

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 30/09  
5115450

BETWEEN                      NICHOLAS IAIN CAMERON  
Applicant  
  
AND                              PBT COURIERS LIMITED  
Respondent

Member of Authority:      James Crichton  
  
Representatives:            Jonathan Smith, Counsel for Applicant  
   Candice Murphy, Counsel for Respondent  
  
Submissions received:      23 December 2008 and 22 January 2009 from Respondent  
   21 January 2009 and 22 January 2009 from Applicant  
  
Determination:              17 March 2009

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The application for costs**

[1] By determination dated 25 September 2008, the Authority resolved the employment relationship problem between these parties by determining that Mr Cameron was not an employee (as he claimed) but was in truth a contractor to PBT Couriers Limited and thus his claim to have been unjustifiably dismissed must of necessity fail.

[2] Costs were reserved.

**The “without prejudice” communication**

[3] Before dealing with the claim for costs proper, it is appropriate that the Authority addresses the issue of a without prejudice communication which arises as part of the submissions of the respondent (PBT).

[4] As an attachment to its costs submissions filed on 23 December 2008, PBT included a letter its solicitors had written to Mr Cameron's solicitors dated 14 November 2008 and marked "confidential and without prejudice".

[5] That same day, counsel acting for Mr Cameron served by email a notice objecting to the inclusion of the subject letter in PBT's costs submissions. The essence of the complaint was that the letter was not a *Calderbank* letter and by virtue of it being marked "confidential and without prejudice", was not able to be presented in an "open" forum.

[6] In an email response sent later that same day, counsel for PBT argued the privilege was created by PBT (as the author of the communication) and therefore it was available to PBT to waive that privilege. Critical in PBT's position was the fact that the response to the letter from Mr Cameron's counsel was not on a "without prejudice" basis and did not result in any confidential or "without prejudice" communications or negotiations. Counsel for PBT also relied on the leading decision on costs from the Employment Court, *PBO Limited v. Da Cruz* [2005] 1 ERNZ 808 at 819 as authority for the proposition that without prejudice communications may be taken into account.

[7] The reliance on *PBO Limited's* case refers to one of eleven bullet points in the well known passage in the judgment where Her Honour Judge Shaw, giving the decision of the full bench, refers to *some basic tenets when considering costs* and then proceeds to list the bullet points but not on an exclusive basis. The relevant reference reads as follows:

- *That without prejudice offers can be taken into account.*

[8] I am satisfied that in *PBO*, the Court was not enunciating a general rule that without prejudice offers ought always to be considered by the Authority but only that they could be. Certainly I do not read the relevant passage as requiring the Authority to consider without prejudice communications especially in circumstances where such consideration may be unfair to another party or may breach other well established principles of law.

[9] The particular circumstances of the present case are that the objection from Mr Cameron's counsel is put on the footing that the Authority's consideration of the confidential communication from PBT to Mr Cameron made some proposals as to

settlement. For various reasons the matter was not resolved by agreement and proceeded to hearing. Mr Cameron's counsel argues that in effect PBT had been guilty of a kind of entrapment by forwarding a "without prejudice" communication which Mr Cameron was entitled to consider as confidential as its labelling mandated.

[10] I am satisfied that Mr Cameron's argument through counsel is to be preferred. The subject letter is very clearly not a *Calderbank* letter and so not in principle the kind of without prejudice communication which is typically considered in a costs setting. Furthermore, while on general principles, it is true that a party may, in some circumstances, waive privilege in its own communication, allowing that course of events in circumstances such as the present case would unreasonably prejudice the interests of the other party because from the point at which that letter was received by Mr Cameron's counsel, it has been treated as a confidential communication just as its labelling requires. For it now to reappear in an "unlabelled" guise is I hold unfair to Mr Cameron and it follows that I will not consider the subject letter or any material deriving from it in determining the issue of costs in the present matter.

[11] While I must of necessity read the submissions of the parties, I confirm that I have not and will not read the subject letter.

### **The claim for costs**

[12] PBT, as the successful party, seeks an award of costs equating to 60% - 80% of the actual costs incurred which are \$16,402.50 inclusive of GST. First I would observe that costs awards in the Authority typically exclude the GST component, but even with that adjustment, the claim is for an award of significant magnitude. For instance, on the basis of a 60% award of the net costs a figure of between \$8,500 and \$9,000 would be required and on an 80% decision, the figure would increase commensurately again.

[13] Mr Cameron argues that costs should lie where they fall or, in the alternative that only a minimal award be made.

[14] Mr Cameron relies on his limited financial means on the one hand and the well established principle that in *test* cases, costs should lie where they fall. Mr Cameron refers to the remarks of the then Chief Judge in *Vaughan v. Canterbury Spinners Limited* CC18A/03 29 October 2003 in which His Honour made the point that while test cases may attract the principle that costs lie where they fall, ... *recognition of a case as a test case is not decisive of a proper application for costs.* Chief Judge

Goddard goes on to remark that the status of a matter as a test case is *a discretionary element which may be outweighed altogether by other elements...*

### **The legal principles**

[15] The full Court in *PBO Limited v. Da Cruz* AC2A/5 identifies the salient principles and confirms that the practice traditionally used by the Authority in determining costs awards are appropriate. Further, the Court also approves the *tariff based approach* often adopted by the Authority as long as the particular circumstances of the individual case are taken into account as well.

### **Discussion**

[16] PBT seek a significant award of costs and contend that the way in which the case was argued by Mr Cameron effectively increased PBT's costs. In particular, PBT contend that Mr Cameron was *merely an opportunist* who put PBT to significant cost in defence of its position.

[17] PBT also urged on the Authority the proposition that the daily tariff approach should be used in quantifying costs in the present case notwithstanding the fact that this particular matter was dealt with on the papers. PBT submit that, had the matter been dealt with by way of hearing, a two day investigation meeting would have been *appropriate*.

[18] Conversely, Mr Cameron denies being an opportunist, argues that he brought a genuine claim which was not completely without merit and he draws the Authority's attention to the fact that there were findings in his favour in the Authority's analysis of whether or not he was an employee.

[19] The appropriate starting point I consider is to apply the principles enunciated in *Graham v. Airways Corporation of New Zealand Limited* an unreported decision of my colleague Member Dumbleton AA39/04, 28 June 2004, when the Authority held that the steps to take were:

- (a) First consider the actual costs incurred;
- (b) Consider the reasonableness of those costs;
- (c) Consider what proportion ought to be paid by the unsuccessful party.

[20] The actual costs incurred by PBT as the successful party are significant at over \$16,000. However, those costs are, while more significant than the costs incurred by Mr Cameron, still in the same general realm. I think it fair to say that the costs reflect the importance of the case to both parties but perhaps particularly to PBT, the successful party.

[21] I am also satisfied that the costs were reasonably incurred precisely because of the relative similarity between the parties costs and the obvious importance of the matter to both parties but, as I say, particularly to the successful party PBT.

[22] However, I am not satisfied that PBT is right to contend that the way in which the case was pleaded by Mr Cameron's counsel added materially to the costs nor do I accept that Mr Cameron was simply *an opportunist* as PBT also contend. In my opinion, Mr Cameron was entitled to bring his case and the fact that some of the Authority's analysis of his legal status suggested that he was, as he claimed, an employee gives some credence to the view that the matter was indeed arguable.

[23] Nor do I think it particularly helpful to analyse the costs issue on the basis of a notional contention that, had the matter been argued in a full investigation meeting, two days would have been required. That contention is in my opinion entirely speculative and I do not accept the submission on that basis. The fact of the matter is that the matter was not heard over two days but was, by agreement between the parties, dealt with on the papers. The issue for the Authority is whether Mr Cameron should contribute to the actual costs incurred by PBT in relation to the kind of hearing that the parties had on the matter. I do not think it helpful to try to assess costs on the basis of some notional view of what might have been the position had there been an investigation meeting.

### **Conclusions**

[24] The usual rule is that costs should follow the event and on that basis, the starting point must be a provisional obligation for Mr Cameron to contribute to the costs incurred by PBT.

[25] Furthermore, I am satisfied that the costs incurred by PBT (and Mr Cameron for that matter) are reasonable in all the circumstances having regard to the importance the case had for each of the parties.

[26] I have given earnest consideration to the question of whether this particular matter is, in truth, a test case and if it is whether I should exercise my discretion in favour of concluding that costs should lie where they fall. I have reached the conclusion that this is indeed a test case and indeed the submissions filed on behalf of PBT almost go so far as to confirm that view by the emphasis they put on the importance of the case to PBT.

[27] Having established that I consider the case to be a test case, the next question is whether I should exercise my discretion in determining that costs should lie where they fall. I am minded to reach that conclusion partly because I think it appropriate in the circumstances that PBT effectively bear the cost of defending its position, a position which obviously has significant impact on its business not just in respect to Mr Cameron's claim but in respect to the overall operation of its business, the nature of its documentation and the very scope and extent of its commercial relationships. Indeed, it may also be able to be contended appropriately that PBT has effectively mounted its successful argument not just for the benefit of its own business but also for the benefit of its competitors in the courier industry generally. For those reasons then I conclude that PBT ought to bear its own costs in the matter.

[28] I am reinforced in that conclusion by the submissions filed on Mr Cameron's behalf which indicate that he is impecunious and that he is meeting his obligations to his own counsel on a very slow time payment system. I do not think it fair or equitable for Mr Cameron's counsel to be required to extend further credit to Mr Cameron because Mr Cameron has to make any contribution to the costs of PBT.

[29] A further impost on Mr Cameron by way of legal costs would not, in my opinion, be in the interests of justice and the nature of the present case is such as to justify the conviction that costs should lie where they fall.

### **Determination**

[30] In the unusual circumstances of this case, I determine that no costs award should be made against Mr Cameron and in favour of PBT Couriers Limited.

James Crichton  
Member of the Employment Relations Authority