

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 9/10  
5142448

BETWEEN                      PHILLIP LEON CHRISTEY  
   Applicant  
  
AND                                SEARELL & CO LIMITED  
   Respondent

Member of Authority:    Helen Doyle

Representatives:         Philip James, Counsel for Applicant  
   Michael Smyth, Counsel for Respondent

Submissions Received:    6 November 2009 for Applicant  
   7 December 2009 for Respondent

Determination:            20 January 2010

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**DETERMINATION AS TO COSTS OF THE AUTHORITY**

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[1]     In my determination dated 28 October 2009 I found in favour of the applicant that he had a personal grievance that he was unjustifiably dismissed and made awards for reimbursement of lost wages and compensation. I reserved the issue of costs. The applicant alleged a personal grievance that there had been on the part of the respondent unjustified actions that had caused him disadvantage but that was not successfully made out and the respondent's counterclaim was dismissed in its entirety.

[2]     I have now received submissions from Mr James on behalf of the applicant and Mr Smythe on behalf of the respondent.

**Applicant's submissions**

[3]     Mr James submits that the applicant has incurred legal costs in the sum of \$20,500 plus GST and disbursements in the sum of \$615.50. Mr James seeks on

behalf of the applicant either indemnity costs or a significant contribution towards his costs and does so in reliance on the following:

- This was a complex case.
- There was an investigation meeting of two days duration.
- The applicant made reasonable attempts to resolve the matter before an investigation meeting was required but was not successful and the respondent's position was unreasonable.
- A detailed counterclaim was lodged by the respondent requiring a reply and significant evidence to be prepared and the counterclaim was without merit.
- The briefs of evidence lodged by the applicant numbered six and there were more lodged in reply to the respondent's evidence and counterclaim.
- There was more than one telephone conference required by the Authority as the result of various issues being raised by the respondent.
- That there were costs in terms of the medical expert witnesses.
- The applicant lodged full and lengthy submissions.
- That this was not a matter with a single issue.
- Failure to award indemnity or significant costs would deprive the applicant of the full fruits of the litigation.

### **Respondent's submissions**

[4] Mr Smythe accepts on behalf of the respondent that the disbursements claimed by the applicant are properly payable by the respondent and further accepts an obligation on behalf of the respondent to contribute towards the applicant's costs because its offers to settle fell below the final award made by the Authority, but submits the following:

- That costs should be assessed in accordance with the principles and daily tariff referred to in the Full Court judgment of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ

808, rather than as the applicant submits, *Graham v. Airways Corporation of New Zealand* (2004) 7 NZELC 97, 421.

- That the costs claimed are excessive and some are not properly claimable being those incurred before the statement of problem was lodged.
- The counterclaim did not occupy significant time at the investigation meeting and equal time was spent on the applicant's unsuccessful unjustified disadvantage claim.
- There was no further telephone conference required as a result of the memorandum about medical issues as the matters contained therein were dealt with at the commencement of the investigation meeting.
- The medical expert witnesses gave their evidence by telephone by agreement with the respondent that they do so and that reduced costs in circumstances.
- The investigation meeting last 1.5 and not 2 days.
- The respondent admitted liability for the unjustified dismissal from the outset and the only issue of dispute was quantum.
- The respondent made realistic offers to the applicant given that there was no medical evidence from the applicant to support his claim until statements of evidence were filed. The offer by the applicant was for an amount that exceeded the award made by the Authority and was not a *Calderbank* offer and that in the circumstances all offers of settlement should be put to one side in assessing costs.
- This is not a case for awarding indemnity costs and the counterclaim was not unmeritorious.
- That costs should be calculated on the basis of a daily tariff set at \$2,000 per day for a 1.5 day investigation meeting which with an allowance for the unsuccessful counterclaim should be the amount of \$4,000 and disbursements of \$618 payable in addition.

**Determination**

[5] I accept Mr Smythe's submission that the Full Court in *PBO* sets out the principles that are appropriate to the Authority and consistent with its functions and powers in exercising its discretion as to costs. *PBO* is recognised as the leading case on costs in the Authority and I apply the stated principles in that case in relation to this matter.

[6] Costs generally follow the event and the respondent accepts that the applicant is entitled to a contribution towards his costs.

[7] I do not accept that this was, on its face, a complex employment relationship problem although there were several issues. The employment problem was made more complex by the counterclaim and the understandable concentration, in the circumstances, on the quantum to be awarded in terms of medical evidence as to the effect of the dismissal and evidence as to the availability of accountant positions at the time or shortly after dismissal.

[8] The case was clearly important to both parties.

[9] From Mr James' submissions it appears that the costs incurred by the applicant of \$20,500 plus GST included a preparation for a half day and attendance at mediation. Although there may well be a possibility that the costs of mediation could in some situations be taken into account – *Waugh v. Commissioner of Police* [2004] 1 ERNZ 450, I am not satisfied in exercising my discretion in this case that they should be.

[10] Frequently costs in the Authority are judged against a notional daily rate and often modest. This may mean that a successful applicant may well not enjoy the full fruits of the litigation. I am not satisfied that this is the type of case where indemnity costs should be awarded.

[11] I am of the view that it is appropriate in exercising my discretion in this case to start with a notional daily rate to which adjustments can then be made. Although Mr Smythe submits that the sum of \$2,000 would be an appropriate starting point, I note in the Employment Court judgment in *Sefo v. Sealord Shellfish Ltd* CC4B/08, Chief Judge Colgan (4 June 2008), the Chief Judge noted in paragraph [10] of that judgment that although in *PBO* a tariff was affirmed of \$2,000 per day, that has

subsequently been approved in a range up to \$3,000 per day: *Cliff v. Air New Zealand Ltd* AC47A/06, 17 November 2006, and the *Chief Executive of Department of Corrections v. Tawhiwhirangi* WC4A/08, 10 March 2008.

[12] When I consider all the circumstances of this matter I conclude the appropriate starting point would be \$3,000 per day.

[13] Mr Smythe is correct that the matter occupied 1½ days investigation meeting time, although in effect I do not consider that the fact the second day was only half a day would have had any significant effect on the preparation and on that basis I assess costs on the basis of \$3,000 for each day with an adjustment of \$1000 for the second day.

[14] Without prejudice offers can be taken into account, although there were no *Calderbank* offers put before the Authority. The applicant himself made a without prejudice offer to settle his claim to the Director of the respondent company directly. The applicant achieved less in terms of lost wages, but the compensatory award was greater than the applicant would have been prepared to accept in December 2008.

[15] In exercising my discretion, I do not make any adjustment to the daily tariff in terms of the settlement offer. I accept Mr Smyth's submission that the statements from the psychiatrist and psychologist were made available for the first time to the respondent for the purposes of the Authority investigation meeting. There was considerable reliance placed on the medical statements in terms of the awards made by the Authority. The respondent therefore did not have the benefit of that information when it considered the settlement offered by the applicant. The respondent also attempted to resolve the matter before it reached the Authority, although clearly its offers were unacceptable to the applicant.

[16] I do make an adjustment in terms of the counterclaim. The counterclaim required significant preparation to be undertaken by the applicant and although I accept it did not occupy a lot of time during the investigation meeting, it did require addressing in statement of evidence and submissions. In all the circumstances, I make an adjustment up of \$3,000.

[17] I make an adjustment down for the applicant's unsuccessful unjustified disadvantage claim. It was largely factual in nature and could not be said to be as complex, in my view, as the counterclaim or requiring nearly as much preparation. A

global amount had been sought in terms of compensation and there was no separate amount claimed for that personal grievance. In that regard I only make an adjustment of \$500.

[18] I am not satisfied that otherwise I should make any adjustment for the conduct of the parties. There was an additional telephone conference with the Authority to deal with issues raised by the respondent but that, together with the number of statements of evidence has been recognised in arriving at the daily tariff of \$3000.00. I accept Mr Smyth's submission that the other matters in a later memorandum were dealt with at the commencement of the investigation meeting and did not require a further telephone conference.

[19] In all the circumstances I consider an appropriate award of costs in this matter to be \$7,500 together with the following disbursements:

- (a) Dr Brian Deavoll's costs on giving evidence (invoice supplied)- \$150
- (b) Mr Alan Prosser's costs on giving evidence (invoice supplied) - \$160
- (c) Filing fees in the Authority - \$70
- (d) Out of office photocopying bundles - \$48
- (e) Authority hearing fee for one part day - \$150
- (f) In office photocopying - \$37.50

Total disbursements: \$615.50

[20] I order Searell & Co Limited to pay to Phillip Leon Christey the sum of \$7,500 being costs and \$615.50 being disbursements.

Helen Doyle  
Member of the Employment Relations Authority