

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 150/09
5094862

BETWEEN EASTERN BAY INDEPENDENT
INDUSTRIAL WORKERS
UNION INC
Applicant

AND PEDERSEN INDUSTRIES LTD
Respondent

Member of Authority: James Wilson

Representatives: Lou Yukich for the applicant
Russell Drake for the respondent

Submissions received: 22 April 2009 from the applicant
21 April 2009 from the respondent

Determination: 13 May 2009

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] In a determination dated 12 March 2008 (AA 88/08) I determined:

The Union's request for a compliance order is declined. Pedersen's is correct in its interpretation of the tool account provision in the CEA

In that determination I reserved the questions of costs and requested the parties to attempt to settle this issue between themselves. Unfortunately they were unable to do so and on 5 April 2008 Mr Yukich, on behalf of the Union, advised the Company that they intended to challenge the Authority's determination. Mr. Yukich suggested that a contribution towards the Company's costs should be in the order of \$750 but proposing that the issue of costs should be set aside until the Court had issued its judgement in respect to the Union's challenge. On 5 April 2008 Mr. Drake, on behalf of Pedersen's, wrote to the Authority submitting a claim for costs against the Union and requesting that the Authority holds those submissions on file pending the outcome of the Employment Court proceedings.

[2] On 23 March 2009 the Employment Court issued a judgement rejecting the Unions challenge and upholding the Authority's determination in this matter. On 27 April the Court issued a supplementary judgement declining to award cost and commenting:

[2] Although the company's submissions include a number of references to legal principles and decided cases, they are devoid of the essential information that the Court needs to make an order and, more particularly, of a substantial amount for a hearing that was concluded in one day.

[3] I have no information about whether the claim for costs covers the Authority investigation or the challenge alone. I have not been told what legal costs or disbursements were charged by its advocate to Pedersen Industries Ltd or even that it may have been billed these costs. There is no way that I can determine what the defendant's costs have been, let alone whether they are reasonable in all the circumstances, and then what should be reasonable contribution to them.

[3] It is now appropriate for me to decide the question of costs in respect to the Authority's investigation.

The submissions

[4] I have not seen the submissions made to the Court in respect to costs in that forum. However very similar comments to those made by Court can be made of the company's submissions in the Authority. As in the submissions to the Court, Mr Drake includes a number of references to legal principles and decided cases. In his letter of 5 April 2008 Mr Drake sort a contribution of \$8000.00 plus GST towards total fees incurred of \$12,000.00 plus GST. In The company's submissions in April 2009 Mr Drake has amended this claim to *(Pedersen Industries) seeks costs in the sum of \$12,000.00*. He does not provide any breakdown or invoices in support.

[5] In his submissions Mr Yukich points out that the Authority's investigation meeting was less than half a day and asserts that the unions were partially successful. He also points out that the company has submitted no documentation in support of its costs. Mr. Yukich suggests that an appropriate contribution by the union to Pedersen's costs, if any, should be based on the "tariff" usually applied by the Authority and fixed at a sum not greater than \$500.00.

Legal principles

[6] In *PBO Ltd v. Da Cruz* (AC2A/05, 9 December 2005) a full bench of the Employment Court said:

[44]. The costs principles which the Authority now applies are not necessarily as comprehensive or as prescriptive as those set out in Okeby and similar earlier judgments. The Authority is able to set its own procedure and has, since its inception, held to some basic tenets when considering costs. These include:

- *There is a discretion as to whether costs would be awarded and what amount.*
- *The discretion is to be exercised in accordance with principle and not arbitrarily.*
- *The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.*
- *Equity and good conscience is to be considered on a case by case basis.*
- *Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.*
- *It is open to the Authority consider whether all or any of the parties costs were unnecessary or unreasonable.*
- *That costs generally follow the event.*
- *That without prejudice offers can be taken into account.*
- *That awards will be modest.*
- *That frequently costs are judged against a notional daily rate.*
- *The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.*

[45] *We hold that these principles are appropriate to the Authority and consistent with its functions and powers. They do not limit its discretion and proper application of them should ensure that each case is considered in the light of its own circumstances. While these general principles are applicable also to the Court, the Authority is not bound by the Binnie principles which extend the range of costs which the Court may award beyond what could reasonably be labelled "modest."*

Discussion

[7] As set out in *Da Cruz* the awarding of costs is discretionary. As the Union has quite rightly pointed out the Authority's investigation meeting was relatively short (half a day) and preparation for that meeting was not particularly onerous or complex. The Company was successful and one of the basic principles when considering an award of costs is that *costs should follow the event*. Although as with the Court I do not have any detail of the actual costs incurred by Pedersen's in defending the Unions claim in the Authority, there is no doubt that they did incur not inconsiderable costs. Despite the lack of specificity in the company's submission a modest award is warranted.

Determination

[8] Taking into account the duration of the meeting, the narrow issue to determined and the usual range of costs awarded in the Authority, **the Eastern Bay Independent Industrial Workers Union Inc is ordered to pay Pedersen Industries Ltd \$750.00, including GST as a contribution towards their costs.**

James Wilson

Member of the Employment Relations Authority