Determination Number: WA 1A/03
File Number: WEA 91 & 232/03

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	James Bryson
AND	Three Foot Six Limited
REPRESENTATIVES	Michael Gould for Mr. Bryson Keith Binnie for the Company
MEMBER OF AUTHORITY	Paul Stapp
SUBMISSIONS	20 March, 4 & 11 April 2003
DATE OF DETERMINATION	9 June 2003

DETERMINATION OF THE AUTHORITY

Employment relationship problem

This is an outstanding matter of costs that has been raised by Three Foot Six Limited (TFS). In my earlier determination dated 7 January 2003 (WA 1/03, WEA 91/02 and 232/02) I found that James Bryson was a contractor and not an employee under section 6 (2) and section 6 (3) of the Employment Relations Act 2000[1].

TFS has sought a contribution of $9,000 costs and $374.22 disbursements and $8,532.53 witness expenses.

Mr. Bryson's representative submitted that costs should lie where they fall.

The Legal Principles

The principles that relate to costs have been well settled having regard to the conduct of the parties that essentially relate to avoiding unnecessary expense to the other side. I have applied in this case the following cases that outline the law[2]. I have included cases on the principles relating to Calderbank letters because the respondent relies upon one in the current claim.

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[1] The Authority's Determination dated 7 January 2003 WA 1/03 incorrectly referred to section 6 (5) in two references. These references were wrong. The references should have been to sections 6 (2) and (3) of the Act.

[2] *Allan Binnie v Pacific Health Limited* (unreported) 1 April 2003 CA 65/02 Keith J, Tipping J, Glazebrooke J. *NZ Airline Pilots' Association v. Registrar of Unions* [1989] 2 NZILR 550; *Okeby v. Computer Associates (NZ) Ltd* [1994] 1 ERNZ 613; *Reid v. NZ Fire Commission* [1995] 2 ERNZ 38. *Burns v AG in respect of the Chief Executive of the Inland Revenue Department* (unreported) CC 16B/02 Goddard C J 19 August 2002. Also see *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305, *Wellington Racing Club Inc v Welch and one other* (unreported) WC 29/02 Goddard C J 23 August 2002 and *Pandaraparambath Ramankutty v The Vice-Chancellor of the University of Auckland* (unreported) AC 27A/02 Goddard C J 8 July 2002.

Comment

I accept that this case was in some respects, a test case in regard to the film making industry. The Authority's investigation meeting involved a one day investigation meeting to collect evidence, hear from witnesses when they were available and to hear final submissions. Subsequently submissions and details on the actual costs were provided in writing.

The case was clearly important to both parties. The extensive evidence from TFS confirms the importance of the case particularly in regard to the TFS practice and generally to the film industry.

Also Mr. Bryson had to go through this preliminary matter to reach the stage where his other matters could be considered such as the 90 day requirement and the alleged personal grievance. Therefore much hung on the issue for him too.

Since the contractor matter was heard first I have not needed to consider the other three matters that relate to the 90 day requirement, the alleged grievance and the TFS damages claim. These I hold are entirely separate matters and are not relevant to the current costs claim. It would have been reasonable to expect any costs relating to these matters to have been dealt with later if necessary.

It has been submitted by TFS that I take into account a *Calderbank* offer that put Mr. Bryson on notice of the company's intention to counter claim for damages if he was not successful and offered a sum to settle. The offer was unambiguous and made in ample time for Mr. Bryson to consider. I have decided not to apply the *Calderbank* offer as a factor because TFS was successful anyway for costs to follow the event. Even so it is surprising that Mr. Bryson did not take up the offer to settle and can only reflect the strong sense of principle he has staked out in this matter. All I am left to decide in regard to the *Calderbank* offer is the discretionary consideration of any reduction in any award.

Also, the matter has not got to the stage of determining the 90 day issue and any grievance and the damages claim yet. There was clearly an issue to sort out on whether Mr. Bryson was an employee or a contractor. The answer to this would be necessary for both parties. However Mr. Bryson must have known that if he was unsuccessful then he could well have to accept costs following the event and have to pay costs, including his own not inconsiderable costs.

Indeed this is the very thing he now faces. He was unsuccessful on the preliminary matter. He has been responsible for putting TFS to cost to defend the matter. TFS could reasonably expect Mr. Bryson to pay some contribution toward those costs if he was not successful. Therefore costs should follow the event. No issue has been raised about any inability by Mr. Bryson to pay costs.

I note that TFS has provided details on costs incurred. This was a relatively straightforward matter. There was nothing exceptional about the case, which the respondent accepts by not claiming full solicitor client costs. I determine that reasonable costs to claim relate to the one-day investigation meeting and only in regard to the contractor/employee determination, some time taken for preparation and written submissions on that issue. Costs should not include GST in relation to the claim[3].

[3] *McAuley v DBH 1995 Limited trading as Victorian Rose Pub & Café* (unreported) Palmer J 26 March 2003 CC 1A/03 and *Hoyts Cinemas (NZ) Limited v Melissa Jacob* (unreported) Palmer J 20 February 2003 CC4/03 and *Entwistle v Dunedin City Council* (unreported) Palmer J 5 September 2002 CC10A/02 and *Thoroughbred & Classic Car Owners' Club Inc v Coleman* (unreported) 25 November 1993 CA 203/93.

Both parties contributed to saving costs by agreeing only to deal with the one issue first. Mr. Bryson agreed that it was not necessary to hear the evidence from the industry that saved time and expense. I assess the industry evidence and Mr. Van der Burgh's costs as part of the overall costs, which do not warrant separate witness expenses in isolation considering the nature of the case. Indeed the single preliminary issue involved well-settled law that would have had implications for the industry that was important to the company and even the industry that supported the company (Karen Soich and Jane Wrightson).

I accept the sum of $9,000 for reasonable costs put forward in regard to the investigation time ($6,000) and preparation ($3,000) bearing in mind Mr. Binnie's experience and the overall costs and excluding items that should not be relevant to the preliminary issue. A contribution in the order of 60% would be reasonable[4]. Mr. Bryson surprisingly did not take up an offer to settle and the case was in some respects, a test case. I order Mr. Bryson to pay $5,400 costs plus $374.22 disbursements to Three Foot Six Limited.

P R Stapp
Member of the Employment Relations Authority

[4] I have applied *Binnie v Pacific Health Limited* (unreported) 1 April 2003 CA 65/02 Keith J, Tipping J, Glazebrooke J and *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 and *McCammon v Wellington Free Ambulance Service (Inc)* (unreported) Goddard CJ 16 May 2003.