

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Donald Montrose Graham (Applicant)
AND Crestline Pty Limited (Respondent)
REPRESENTATIVES Tony Drake, Counsel for Applicant
Malcolm Crotty, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
MEMORANDA RECEIVED 28 November 2005, 20 January and 3 February 2006
DATE OF DETERMINATION 7 February 2006

DETERMINATION OF THE AUTHORITY ON COSTS

[1] In a determination of the above, dated 4 October 2005, I found that Crestline Pty Limited (“Crestline”) was not Mr Graham’s employer. Accordingly the substantive claims Mr Graham wished to make against Crestline in the Authority could not proceed.

[2] Costs were reserved, and the parties have filed memoranda on the matter.

[3] Crestline seeks a contribution to its costs in the sum of \$49,469, comprising legal fees of \$39,360 and disbursements of \$10,109. Its actual legal costs were \$112,112. The figure of \$39,360 was arrived at by applying Mr Crotty’s charge out rate to three meeting days (although a little more than three days were required) plus a notional 6 preparation days, and allowing for a further three days in respect of preliminary applications, information provided after the investigation meeting and closing submissions.

[4] The disbursements were incurred in respect of travel and accommodation costs for Messrs Reynolds and Pynt and allowances for their attendance at the investigation meeting, as well as charges including photocopying, telephone and faxes.

[5] Counsel for Mr Graham submitted that the costs were manifestly excessive, and referred to Mr Graham’s ability to pay. He also relied on comments in the determination about the substantive merits of Mr Graham’s grievance.

Determination

[6] A full Employment Court has recently addressed costs in the Authority in **PBO Limited v Da Cruz** (AC 2A/05, 9 December 2005). It found that certain principles enunciated in a triumvirate

of Court of Appeal decisions¹ were not applicable to the Authority, although the following principles were appropriate and consistent with the Authority's functions and powers:

“ [44] ...

- . there is a discretion as to whether costs should be awarded and what amount.
- . the discretion is to be exercised in accordance with principle and not arbitrarily.
- . the statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- . equity and good conscience is to be considered on a case by case basis.
- . costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- . it is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable.
- . that costs generally follow the event.
- . that without prejudice offers can be taken into account.
- . that awards will be modest.
- . that frequently costs are judged against a notional daily rate.
- . the nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.”

[7] Many employment relationship problems coming before the Authority do not, or should not, require the parties to incur more than relatively modest costs. The approach of the Authority has been to reinforce that by making modest awards when asked to determine costs in respect of them. That is reflected in the tendency of costs awards to cluster in a readily identifiable range, which has in turn been acknowledged in subsequent determinations, but the Authority has made awards outside the range when it considered it appropriate to do so. For example some problems are either lengthy or complex or both and require one or both parties to incur high costs, with a consideration of all of the circumstances leading in turn to awards of costs outside the upper end of the range.²

[8] Further to that, the Court said in **da Cruz**:

“[46] We find there is nothing wrong in principle with the Authority's tariff-based approach so long as it is not applied in a rigid manner without regard to the particular characteristics of the case. For example, even an award of costs based on a low daily rate may not be feasible where the liable party does not have the means to pay or, on the other hand, the daily rate may not adequately reflect the conduct of the parties or the preparation required in a particularly complex matter. The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs.”

[9] At [40] of the decision the court commented, too, on the need for the Authority to judge the reasonableness of the parties' costs in the light of the procedure used in the investigation in question. It commented further that the Authority's procedures range from the formal to the informal and from at least partly adversarial to inquisitorial, with the nature of the procedure in a particular problem being a relevant consideration.

[10] This has been a lengthy problem of some factual complexity. Aside from the conduct of the meeting itself the process incorporated a number of the features of an adversarial proceeding, hence I consider it appropriate to draw on some of the costs considerations applicable in adversarial proceedings. The investigation was characterised by voluminous documentation and, because Mr Graham was saying a signed written employment agreement did not correctly identify the employer, it was necessary for the evidence to traverse a detailed history of the parties' negotiations. Evidence bearing on the identity of the employer took up more than half of the meeting time, and the material suggests it would have taken up considerably more than half of the preparation time. The rest of the meeting and preparation time concerned Mr Graham's substantive claims.

¹ **Victoria University of Wellington v Alton-Lee** [2001] ERNZ 205; **Binnie v Pacific Health Limited** [2002] 1 ERNZ 438; **Health Waikato Limited v Elmsly** [2004] 1 ERNZ 172

² For example **Daniels v Maori Television Service** (AA 330A/05, 15 December 2005)

[11] Overall the investigation was by necessity very time consuming in terms of preparation, as it was in terms of the meeting time required. The parties' preparation was necessary to the investigation and assisted the Authority, reducing the need for it to take an actively inquisitorial approach. I therefore accept that the associated cost to the respondent was reasonably incurred in respect of both hearing and preparation time. Counsel for the respondent quantified the actual cost incurred in respect of that time as \$57,200. Assuming 6 days' preparation time and 3 days' hearing time at his charge out rate, he came to a notional reasonable cost of \$29,520.

[12] Counsel also indicated substantial additional costs were incurred in respect of other matters arising prior to and after the investigation meeting. He sought an allowance assessed as three days at his charge out rate, being \$9,840.

[13] One of the matters arising prior to the investigation meeting concerned service of the papers on a respondent, namely Crestline, which was registered and carried on business outside New Zealand. The first statement of problem was filed on 16 December 2003, with the applicant giving Crestline's New Zealand solicitors' address as an address for service. The solicitors responded by saying service was not accepted on the ground their client was an overseas company. At the time this was not an issue which many overseas-based respondents sought to pursue, and many were electing to accept service and participate in addressing the problem in question. However at least one had sought to place the matter before the Employment Court. Crestline's solicitors were entitled to say Crestline would pursue the matter too.

[14] By the time a conference call between the Authority and the parties had been convened a law reform bill had been introduced in Parliament. The bill included the provision enabling service outside of New Zealand which is now clause 4A, Schedule 2 of the Employment Relations Act 2000. At the time the provision was to come into force in October 2004, although it eventually came into force on 1 December 2004. Accordingly the parties were in a position where they could argue a point that would be resolved by legislation in some 6 months, or they could wait until the provision came into force and proceed from there. They chose the latter. Claimable costs in respect of that issue should have been minimal.

[15] A second matter raised in Crestline's initial response to the statement of problem concerned proceedings between the parties in Western Australia. I was told the proceedings were pending over some of the same subject matter as that before the Authority. That is why I subsequently required updates on the proceedings, even though Crestline did not pursue the associated preliminary issues it had indicated it would pursue. For the most part counsel for Crestline has very properly not sought to incorporate the resulting costs in the present application.

[16] Of more significance in terms of the additional allowance counsel sought is the time needed to consider certain financial and other documentary information which Mr Graham supplied after the investigation meeting. Some of the financial information was produced at my request, because the evidence Mr Graham had produced was not adequate to support several of his claims for payment. Other information comprised material Mr Graham was providing because he thought it shed light on some of the matters discussed during the investigation meeting. It is appropriate to make provision for that in costs.

[17] Counsel also sought to incorporate provision for the preparation of final submissions. I accept that, too, was time consuming and reasonably so, but the Authority does not have a practice of making separate provision for that matter in costs.

[18] Accordingly I consider it appropriate to make an allowance of one day for these additional activities. The resulting figure is 1 day x 8 hours x \$410 = \$3,280.

[19] The total overall cost assessed as reasonable is therefore $\$29,520 + \$3,280 = \$32,800$.

[20] Regarding disbursements claimed in respect of witnesses, clause 6(1) Schedule 2 of the Employment Relations Act entitles every person giving evidence to be paid (by the party calling that witness) fees, allowances and travelling expenses payable under the Witnesses' and Interpreters' Fees Regulations 1974. While the Regulations provide for the payment of daily fees such as those sought in respect of Messrs Pynt and Reynolds, I am not satisfied Crestline (being the party calling the witnesses) incurred any cost in that respect. Accordingly I do not take such fees into account in costs.

[21] I accept that the costs of travel and accommodation were valid expenses, as both Messrs Pynt and Reynolds were resident in Australia and were necessary witnesses. Those costs, including taxi fares, came to \$4,603. Crestline is entitled to seek reimbursement of those expenses.

[22] The rest of the disbursements covered the usual administration costs, including faxing and photocopying. They were claimed in the unusually high figure of \$4,767. Because of the amount of documentation, and the fact that Crestline and its witnesses were based in Perth, I accept the amount was validly incurred and Crestline is entitled to seek reimbursement.

[23] Accordingly the total claimable disbursements are $\$4,603 + \$4,767 = \$9,370$.

[24] In summary:

- (a) Crestline incurred reasonable costs of representation in the sum of \$32,800; and
- (b) Crestline incurred claimable disbursements in the sum of \$9,370.

[25] I turn now to whether and to what extent Mr Graham should contribute to those costs.

[26] Mr Graham was not successful on the issue of the identity of his employer. That issue was by far the most significant issue in terms of the amount of evidence produced, the time taken to investigate the employment relationship problem, and the arguments raised in submissions. Although Mr Graham 'firmly believed' Crestline was his employer and I accept the belief was genuinely held, it was not well-founded. Moreover, while his advisors gave evidence that they held that belief too, they were only reflecting Mr Graham's instructions to them. Mr Graham should be required to contribute the respondent's costs in respect of that issue.

[27] As I have noted, the investigation also addressed the substantive merits of Mr Graham's personal grievance and claim for monies owing. The merits were discussed extensively as I said in the determination of 4 October 2005, but not as extensively as the identity of the employer. Regarding the merits, I also said in the October determination that Mr Graham **could** succeed in a claim based on the unexpired portion of his employment agreement and that there was an outstanding entitlement to annual leave. However those points took up only a small proportion of the investigation into the merits, with the genuineness of the redundancy and associated issues taking up a substantial majority of the time devoted to that matter. Mr Graham cannot claim any kind of success in respect of the genuineness of the redundancy. Overall I do not consider that my comments on the merits mean a reduction in Mr Graham's contribution to Crestline's costs is warranted.

[28] Mr Graham's financial circumstances were also raised. Ability to pay is a relevant consideration in setting costs. While I accept Mr Graham suffered a drop in income after the termination of his employment, there was not enough in the evidence to persuade me a nil or small award of costs would be appropriate to his circumstances. There was nothing to assist me regarding

the level of contribution that would be reasonably likely to cause him serious financial difficulty. Lack of adequate information means I do not give weight to this factor.

[29] Finally, in case it is of concern to Mr Graham, I have disregarded Crestline's reference in a letter dated 20 October 2005 to a settlement offer apparently made in mediation.

[30] In conclusion, this is a problem in which the so-called tariff applied in the Authority should be revised upwards. Its length and complexity required a degree of assistance from the parties which involved more of the elements of an adversarial process than in less complex problems, and Crestline was the successful party. Having said that, I also believe that a full adversarial process would have required a much longer hearing.

[31] Overall, if I were to award a full contribution to the reasonable costs I have found Crestline incurred, the rate per day would be just under \$11,000. That may now be considered too high. A contribution of two thirds of that figure comes to \$7,260 per day, which may also be too high. Overall, and bearing in mind the conduct of the problem, I believe a contribution of \$5,000 per day is warranted.

[32] Accordingly Mr Graham is ordered to contribute to Crestline's costs in the sum of:

- (a) 3 days x \$5,000 = \$15,000; and
- (b) \$9,370 as disbursements.

R A Monaghan
Member, Employment Relations Authority