IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 48/09
5108526

	BETWEEN	JEREMY COX Applicant
	AND	ALLIED TELESIS LABS LIMITED Respondent

Member of Authority:	Paul Montgomery
Representatives:	Tim Mackenzie, Counsel for Applicant Penny Shaw, Advocate for Respondent
Determination:	16 April 2009

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination on the substantive issues, the Authority ordered the respondent to pay Mr Cox redundancy compensation to which it found he was entitled under the employment agreement between the parties. It was also ordered to pay interest to the applicant for the relevant period. The total quantum calculated was $100,800.48.

[2] The applicant was unsuccessful in his claims of unjustified action causing disadvantage and in his claim for a penalty against the respondent for an alleged breach of good faith.

[3] For the applicant, Mr Mackenzie seeks full solicitor/client costs in the sum of $8,256.56 including *preparation and attendance at mediation*. For the respondent, Ms Shaw submits that costs ought to lie where they have fallen. Her view is that the dispute was a genuine issue over the interpretation of the applicant's employment agreement and, given that, the Authority should exercise its discretion to let costs lie.

Further, Ms Shaw submits that Mr Cox was unsuccessful in two of three claims he brought to the Authority.

[4] Mr Mackenzie submits the applicant was successful in his primary substantive claim and further that his client was obstructed by the respondent's denial that the company had a practice of paying redundancy compensation. This latter issue gave rise to a preliminary investigation which resulted in the respondent being ordered to disclose documents which clearly demonstrated the company's practice of paying redundancy and the relevance of this practice to Mr Cox's case. In counsel's submission, this materially affected the applicant's costs to his disadvantage.

[5] Both representatives drew the Authority's attention to the principles relating to costs awards in matters before the Authority. However, not surprisingly, each emphasised different aspects of the Full Court's decision in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. In the light of their submissions, I have read this decision again and also the four precedent cases referred to by counsel in the context of costs incurred in mediation.

[6] I concur with the view that this matter is, as yet, not clearly determined by the Employment Court and while I have some empathy for the case advanced by Mr Mackenzie on this point, I am of the view that, pending an on point decision from the Employment Court, there is no certainty for the Authority in respect of such costs.

[7] This matter was prolonged somewhat by the staunch reluctance of the respondent to disclose details of how it had handled earlier redundancies. The preliminary investigation on that point took less than 45 minutes but entailed the applicant's counsel preparing evidence to establish the need for disclosure of what was significant information in support of Mr Cox's claim. It was far from *irrelevant* information.

[8] The primary investigation meeting went some 15 minutes beyond the full day with a shortened lunch adjournment.

[9] This was not an entirely *run of the mill* case. Counsel for the applicant had submitted a *Calderbank* offer in December 2007 proposing a gross settlement of $100,000. As counsel rightly submits, this was some months before the matter proceeded in the Authority. That offer was declined and the gross amount awarded to Mr Cox totalled $100,800.48.

[10] Clearly, the similarity of the figures indicates that had the settlement offer been accepted by the respondent, both it and the applicant would have certainly been spared very significant costs relating to two appearances in the Authority, perhaps most notably the briefing of witnesses who appeared.

[11] As noted, Mr Mackenzie seeks full solicitor/client costs of $7,875 and disbursements of $381.56. This application has been seriously considered and I have held in mind the lengths to which the applicant had to go in order to obtain what was a contractual entitlement.

[12] While mindful of the decision of the Full Court in *PBO Ltd v. Da Cruz*, I am of the considered opinion that the particular circumstances of this case warrant an approach to costs different from that set out in the Full Court's judgment. In short, this is a case which needs to be treated on its own facts and to which the Authority needs to apply its own discretion.

[13] In this case, I think it just to begin with the 66% set out in *Binnie v. Pacific Health Ltd* [2002] 1 ERNZ 438 (CA). I do so because a very significant proportion of the applicant's costs were reasonably incurred **after** the respondent's offer of settlement without prejudice save as to costs. The invoice tendered to the applicant, inclusive of preparation for and attendance at mediation, was as set out above. Excluding the mediation costs, which I estimate to be of the order of $1,250 and the disbursements, I begin with a costs total of $5,750. Sixty six percent of this sum is $3,795. Given the rebutted *Calderbank* offer, the costs incurred rose significantly for the applicant. I am of the view that this sum needs to be increased to 75%, namely $4,312.50. To this needs to be added the $381.56 for disbursements which I find were reasonably incurred.

Determination

[14] I order the respondent to pay the applicant the sum of $4,694.06 as a contribution to his reasonably incurred costs.

Paul Montgomery
Member of the Employment Relations Authority