Determination Number: WA 73A/07
File Number: 5079519

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Hayden Darbyshire & Andy Dyke (applicants)
AND	PPCS Ltd (respondent)
REPRESENTATIVES	Simon Mitchell for Messrs Darbyshire & Dyke Tim Cleary for the Company
MEMBER OF AUTHORITY	Denis Asher
SUBMISSIONS RECEIVED	by 24 August 2007
DATE OF DETERMINATION	29 August 2007

COSTS DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In my substantive determination of 10 May 2007 (WA 73/07) I found against the applicants' health and safety and compensation claims. The Company says it has made several inquiries of counsel for the applicants about costs but has received no response. It now seeks costs.

Company's Position

2. The Company's approach relies on *Binnie* v *Pacific Health* [2002] 1 ERNZ 438 and its two Calderbank letters (copies of the latter being attached to its costs submission received on 5 July 2007). The first offer was sent to the applicants well prior to the hearing on 17 April, and the second prior to the final day's hearing on 7 May.

3. The Company has been put to particular cost because of the applicants' attitude toward obtaining expert evidence. Such evidence was first mooted on behalf of the applicants during the first teleconference with the Authority (26 February). Two hearings were then adjourned to allow a response to the Company's expert evidence but in the end, and without notice, the applicants abandoned the generous opportunities given them by the Authority to present rebuttal evidence.

4. There was no appearance from either applicant at the 17 April hearing. No reasonable excuses were advanced on their behalf. An application to dismiss proceedings was declined. There was no appearance by Mr Dyke on 18 April and again no reasonable excuse offered. The matter would likely have been dealt with by 17 or 18 April if the applicants had adopted a more co-operative approach.

5. In the end the Company was, in spite of its opposition to adjournments, repeated requests for the applicants' rebuttal evidence, and reasonable offers made, put to the task of fully responding to the ultimately futile case made against it. If the offer put prior to 7 April had been accepted the applicants would be in a far better position they are in now, i.e. they would have received a payment and been re-employed as boners. In the result they obtained neither. The Company is therefore seeking indemnity costs from the date of the offer.

6. Costs incurred by the Company total $20,539.76; actual costs sought are $18,374.10, i.e. 2/3rds of its legal and disbursement costs to 5 April 2007 and indemnity costs (including those for its expert) thereafter; *South Taranaki Kindergarten Association* v *McLennan*, unreported, WRC 24/06, Shaw J, 6 March 2007.

7. Any costs award should be made on a joint and several basis as both applicants, supported by their union, ran the same case.

Applicants' Position

8. The applicants say costs should lie where they fall or be reserved until the outcome of the challenge.

9. This was a test case. It related to the untested legal effect of s. 28A (8) (b) of the Health & Safety in Employment Act 2002 and the appropriate conduct of parties in such circumstances: as such it was novel.

10. The applicants successfully established their genuinely held subjective belief as to the safety risk but failed to convince the Authority that, objectively assessed, their concerns were reasonable.

11. It was also a matter concerning health and safety in which clarification of a safety risk was required. The investigation was of assistance in addressing some of the applicants' *bona fide* safety concerns.

12. The Calderbank letters do not address the fundamental issues in this case. The applicants faced disciplinary action for refusing to carry out a task they considered dangerous, and where there was no offer of a risk assessment or change of practice to ameliorate those concerns. The Authority found the applicants did not act in-genuinely or with ill motive (par 41 of the substantive determination). In similar cases Calderbanks have been held to be less effective: *Binnie* (para 38, above), etc.

13. In this case the Calderbanks should have, but did not, address the applicants' genuine concern over a safe process for raising equally genuine health and safety concerns. The first was unclear as to the nature of the discipline the applicants would face: lack of clarity in respect of a fundamental principle renders the offer invalid.

14. The Calderbanks did not set out a mechanism such as to allay the applicants' fundamental concerns but instead presumed they were not genuine in their belief the work was dangerous.

15. While the second Calderbank was tendered after the Company had undertaken a risk assessment, almost all costs had then been incurred. It cannot therefore be relied upon to retrieve expenditure to that point. The second Calderbank also insisted – like the first – on disciplining the applicants: this was inappropriate and unlike the finding of the Authority in this significant respect.

16. The Company was not entirely successful, as it claims: the Authority recommended the re-employment of the applicants. There was no suggestion by the Authority that it considered any disciplinary action as appropriate. The Authority also found both parties' behaviour was less than ideal (e.g. par 36 of the 10 May determination).

17. The Company only acknowledged the appropriateness of the recommendations of the health and safety inspector to obtain a risk assessment during the Authority's investigation. The investigation thereby achieved very real progress towards the parties' resolution of the

dispute between them. It was not a waste of the parties' resources to therefore participate in the investigation.

18. The Authority explicitly accepted that the parties had made their best efforts to expedite this investigation (par 28, above).

19. The applicants did not abandon their disparity claim: the allegation was found instead to have failed on the evidence as did parts of the Company's position, including the claim the applicants lacked a genuine belief in the claimed hazard. The Company has suffered no unusual additional costs with regard to defending this aspect of the claim.

Discussion

20. My approach to this costs application is consistent with the findings of the Employment Court in *PBO Ltd (formerly Rush Security Limited)* v *Da Cruz* [2005] 1 ERNZ 808.

21. I do not accept that this was a test case in respect of s. 28A (8) (b) of the Health & Safety in Employment Act 2002 and therefore costs should lie where they fall: in reality the focus of this investigation was largely on the parties' contractual obligations, particularly procedural requirements set out in the Employee Induction Handbook. It is therefore appropriate that costs follow the event.

22. The Calderbank offers can be put to one side as the Company succeeded in its position and, for the following reasons it is any way entitled to a significant contribution to its fair and reasonable costs. While finding that *"despite the best efforts of all concerned, the investigation … proved an extended one"* (par 28 of the 10 May 2007 determination), I do not accept the effect of that good will is costs neutrality. Instead, I am satisfied that the applicants were responsible for, in the first instance, seeking an urgent application and, in the second, extending the investigation because of the adjournments they sought and obtained. The reason for the adjournment was to obtain expert evidence: in the end the applicants abandoned that proposal. Not only was the Company put to the cost of responding urgently, but also to attending an unnecessarily extended investigation and obtaining expert evidence of its own, in anticipation of the applicants doing the same which they, ultimately, did not. The Company was also obliged to address disparity claims that, ultimately, were not pursued by the applicants.

23. The investigation ran to 3 and ½ days. A portion of that time was taken up by the parties, unsuccessfully, attempting to settle matters on their own terms. The absence of the

applicants during some of that time did not facilitate a speedy investigation: their absence was attributed to – and I accept – some internal communication breakdowns. The Company is nonetheless entitled to recover some of its resulting extra costs.

24. Having regard to the above I am satisfied that a fair and reasonable contribution to the Company's costs is $10,000 (ten thousand dollars).

25. I am confident the Company will reach agreement with the applicants on a repayment regime, taking fair and reasonable account of their financial circumstances, in the event that their union does not cover the costs incurred.

Decision

26. The applicants, jointly and severally, are to pay to the Company, as a contribution to its fair and reasonable costs, the sum of $10,000 (ten thousand dollars).

Denis Asher
Member of Employment Relations Authority