IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 124A/09
5135001

	BETWEEN	VINCENT FLEMING Applicant
	AND	DELAMORE & REIDY MENTAL HEALTH COMMUNITY SUPPORT SERVICES LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Vincent Fleming in person Mark Lawlor, Counsel for Respondent
Submissions Received	5 June 2009
Determination:	15 July 2009

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 17 April 2009, the Authority resolved the employment relationship problem between these parties by determining that Mr Fleming had failed to establish any of his claims against the respondent employer (Delamore & Reidy).

[2] Costs were reserved.

The claim for costs

[3] Counsel for the successful respondent seeks full indemnity costs in the sum of $37,614.14 inclusive of GST and disbursements.

[4] Mr Fleming, on the other hand, seeks to avoid making a contribution to Delamore & Reidy's costs at all, principally on the footing that he is impecunious. Mr Fleming also persists with allegations he made at the investigation meeting which

were found to be completely without justification or merit and he expresses *some sadness* that Delamore & Reidy *received such high costs*.

The legal principles

[5] The Full Court in *PBO Ltd v. Da Cruz*, AC2A/5, identifies the salient principles traditionally referred to by the Authority in a costs setting and confirms the appropriateness of those principles. The Full Bench of the Employment Court also specifically approved the tariff-based approach often adopted by the Authority in a costs setting, so long as the particular circumstances of the individual case were taken into account as well.

[6] I also think it helpful to adopt the approach of my colleague Member Dumbleton in *Graham v. Airways Corporation of New Zealand Ltd* (Employment Relations Authority, Auckland, AA39/04, 28 January 2004), wherein the Authority postulated a three step approach in evaluating applications for costs. The first step was the identification of the actual costs incurred by the successful party; the second was to consider whether, in all the circumstances, those costs were reasonable; and the third was the determination of what proportion of those costs ought to be met by the unsuccessful party.

Discussion

[7] The actual quantum of costs charged to Delamore & Reidy has already been identified. I must say that, at first blush, the amount charged appears to be extraordinarily high. The principles set out in *PBO* (supra) and the range of costs awarded in the Authority, are well known. In considering the award to be made in favour of the successful party, the reasonableness or otherwise of the costs incurred is a significant factor and one properly highlighted by the Authority in *Graham* (supra). Costs awards are a discretionary remedy and one of the principal bases on which the Authority will exercise its discretion is the reasonableness of the costs actually charged. How that evaluation is made is, of course, by reference to the other costs incurred in the Authority in similar matters.

[8] Furthermore, the Authority's *modus operandi* as an informal and inquisitorial tribunal tends to discourage awards of any magnitude for the very reason the whole point of the Authority as a decision-making body is to reduce unnecessary formality

and limit the occasionally prohibitive costs of trial in the traditional adversarial system.

[9] Costs in the Authority have moved upwards over time and there have been various observations to that effect by the Judges and by the Authority. The start point of $3,000 per day is not considered an unreasonable tariff in this jurisdiction, having regard to the nature of the Authority and in particular its inquisitorial rather than adversarial way of operating.

[10] This was a relatively straightforward personal grievance dealt with in two days and the successful defence of the claim ought to have been accomplished in a fraction of the costs actually charged.

[11] Mr Fleming appeared for himself and as the decision itself makes clear, ran an argument that was completely without merit which seems to me to make the claim for an award of the magnitude sought by Delamore & Reidy, even more extraordinary. If the claim were complex or in any way unusual there could perhaps be some basis on which a higher than usual award would be made. But that is not the case here. This was simply an example of an employee exercising his legal right to bring a claim against his employer, a claim which there is little doubt any competent professional adviser would have told him had no merit whatever. Indeed, Mr Fleming's own union official told him to settle the dispute and not to bring it to the Authority at all.

[12] I note my colleague Member Robinson in *Jackson v. Enterprise Motor Group (North Shore) Ltd* (Employment Relations Authority Auckland, AA192/05, 24 May 2005) was prepared to substitute a lower hourly rate for the practitioner in order to produce what the Authority considered was *a reasonable hourly rate*. In that case, Member Robinson reduced the rate charged by about 40%.

[13] I prefer to simply look at the matter in the round. As I have made abundantly clear, I do not consider the costs reasonable in this forum. There is, in my opinion, no basis whatever on which full solicitor/client costs could be recovered in the present matter. I do accept that Mr Fleming was somewhat discursive in his approach to the matter because he is not a trained advocate, but the quality of his argument did not necessitate attendances that were in any way out of the ordinary.

[14] If that deals with the issue of reasonableness, the third and final leg of the *Graham* (supra) postulation is the amount that ought to be recovered from the

unsuccessful party. Here, I am forced to consider Mr Fleming's financial circumstances. His submissions in respect of costs tell me that he is in significantly reduced circumstances and the evidence submitted with those submissions tends to graphically support that submission and to confirm the mathematical certainty that he is incurring significantly more costs in his daily living than he is deriving income to support it. That being the position, there is an issue about the Authority considering Mr Fleming's ability to pay.

[15] The short point is that any significant award made against Mr Fleming is likely to be impossible for him to meet and even a very modest contribution to the costs of the employer would be a significant impost.

Determination

[16] This was, in my judgement, a straightforward personal grievance, dealt with by the Authority in approximately two hearing days time. I accept that Mr Fleming may have contributed to increasing that hearing time by the rather disjointed presentation of his case. However, there were no matters of particular complexity which could be said to materially add to the time required to prepare for the investigation meeting, and accordingly I am not persuaded that the special pleading of Delamore & Reidy for an extra large contribution is in any way made out.

[17] Furthermore, I do think it appropriate to take into account Mr Fleming's reduced circumstances. On the face of it, any significant award would simply be beyond his means. That being the position, I direct that Mr Fleming is to pay to Delamore & Reidy the sum of $1,000 as a contribution to its costs and given Mr Fleming's reduced circumstances, I note that it is likely that that amount would need to be paid on a time basis.

James Crichton
Member of the Employment Relations Authority