Determination Number: CA 9/06
File Number: CEA 347/03
CEA 54/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	An Employee (Applicant)
AND	An Employer (Respondent)
REPRESENTATIVES	Lois Flanagan for Applicant Christine French for Respondent
MEMBER OF AUTHORITY	Philip Cheyne
DATE OF DETERMINATION	27 January 2006

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 21 October 2005, I found that the applicant had no sustainable grievance against the respondent and reserved costs. The respondent lodged a memorandum regarding costs on 12 December 2005 and the applicant lodged a memorandum in reply on 22 December 2005. This determination resolves the disputed question of costs.

[2] In the earlier determination I made an order prohibiting from publication the names of the parties or any details of the parties that might tend to identify them. That order is continued in this determination.

[3] The respondent seeks an order for full solicitor/client costs against the applicant because it cautioned her at the very outset of the proceedings that her claims were hopeless and that it would pursue full solicitor/client costs if she continued. The respondent makes several points about the way in which the applicant conducted the proceedings. The other point made by the respondent is that it made several offers of settlement on a *without prejudice save as to costs* basis, all of which were rejected. The respondent points out that its legal costs regarding the investigation meeting could have been avoided if the applicant had accepted an offer.

[4] The applicant has engaged counsel to deal with the costs issue. The applicant acknowledges that an order of costs might be made given the outcome of the litigation but says that an award of no more than $2,000 within the usual range of costs awards made by the Authority would be appropriate.

[5] This is not a case for an award of full solicitor/client costs. The applicant genuinely felt aggrieved about a number of issues that arose in the context of her employment relationship with the respondent and she felt the need to have those issues legally determined. Ultimately, there was no sustainable personal grievance or other claim against the respondent but in that, the applicant's position differs little from other grievants who do not succeed in their claims. It is also relatively common for one party to try and deter another by saying that costs will be claimed, so that feature does not distinguish the present case.

[6] I do accept the point made by counsel for the respondent that the applicant provided and referred to a very large volume of irrelevant material. What makes this case different from many

others is the volume of that material rather than its irrelevancy. The extra time and therefore cost visited on the respondent in having to review the material can properly be dealt with by adjusting the usual range of costs rather than making a full solicitor/client award.

[7] The settlement offers referred to by the respondent do not have the effect argued for. Because the respondent was completely successful in defending the claims, this is not a case where a litigant did not need to proceed to an investigation meeting to recover as much or more than was finally awarded.

[8] There are several points made by counsel for the applicant with which I do not agree. I conducted an interview initially in an effort to limit the issues that needed to be factually canvassed with the respondent in a full investigation meeting. Once I had satisfied myself that the applicant could not succeed on what she appeared to be saying across a range of issues, an investigation meeting into the remaining issues was held in the usual way. The applicant is liable for costs arising from that investigation meeting in the usual way.

[9] I do not accept that the matter can properly be described as a straightforward one day investigation meeting. Most one day meetings do not involve scrutiny of many events over a number of years requiring careful review of hundreds of pages of evidence and documents provided by the applicant.

[10] The respondent's legal costs amount to about $9,500 excluding GST. I am told that those costs accrued over a four year period. That means that some of those costs must predate the original application to the Authority which was first made on 29 September 2003. The respondent involved counsel in dealing with the problem prior to the proceedings being issued as it is entitled to do but those are not costs that should be visited on the applicant.

[11] The cost figure given to me by counsel excludes the time involved in mediation. I know the time that I spent with this file and I can readily accept that counsel for the respondent might have spent $8,000 to $9,000 worth of time attending to the litigation once commenced.

[12] A Full Bench of the Employment Court recently considered the principles applicable when the Authority is making an award of costs: see *PBO Ltd v. Eneida Leonor Christo Da Cruz* 9/12/05, Colgan CJ, Travis and Shore JJ, AC2A/05. There, the Employment Court particularly noted that costs are not to be used as a punishment or expression of disapproval and that awards will be modest.

[13] Ability to pay can often be an issue for unsuccessful applicants but it is not a significant feature in the present case as the applicant has continuing employment in a professional capacity.

[14] I accept that the Authority will often judge costs against a notional daily rate which the Court indicated has usually been between $2,000 and $2,499 per hearing day. However, the application of a notional daily rate in the present case is not appropriate. The hearing time was reduced as a result of the interview but the respondent nonetheless had to canvas a substantial amount of documentation prior to the interview and the investigation meeting.

[15] A modest award of costs in the present circumstances is $5,000 and I order the applicant to pay that sum to the respondent.

Philip Cheyne
Member of Employment Relations Authority