IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 241A/10
5134019

	BETWEEN	NGAMU PARATA Applicant
	AND	MONTAGE GENERAL INSURANCE LIMITED Respondent

Member of Authority: Alastair Dumbleton

Submissions Received 4 and 18 June 2010

Determination: 12 November 2010

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination dated 24 May 2010 the Authority (Member Leon Robinson) made an order of compliance against the respondent company Montage General Insurance Ltd. That order, made pursuant to s 137 and s 138 of the Employment Relations Act 2000, was in favour of the applicant Mr Ngamu Parata.

[2] The Authority declined to grant other relief, including a penalty sought by Mr Parata against Montage and certain payments sought by Montage against Mr Parata.

[3] The question of costs was reserved by the Authority. As the parties have been unable to resolve it themselves, an application for costs has been made and responded to within the time directed.

[4] Because of Mr Robinson's resignation from the Authority between the date on which the determination was issued and the date on which the last costs submission was received, the application has had to be considered by a different Authority member, as permitted by clause 16 of Schedule 2 of the Employment Relations Act 2000.

[5] The compliance order made against Montage required the company to act in accordance with the terms of a *Settlement Agreement* that Mr Parata and the Managing Director of Montage had signed. The Authority found that the settlement agreement was enforceable under s 137 and 138 of the Act as an employment agreement, or a variation or extension of such agreement.

[6] The settlement agreement provided that the employment of Mr Parata by Montage had been terminated by mutual agreement. Mr Parata was to be paid all wages and holiday pay due to the date of termination. As part of the settlement he was also to receive $15,000 and a further $3,000, the latter sum being subject to deduction of any costs or expenses Mr Parata was personally responsible for.

[7] As well as settlement on a monetary basis, other terms provided for a statement of service for Mr Parata, the return by him of all Montage's property, confidentiality, and other provisions benefiting the parties.

[8] The determination issued by Mr Robinson indicates that the investigation meeting he conducted took place over two days. The Authority's file has on it copies of extensive written submissions made by counsel and advocates for the parties. They cover factual matters in dispute and also a relatively complex legal issue of the contractual force of the settlement agreement and its enforceability by compliance order.

[9] Mr Organ and Mr McFadden in their costs submissions for Montage describe the investigation as requiring a hearing of less than two days duration during which a total of six witnesses gave evidence. They describe the briefs of evidence as not being lengthy or dealing with complex matters of fact. Two hours of the meeting were taken up with the delivery of closing submissions. Written submissions were reserved and were provided several weeks after the meeting. The submissions were extensive. With the leave of the Authority, an amended statement of problem was also lodged after the investigation meeting.

[10] In these circumstances Mr Parata through counsel has applied for an order of costs against Montage, doing so on the basis that he was *successful in all respects* in the determination. That is not entirely correct for, as the determination records, he did not succeed in recovering either to himself or to the Crown any of the $10,000 penalty he had claimed against Montage.

[11] The amount of costs sought by Mr Parata, as a contribution to his actual costs, is $48,614 (excluding GST). That sum includes $2,492 sought as a disbursement for the cost of video link facilities used during the investigation meeting to enable Mr Parata to give evidence and be examined from a distance. He was linked to Auckland from Brisbane.

[12] The contribution of $46,122 to legal costs sought is calculated as ¾ of actual costs of $61,497 (excluding GST). A further $1,500 was incurred in relation to resolving the question of costs itself. Correctly, costs incurred in mediation have not been included in the $61,497. Mr Parata may yet incur still further costs, as Montage has challenged the Authority's decision to the Employment Court.

[13] I have considered the three particular matters raised on behalf of Mr Parata in support of the high award of costs sought for him and responded to on behalf of Montage opposing that level of award. They are referred to as *Shifting grounds, Serious allegations* and *Settlement attempts.*

[14] In relation to 'shifting grounds,' I accept that some additional work would have been required to counter the changes the respondent made in its stance toward the issue of enforceability of the settlement agreement it had signed. It ought to have known from the start why it had resiled from the agreement and should have been able to give the reasons, which were largely factual, in the statement of problem. Trying to rewrite history part way through an investigation no doubt influenced the view taken by the Authority of the credibility of the respondent's witnesses.

[15] On the other hand the applicant was not prevented from maintaining the case it had presented as being correct in fact and law despite the respondent's shifting grounds. Assuming his representatives had researched the applicant's case properly to begin with, the theory of the case should not have needed to be changed every time the respondent wanted to try a different tack. The unusual post meeting amendment permitted to the statement of problem suggests that very late in the investigation the theory of the case may not have been as well settled as it should have been for the applicant.

[16] In relation to 'serious allegations,' as submitted for the respondent it is not clear what specifically they were. It appears that two solicitors from Kensington Swan gave evidence as to material matters of fact in dispute. They were challenged

on their evidence, which is not unusual for a witness and is allowed for as part of the investigation process. Simply suggesting that a witness who is also a solicitor may have an incorrect recall of facts is not to impugn the professional integrity of the witness, and the pair were not acting as counsel before the Authority, only as witnesses. Too much has been made of this as a good reason for sharply increased costs. There is nothing in the determination about it, although the solicitors were given anonymity, something their client Mr Parata did not achieve.

[17] It is yet another question as to why Mr Parata should have to bear the extra cost, since he could reasonably expect that only reliable witnesses would be put forward on his behalf and that his counsel would always act with professional integrity.

[18] The third matter, 'settlement attempts,' is quite weak as a justification for significantly increased costs being incurred. As could be expected, the applicant's solicitors wrote to the respondent's advocate predictably stating that unless the settlement agreement was complied with legal proceedings would be commenced. This is hardly a settlement attempt but is simply the stating of an obvious intention.

[19] From reading the costs submissions for Mr Parata, it is as if there is nothing untoward about a situation where a party has been charged over $60,000 to recover only about a third of that. The submissions do not explain or even acknowledge the occurrence of what plainly appears to have been a major blow-out in the cost of his legal representation in this case.

[20] The justification provided for this level of actual costs seems to come down mainly to being a matter simple arithmetic; over 180 hours were spent on the case by Mr Parata's legal team, to which the charge-out rates of various junior and senior authors (ranging from $170 to $510 per hour) have been applied to give the product of $61, 497.

[21] The costs submissions for the applicant fail to address even the correct principles as to costs awards in the Authority. The reasons for seeking costs at a level of ¾ of actual reasonable costs, adjusted up from a *2/3 starting point*, do not accord with those principles which are now well established from the cases and which counsel specialising in employment law should be well acquainted with.

[22] Many of the cases referred to in support of the applicant's costs submissions, such as *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438, have been held by the Employment Court, in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, to be based on principles that are *not applicable to the Authority*; see para [35] of the Full Court's judgment, or that the Authority is not *bound by*; see para [45] of the judgment.

[23] The omission of any reference in submissions (those of the respondent's advocates as well) to *Da Cruz* (above) is surprising, given that it is the leading case on awards of costs in the Authority.

[24] Assuming counsel for Mr Parata were aware of *Da Cruz*, it seems they did not heed the Court's entreaty to representatives at para [47] of the judgment, which is as follows;

> *……we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.*

[25] Even allowing for the sums recovered by Mr Parata being tax free (they were expressed to be payable under the ubiquitous s 123(1)(c)(i) of the Act) and that he had claimed (unsuccessfully) an additional $10,000 as a penalty, the result of this case is by any method of accounting an economic disaster. At best the penalty claim if successful might have put a further $2,000 to $3,000 in Mr Parata's pocket, on the basis that he was awarded 50% of the penalty that is usually payable to the Crown. Although final wages and holiday pay (about $3,000) due at termination were also required to be paid under the settlement, they were likely to have been paid in any event, or should have been readily recoverable with minimal expense.

[26] Out of this case on the positive side Mr Parata did achieve vindication of his rights as a contracting party to have the other party, Montage, carry out its promises. But on the negative side he now has a public determination that is adverse to his future interests and prospects in securing new employment. It refers to allegations of poor work performance and CV fraud that had been made by Montage against Mr Parata. The nature of the case did not require those allegations to be determined but their existence is likely to put off any prospective employer who becomes aware of

them. On any analysis Mr Parata made a substantial net loss from the legal expense he incurred.

[27] In *Da Cruz* (above) the Full Court gave the clearest explanation as to why costs principles applying in the Authority are different from those applying in the Employment Court;

> *The unique nature of the Authority and its proceedings mean that parties to investigation meetings should not have the same expectations about procedure and costs as they have of the Court.*

[28] The Court noted the differences between the two institutions that warrant the Authority taking a different approach to the question of costs, particularly because the Authority rather than the parties conducts the investigation and also because it conducts an investigation rather than an adversarial process.

[29] The Court also noted;

> *……there is no binding authority on the Employment Relations Authority which impels it to apply the 66 percent* [2/3rds] *guideline. We find that any such authority would run counter to the imperative that it should act without technicality.*

[30] The Court concluded, at para.[42], that:

> *When the Court is considering a challenge to the Authority's award, it should not apply the same criteria as which applies to costs of proceedings before the Court.*

[31] Alongside 11 bullet points the Court set out some basic principles applying to the consideration of costs by the Authority. They are:

- *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 of award of 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 to 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 infrequently 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.*

[32] The Court emphasised that these tenets do not limit the discretion of the Authority and that proper application of them should ensure that each case is considered in the light of its own circumstances.

[33] The Court found there was nothing wrong in principle with the Authority's now frequently used tariff based approach, so long as it is not applied in a rigid manner without regard to the particular characteristics of the case.

[34] It is no surprise that the parties' representatives have been unable to settle the question of costs, as for the respondent a total award of only $4,000 is conceded as being a reasonable contribution. With that gulf between the parties as to an appropriate level of costs, clearly the representatives of one of them have not taken a realistic view of the situation. They have also failed to have regard to the law. *Da Cruz* is binding on the Authority, and legal representatives are expected to know that.

[35] I consider that costs should follow the event in this case and be a reasonable contribution to total notional reasonable costs. There is nothing about this case persuading the Authority that costs of anywhere near $60,000 were incurred reasonably by Mr Parata in obtaining legal representation.

[36] On the other hand I consider that costs conceded for the respondent at the rate of $2,000 for each day of the two day investigation meeting are unreasonably low. In my view there was a degree of legal complexity about this case elevating it a little above the usual where the determination turns largely on matters of evidence.

[37] I assess total notional reasonable costs for this case of medium legal and factual complexity as being about $20,000. That assumes the case was properly managed and supervised, so that a hearing of about a day and a half was all that was needed. A modest yet reasonable contribution I fix at about half that amount.

Determination

[38] To reimburse legal costs I consider that an award of $9,500 is appropriate in the circumstances, or $4,750 for each day of the investigation meeting, an amount which is considerably above the current tariff.

[39] I do not consider it reasonable to reimburse Mr Parata for the $2,492 ($A apparently) disbursement in obtaining the video link. Those who initiate investigations by the Authority are expected to attend in person and give support to their claims. Allowing Mr Parata to attend electronically was an indulgence granted at his request. Had he flown back to New Zealand from Queensland he would have had a good claim to recover all or part of the fare. This would have been considerably less than $2,500 however. I award $650 as a contribution to disbursements.

[40] Montage is to pay the amounts above, $9,500 and $650, to Mr Parata. The order is made pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

A Dumbleton
Member of the Employment Relations Authority
(Pursuant to clause 16 of Schedule 2 of the Employment Relations Act 2000)