IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 95A/09
5086992

BETWEEN	NICOLAS JOHN Applicant
AND	AIRWAYS CORPORATION OF NEW ZEALAND LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Richard McCabe and Lauren Phillips, Counsel for Applicant Stuart Dalzell, Counsel for Respondent
Submissions received:	17 September 2009 from Applicant 4 September 2009 and 15 September 2009 from Respondent
Determination:	2 December 2009

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 3 July 2009, the Authority resolved the employment relationship problem between these parties by determining that Mr John had failed to satisfy the Authority that he had a personal grievance.

[2] Costs were reserved.

The claim for costs

[3] The successful party (Airways) seeks a substantial costs award in the sum of $22,984.75 inclusive of disbursements. The actual costs charged to Airways by its counsel amount to around $50,000 and the Authority is provided with evidence of those costs having been billed to Airways.

[4] Counsel for Mr John argue that the costs incurred by Airways ... *appear extraordinary and excessive in the circumstances*.

[5] Both parties refer to the decision of the Full Court in *PBO Ltd v. Da Cruz* AC 2A/5 as articulating the principles to be applied in the Authority in a costs setting. Counsel for Mr John also refer to an earlier decision of mine and in particular a decision of my colleague, Member Dumbleton, which I had earlier relied upon: *Graham v. Airways Corporation of New Zealand Ltd* (Employment Relations Authority, Auckland, AA39/04, 28 January 2004). The approach in *Graham* required:

(a) The identification of the actual costs incurred by the successful party;

(b) Consideration of whether those costs were reasonable; and

(c) A decision as to what percentage of those costs ought to be met by the unsuccessful party.

The actual costs incurred

[6] As I have already noted, Airways has supplied invoices of costs levied in respect of this matter and they total in the order of $50,000.

[7] The reasonableness of those costs, in all the circumstances, needs now to be assessed.

The reasonableness of the costs charged

[8] Mr John's counsel protest that:

(a) The costs are unreasonable in themselves as being excessive;

(b) The matter was not complex and therefore the costs incurred appear to be excessive;

(c) Some of Airways' disbursements are not a fair charge on the unsuccessful party.

[9] It is the case, as counsel for Mr John contend, that one of the guiding principles for costs in the Authority is that costs ought to be modest. Further, Mr John contends that an award of the magnitude sought by Airways would be unprecedented

and would have the appearance of a punishment for an unsuccessful litigant. In support of the first of these two submissions, Mr John refers to the Department of Labour's statistics which for the period he alludes to contain no costs awards of the magnitude of $20,000 or thereabouts. It is, however, not the case that an award of $20,000 is unprecedented in the Authority; the Authority made an award of that order in *Allan v. Ogilvy Wellington Ltd* (WA50/09), albeit that that particular award involved the assessment of a *Calderbank* offer as well.

[10] However, fundamental to Mr John's argument is the contention that there was nothing particularly complex about the claim he brought and that Airways expended a great deal of energy and money in refuting what was actually a simple question of whether Mr John had properly notified Airways of the alleged affects of the workplace on his health.

[11] As to this last point, I do not accept that the matter was as straightforward as is represented by Mr John. First, it is fair to say that the way in which the matter was argued of necessity, militated against a straightforward response. Airways would have been failing in its duty if it did not meet each and every one of the aspects of Mr John's claim head on and the only way to do that was by producing and briefing up the witnesses required to deal with the various disparate portions of evidence brought by Mr John. I am not persuaded that any of the witnesses produced by Airways was superfluous; had I believed that to be the case, I would have declined to hear them. In the substantive determination, I observed that it was necessary and helpful to consider *each of the chapters in the concluding part of Mr John's employment history with Airways*. I stand by that view. Those *chapters* covered a timeline of some four years, although the bulk of the concentration of analysis was required over the final two years or so.

[12] It follows that the matter was, I hold, complex to argue and while no doubt it could have been presented differently by the applicant, I am not persuaded that any criticism can be directed at the New Zealand Airline Pilots' Association for the way in which it prepared and argued the case for Mr John. Indeed, I fancy that the matters it put into contention in its claim were matters which were central to the issues on which the Authority had to make a determination, and it was only appropriate that those matters were brought before the Authority and were responded to by Airways as part of the normal investigative process.

[13] Because the matter was not straightforward, either in terms of its overall complexity or in terms of its breadth and length in a time sense, Airways seeks indulgence of the Authority in extending the commonly used daily tariff approach by applying the tariff not just to the actual days of hearing but also to some appropriate preparation time. It is, of course, unusual for the Authority to apply the daily tariff approach to days other than the actual hearing days, but I hold that this is an unusual case. Based on the workload of the Authority and the general run of cases which the Authority is required to determine in any year, this case was more significant, more time-consuming, and more complex to determine than the majority of cases and accordingly it is my considered view that it is appropriate for a more significant costs award than would otherwise be appropriate.

[14] The parties have endeavoured to resolve matters between them and have not been successful. Those discussions have, however, been within an appropriate and realistic range.

What contribution is appropriate?

[15] If this matter were treated exclusively as a typical case on a daily tariff basis, then an award of perhaps between $8,500 and $9,500 might be an appropriate exercise of the Authority's discretion. However, as I have made clear, this is not a typical case and I think it more realistic to direct that Mr John is to contribute a sum of $17,500 inclusive of disbursements to the costs incurred by Airways in the successful defence of Mr John's claim. I reach that figure by considering the daily tariff approach and then adding a contribution to disbursements (which is modest), and a further amount relating to the sheer extent of the matter, especially in a temporal sense.

James Crichton
Member of the Employment Relations Authority