IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 66A/09
5102857

	BETWEEN	LIUBOV TROPOTOVA Applicant
	AND	OCS LIMITED Respondent

5102860

	BETWEEN	NATALIA TROPOTOVA Applicant
	AND	OCS LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Kevin Murray, Advocate for Applicants Paul McBride, Counsel for Respondent
Submissions received:	26 June 2009 from Applicants 3 June 2009 from Respondent
Determination:	17 July 2009

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 25 May 2009 the Authority dismissed a succession of *unusual claims* brought by the applicants (the Tropotovas) against the respondent (OCS). The Authority determined that those *unusual claims* were outside the Authority's employment jurisdiction.

[2] Costs were reserved.

The claim for costs

[3] Counsel for OCS, the successful party in the Authority's interim decision just referred to, seeks *a substantial award of costs* and argues for full solicitor/client costs being awarded.

[4] Costs have already been awarded in favour of OCS in respect of the completely unreasonable delay in the prosecution of the Tropotovas' claim. The present costs application relates exclusively to the unmeritorious nature of the Tropotovas' *unusual claims*.

[5] For their part, the Tropotovas through their advocate, Mr Murray, rather archly claim that the Authority's categorisation of the *unusual claims* has been relied upon by OCS but that this does not relate to the underlying unjustified dismissal claim. That submission overlooks the point that this costs application relates exclusively to the *unusual claims* because the Tropotovas had so far failed to bring their unjustified dismissal claim proper before the Authority in a way that enabled OCS to respond to it.

[6] The Tropotovas claim that there is a distinction between their application to the Authority (where it is alleged they have a viable personal grievance claim), and the cases relied upon by OCS concerning unmeritorious applications such as *Goddall Manufacturing Ltd v. Wilkes* [19980 1 ERNZ 513 and *Reid v. New Zealand Fire Service Commission* [1995] 2 ERNZ 38.

[7] Again, this submission completely misses the point that the costs under consideration in the present application are the costs incurred by OCS in defending the entirely unmeritorious application constituted by the *unusual claims*.

[8] The second point made by the Tropotovas in their submission is the contention that there is insufficient detail in the invoice attached to the OCS submission to support OCS's claim for a significant costs award.

[9] It is true that the invoice does not indicate, for instance, the hourly rate charged to OCS, nor does it provide a detailed narration of the work performed for the fee charged. However, the fee is, in my considered opinion, a reasonable fee for the nature of the work that would have been required for OCS to attend to the matters required by a defence of its position, and accordingly I take that matter no further.

[10] There is one further, and significant, issue which I must comment on. The Authority is aware, by personal communication to its officers from the Tropotovas themselves, that the Tropotovas have formed a somewhat jaundiced view of the service provided to them by Mr Murray and have sought alternative counsel. They apologise to the Authority for Mr Murray's activities on their behalf and seek the Authority's indulgence in respect to the matters before it. This intelligence may well be new information for OCS; in that regard, I have directed that the new counsel for the Tropotovas is to urgently contact Mr McBride and advise that he is acting.

[11] The impact of this change of representative needs to be considered. Mr McBride, in his submissions on behalf of OCS, argues that OCS ought not to have to bear the consequence of incompetent representation from the other party, and that I think accurately states the law. However, the fact is that any award of costs made in the present matter ultimately will impact on the Tropotovas themselves, either directly or indirectly. That fact, I hold, must be an appropriate counterbalance for the Authority to take into account in considering an application for a significant costs award.

The legal principles

[12] The Full Court in *PBO Ltd v. Da Cruz* AC2A/5, identifies the salient principles usually referred to by the Authority in a costs setting and confirms the appropriateness of those principles. In doing so, the Full Bench of the Employment Court also specifically approved the tariff-based approach often adopted by the Authority in the costs environment, as long as the particular circumstances of the individual case were taken into account as well. Those principles are well known to practitioners in the employment arena and the general run of costs awards in this jurisdiction will be familiar to representatives who regularly appear here.

[13] In *Graham v. Airways Corporation of New Zealand Ltd* AA39/04, 28 January 2004, my colleague Member Dumbleton postulated three steps in evaluating applications for costs. The first of these was the consideration and identification of the actual costs incurred by the successful party; the second was a decision about whether those actual costs were reasonable; and the final question was the determination of what proportion of those actual costs ought to be met by the unsuccessful party.

Discussion

[14] In the present case, applying the logic of *Graham*, the successful party incurred costs of $3,250 exclusive of GST. I have already indicated that I consider the level of those costs to be reasonable having regard to the nature and extent of the work that would have been required by OCS to defend itself against the *unusual claims* brought against it by the Tropotovas. As I have made clear, I am not persuaded that I need further information in order to analyse the reasonableness of those costs.

[15] The only real question is what proportion of those costs ought to be met by the Tropotovas. As I have already indicated, the Tropotovas have written to the Authority and expressed their remorse at the way in which their case has been conducted and have sought more competent representation. For its part, OCS points out that the Tropotovas' representative was advised by me at the earliest opportunity (the first telephone conference) that the *unusual claims* that were being mounted by the Tropotovas were entirely without merit or substance. Despite that warning, Mr Murray proceeded with his fanciful arguments, all of which failed (as I indicated they would at the earliest date) by want of jurisdiction amongst other things.

[16] In those circumstances, it is inappropriate for OCS to have to bear the consequences of having to defend these claims.

[17] However, I am concerned that the Tropotovas themselves may not have been as well advised of the nature of the arguments mounted in their name as perhaps they should have been. That is a reflection on Mr Murray and no reflection at all on the Tropotovas who are Russian nationals for whom English is a second language.

Determination

[18] In all the circumstances, I think it appropriate that the Tropotovas contribute to OCS the sum of $1,000 to assist in defraying OCS's costs in this matter. I expect that the Tropotovas' new counsel will now urgently progress their substantive application before the Authority so as to limit the inconvenience to OCS and to the Authority. In

that regard, I direct that a copy of this determination is to be made available to the Tropotovas' new counsel.

James Crichton
Member of the Employment Relations Authority