to proceed to the Authority before deciding on a dismissal. The applicant did not choose to have the grievance included in the Authority hearing: the Company then successfully appealed to the Authority to have the dispute hearing date deferred so that all matters could be heard at once. However, the parties were required to attend mediation over the grievance prior to the new Authority investigation date.
- [14] As the grievance flowed directly from the non-resolution of the dispute, the latter was the primary issue before the Authority; the Company was responsible – in the meantime – for the grievance being heard at the same time.
- [15] The Employment Court does not typically award costs in respect of disputes (I understand this argument to refer to costs in genuine test cases): *Hansells (NZ) Ltd v Ma*, unrep, Travis J, 1 Nov 2007, AC 53A/07, etc.
- [16] Mr Smith has no realistic prospect of meeting any costs claim without substantial hardship: *Merritt v The Commissioner of Police*, unrep, Colgan J, 16 Mar 1998, AEC 16/98. As a result of his dismissal Mr Smith has been out of work since 29 February 2008: he has no funds or income available to meet any financial calls (refer to the attached letter of 10 June 2008 from the BNZ). He is incurring significant interest charges and pressure from his bank because of his inability to make loan payments; his situation has worsened since the letter of 10 June.
- [17] In the meantime the Company has enjoyed a windfall from Mr Smith's dismissal as it has not replaced him: wages etc saved would be of the order of \$20,000. A redeployment of an existing staff member results in the same benefit to the Company.

[18] The Calderbank offer was effectively of nil value as it did not reflect costs incurred by Mr Smith up to the time of the offer. It is anyway not normal to take account of Calderbank offers where the plaintiff loses the case.

[19] The Company's costs are grossly excessive for what was essentially a half day hearing; it was also at the respondent's initiative the submissions be made after the Authority's investigation.

[20] Costs should lie where they fell.

Discussion and Findings

[21] The Company succeeded in defending its position, both in respect to Mr Smith's dispute and his grievance.

[22] It is well settled that costs follow the event and the Company is entitled to claim a contribution to its fair and reasonable costs: see *Da Cruz* (above).

[23] The only obstacle to what otherwise would be a contribution to the Company's fair and reasonable costs is Mr Smith's worsening financial position. It is not disputed he remains unemployed or that he is unable to service his bank loans.

[24] Clause 15 of Schedule 2 of the Act sets out the Authority's power to award costs. In particular, it provides the Authority "*may order ... costs as (it) thinks reasonable*". The Authority may also "*apportion any such costs ... as it thinks fit and may at any time vary or alter any such order in such manner as it thinks reasonable*".

[25] It is not uncommon for the Employment Court and the Authority's costs discretion to be applied so that losing but impecunious parties do not meet costs: see *Graham v Airways Corporation of New Zealand Ltd*, unreported, Colgan CJ, 12 January 2006, AC 1/06.

[26] I am satisfied that, but for Mr Smith's current financial and employment difficulties and taking into account the – relatively speaking – run of the mill nature of this employment relationship problem, costs of \$1,500 would have followed the event. But, because of Mr Smith's difficulties, I am satisfied it is

reasonable to suspend an order to that effect until such time as the applicant resumes employment and has cleared any significant personal indebtedness.

Determination

[27] Mr Smith is to pay to the Company the sum of \$1,500 (one thousand five hundred dollars) as a fair and reasonable contribution to its legal costs. However, this order is suspended until such time as the applicant returns to employment, has significantly cleared his indebtedness and is able fairly and reasonably to pay this sum to the Company, if necessary by way of instalments.

Denis Asher

Member of the Employment Relations Authority