

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Gordon Beck (Applicant)
AND Edge Real Estate Limited (Respondent)
REPRESENTATIVES Brent Climo, Advocate for Applicant
Adam D M Gallagher, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
SUBMISSIONS RECEIVED 22 March 2006
DATE OF DETERMINATION 31 March 2006

COSTS DETERMINATION OF THE AUTHORITY

- [1] In my determination dated 25 November 2005 I did not find that the relationship between the applicant and the respondent was an employment relationship. I reserved the issue of costs.
- [2] There was discussion between Mr Gallagher and Mr Climo about costs but no agreement was reached. I received submissions from the respondent and the applicant.
- [3] The respondent incurred actual solicitor/client costs in the sum of \$10,285.31 (GST inclusive).
- [4] The respondent seeks an award of costs in the region of \$7000.00 together with disbursements in the sum of \$884.00. It seeks a substantial amount on the basis of the following:
- That it was entirely successful.
 - That it was required to prepare its defence on both employment status and the alleged personal grievance.
 - That there was a Calderbank offer to pay the applicant a compensatory amount of \$3000.00.
 - The matter should have been resolved without the need for investigation.
- [5] The applicant submits that an appropriate award would be \$500.00 on the basis of:
- The applicant acted in good faith.
 - Mediation was only held once the Authority directed it and was not constructive.
 - The reference in the judgment of the full Court of the Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz* (unreported) 9 December 2005, AC 2A/05 to the majority of cost awards in the Authority falling within the range \$2000.00 to \$2,499.00 for a one day investigation meeting.
 - The case was not complex and the investigation took approximately half a day.

[6] Mr Gallagher and Mr Climo referred to the well established principles when deciding costs in employment cases in their respective submissions.

[7] The Authority has discretion as to whether costs are awarded and, if they are, the amount awarded. That discretion is to be exercised in accordance with principle and not arbitrarily. Costs are not to be used as a punishment or to express disapproval of the unsuccessful party's conduct although if that conduct has unnecessarily increased costs then that can be taken into account in making an award. Costs generally follow the event and without prejudice offers can be taken into account. Awards in the Authority are usually modest.

[8] I find that there is no good reason in this case not to make an award of costs in favour of the respondent.

Determination

[9] This was an important case to both parties. It was not a legally complex matter but required careful analysis of the documentation leading up to the formation of the relationship and then of the relationship itself.

[10] The evidence about the nature of the relationship between applicant and respondent occupied the significant part of the investigation meeting although the Authority also heard evidence with respect to the claim that the applicant had been unjustifiably dismissed.

[11] The meeting took a little over four hours.

[12] Both parties contributed to the meeting in a helpful way. There was no conduct that unnecessarily increased the time to investigate the matter.

[13] Whilst the respondent was initially reluctant to participate in mediation it did so when directed to and I am not satisfied in this case that initial reluctance or the manner in which mediation was conducted, by telephone, should reduce any award.

[14] The Authority has a unique nature and role and costs awards are generally modest as submitted by Mr Climo. The sum proposed by him of \$500.00 for costs though would not sufficiently or reasonably compensate the respondent for the costs it incurred in defending the applicant's claim. A suitable starting point for an award of costs for a meeting of this nature is \$2000.00. I now consider whether there are matters that require adjustment to that amount.

[15] The respondent put forward a without prejudice save as to costs offer, in a letter, of \$3000.00, under section 123 (c)(i) of the Employment Relations Act 2000. The letter was dated 21 September 2005. The offer was only open until 23 September 2005 although the investigation meeting was not until 12 October 2005. The offer was rejected on 25 September 2005 by the applicant and a counter claim put forward that referred to the option of the Disputes Tribunal if unsuccessful in the Authority. The respondent incurred the majority of its costs from the point of the settlement offer onward.

[16] Looking at the matter overall and the respondent's success in defending the applicant's claim I consider that settlement offer was a realistic one and acceptance would have spared both parties expending costs from the point of the offer. The applicant should bear some responsibility for the costs incurred after the time of that offer.

[17] There was no submission as to the applicant's ability to pay.

[18] I am of the view that a fair and reasonable award of costs in these circumstances would be \$2800.00.

[19] The claim for disbursements includes a sum of \$860.00 for travel. I asked an Authority support officer to make enquiries of Mr Gallagher's office about the claim. It is for return airfares for Mr Gallagher and Mr Goodall from Christchurch to Nelson. Mr Goodall is the director of the respondent and gave evidence at the investigation meeting. I am not prepared to allow the claim for airfares in its entirety. The respondent is entitled to instruct counsel from somewhere other than Nelson but I do not consider that Mr Gallagher's airfare is an amount that Mr Beck should bear responsibility for. I do allow the claim with respect to Mr Goodall's travel of \$430.00 and photocopying in the sum of \$24.00. That is a total for disbursements of \$454.00.

[20] I order Gordon Beck to pay to Edge Real Estate Limited the sum of \$3254.00 being costs and disbursements.

Helen Doyle
Member of Employment Relations Authority