

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 99
5283121

BETWEEN

PRO-SURE INSURANCE
AND GLOBAL INSURANCE
PLACEMENTS LIMITED
Applicant

A N D

STEVEN PRATT
First Respondent

VISION INSURANCE
(SOUTH ISLAND) LIMITED
Second Respondent

Member of Authority: James Crichton

Submissions Received: No submissions from Applicants
3 May 2011 from Respondent

Date of Determination: 8 July 2011

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In the substantive determination of the Authority issued on 21 February 2011, the Authority dismissed the applicant's claim in its entirety and reserved costs.

The claim for costs

[2] The first respondent (Mr Pratt) who incurred the legal costs of resisting the applicant's claim, seeks either a significant contribution to the costs incurred, of \$12,850 exclusive of GST, or indemnity costs.

[3] Despite being given the opportunity to file costs submissions, the applicant chose not to.

The argument for costs

[4] Mr Pratt's submissions rely on the unusual nature of the proceeding as a ground for a higher than usual award of costs.

[5] In particular, the first respondent relies on three aspects of the proceeding to ground that submission. Those three aspects are:

- (a) The protracted nature of the proceeding including the change of solicitor by the applicant at the last minute;
- (b) The allegedly misguided nature of the applicant's claim; and
- (c) The suggested settlement of the matter prior to hearing, and the subsequent attempt at a settlement of costs.

[6] There can be no question that the bringing of this matter to hearing was a protracted business. It was not assisted by the change in the applicant's solicitor and the fact that that change was not properly notified to the Authority. As a consequence, the respondent's evidence was served on the applicant's former solicitor, thus elongating an already disjointed process.

[7] Furthermore, by virtue of the applicant's misconceived involvement of a third party, the respondent was put to the trouble of engaging with that third party.

[8] At the commencement of the investigation meeting, the Authority indicated to counsel the scope and extent of the Authority's jurisdiction and in particular its inability to deal with civil claims pure and simple and that insofar as the applicant sought to rely on the assigning of a personal covenant, that reliance would be misplaced: *Post Haste Couriers Ltd v. Casey* (unreported, High Court, Invercargill, CP83/89, 24 October 1989) applied.

[9] The third aspect that Mr Pratt relies upon in his submission for a greater than usual quantum of costs is the existence of a settlement proposal made on his behalf by counsel prior to the hearing, the effect of which was that both parties should discontinue their respective claims (claim and counterclaim) and the matter would be at an end. That suggestion was rejected by the applicant at the time.

[10] Added to that is the fact that, during the negotiations between the parties in regard to costs, the first respondent made a pragmatic offer to settle the fixing of costs at a sum of \$4,500 but again that suggestion was rejected by the applicant.

The legal principles

[11] The legal principles used by the Authority in a costs fixing environment have been well set out in the Full Bench of the Employment Court decision in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. In that judgment written by Judge Shaw, Her Honour, while enumerating the principles that govern costs fixing in the Authority, specifically approves of the daily tariff approach used by the Authority in a costs environment.

[12] For present purposes, it is appropriate to note the general principle that costs usually follow the event and that, while costs in the Authority are generally fixed at a modest level consistent with the informal nature of the Authority's practice and procedure, there will be circumstances where the unusual nature of the proceeding will justify a higher than usual costs award and, in particular, will justify a departure from the daily tariff approach often applied by the Authority in costs fixing.

[13] Finally, in considering an application for costs, the reasonableness of the costs incurred is a factor that the Authority must take into consideration in fixing an award of costs.

Determination

[14] The Authority is satisfied that the costs incurred by Mr Pratt in defending the applicant's claim are costs that were reasonably incurred. The Authority is satisfied that Mr Pratt took all reasonable steps to constrain the scope of the hearing by, for example, indemnifying the second respondent. Mr Pratt instructed a very experienced practitioner with a long history in the jurisdiction. The Authority is satisfied that, had the applicant's case been prosecuted with the same efficiency adopted by Mr Pratt's counsel, the total costs incurred in the matter would have been greatly reduced and, for present purposes, Mr Pratt's costs would themselves have been much reduced.

[15] Of course, as the present Chief of the Authority observed in *Graham v. Airways Corporation of New Zealand Ltd* [2004] 7 NZELC 97,421, the real question, having established that the costs incurred were reasonable, is to establish what percentage of those costs ought to be met by the other side. In the present case, I am

satisfied that the claim mounted by the applicant was muddled and that that caused further unnecessary costs to be incurred by Mr Pratt. I am also satisfied that the evidence discloses not only an attempt by Mr Pratt to settle the substantive matter prior to hearing, but also an attempt to settle the costs question at a very modest level.

[16] In all the circumstances, I think Mr Pratt is entitled to a significantly greater award than he would be entitled to simply by virtue of the application of the daily tariff approach. Were it not for the confused nature of the applicant's claim and the protracted process necessarily undertaken because of that confusion, this matter might well have been dealt with far more expeditiously and at much reduced cost. I am satisfied that the increased costs to Mr Pratt was directly attributable to the approach taken on behalf of the applicant.

[17] Notwithstanding the Authority's criticism of the applicant's claim and the decision that that sound in costs, the Authority does wish to record that counsel for the applicant by the time of the investigation meeting, Mr McKenzie, did a creditable job.

[18] I direct that the applicant is to pay to the first respondent the sum of \$10,000 as a contribution to costs.

James Crichton
Member of the Employment Relations Authority