IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 34
5336579

	BETWEEN	ADAM RAPHAEL GREENBAUM Applicant
	AND	WAIKATO DISTRICT HEALTH BOARD Respondents

Member of Authority:	R A Monaghan
Representatives:	M O'Neill counsel for applicant A Russell, counsel for respondent
Memoranda received:	7 and 21 December 2011 from applicant 15 December 2011 from respondent
Determination:	23 January 2012

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination dated 28 November 2011 I made a series of findings in respect of a series of claims for monies owed to Adam Greenbaum, and made an order for compliance in respect of one of the claims. I declined requests for penalties.

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

[3] Counsel for Dr Greenbaum cited fees of $9,000 in respect of the hearing, and submitted that an appropriate award of costs in favour of Dr Greenbaum would be the sum of $3,000.

[4] Counsel for the WDHB sought an order for costs in favour of the WDHB, calculated as two thirds of its costs of $10,800 which were directly related to the investigation meeting, being the sum of $7,128.

[5] Neither party relied directly on the principles in *PBO Limited v da Cruz.* [1] Counsel for Dr Greenbaum sought costs on the basis that Dr Greenbaum was successful in part, and calculated as a reasonable contribution to costs actually and reasonably incurred. Counsel for the WDHB noted *da Cruz* but pointed in support of the award sought to:

> . an offer made without 'prejudice except as to costs' on 8 September 2011;
> . the imprecise nature of the applicant's claim;
> . the series of revisions of the claim; and
> . the unnecessarily litigious approach taken to the matter of payment.

The offer made without prejudice except as to costs

[6] The offer made without prejudice except as to costs was expressed in the following terms:

> *This offer is in the amount of $8,000. This offer is to reimburse costs incurred by Dr Greenbaum that relate to either medical or educational expenses subsequent to the termination of his employment on 23 February 2011.*
>
> *Therefore the WDHB require invoices and receipts relating to such expenses in 2011 to justify the payment of the said $8,000.*
>
> ..
>
> *If this offer is not accepted and Dr Greenbaum is not awarded any expenses from the Authority or less than the amount of the expenses contained in this offer, then WDHB reserve the right to present this letter and seek costs from Dr Greenbaum.*

[7] I do not accept Ms O'Neill's submission that the offer is irrelevant because Dr Greenbaum was awarded more than the amount of the offer. The submission takes into account the award made in respect of expenses incurred prior to the termination of employment. The associated claim was made after the offer to settle, in circumstances I do not accept were attributable to Dr Greenbaum's inability to access relevant information. He could and should have known as at the date of termination what reimbursable expenses he had incurred, and which if any had not yet been claimed. Any uncertainty about the calculations underlying his final pay - and in particular whether any pre-termination expenses which were claimed were included in

[1] [2005] ERNZ 808.

the final payment - was addressed by the provision of the calculations in a letter dated 1 April 2011.

[8] For these reasons I exclude from consideration the amount awarded in respect of pre-termination expenses.

[9] The amount of the remaining award in respect of post-termination expenses was $5,138.57, which on its face is less than the amount of the offer.

[10] However the offer was dependent on the production of invoices, and in the absence of invoices it was arguably a 'nil' offer. It made no provision for the resolution of the remainder of Dr Greenbaum's claims, which in a limited respect were resolved in his favour. To say that the sum offered exceeded the sum obtained would not be an accurate reflection of those circumstances.

[11] For that reason I do not give the offer the weight I would otherwise have given it.

Other relevant factors

[12] I now turn to the WDHB's concerns about the imprecise and changing nature of Dr Greenbaum's claims, and the unnecessarily litigious approach he has taken to this matter.

1. Imprecise and changing nature of claims

[13] While I accept that the WDHB was the party in possession of relevant information regarding the calculation of Dr Greenbaum's final payment, that is not an adequate answer to the concerns the WDHB has raised. For example, I have referred to the belated claim for payment of pre-termination expenses. Not only was the claim belated (or not clearly identified until belatedly), some expenses had not been submitted to the WDHB for repayment even as at the date of the investigation meeting.

[14] In addition the claim for payment in respect of CME expenses under cl 36.2 of the cea was originally for the nominated sum of $24,000 - exceeding the amount claimable under the clause without providing any reason - and was subsequently reduced to the maximum claimable under the clause, again without providing any reason. It was in any event unsuccessful because no such expenses had been or were to be incurred. Further, a significant claim for unpaid sick leave also underwent amendment before eventually being withdrawn entirely. In its original form that claim appeared to have been based on a misunderstanding of the treatment of unused sick pay on the termination of employment. The claim also underwent amendment, and was eventually withdrawn because Dr Greenbaum recalled he had been absent on paid domestic leave on the remaining days for which he was claiming payment.

[15] The claims for payment suffered overall because - even if the WDHB was in possession of information regarding the calculation of payments - Dr Greenbaum was also in possession of information regarding relevant matters such as his own expenses. There was no systematic approach to identifying his contractual entitlements, applying the entitlements to information of his own that was or should have been in his possession, measuring the outcome against the calculations provided to him on 1 April and identifying any discrepancies as well as the grounds on which these were said to be discrepancies, seeking explanations if necessary, identifying the possibility of differences in the interpretation of contractual entitlements or errors in calculation as appropriate, and taking the matter further if unresolved issues remained.

[16] There was instead a process of challenging first the calculations, and then the parts of the WDHB's statements of evidence as they related to the calculations, providing little in support beyond mere disagreement. This approach put the WDHB to unnecessary expense.

2. Unnecessarily litigious approach

[17] I commented in the substantive determination on the fact that the statement of problem was filed in the Authority within days of the termination of employment - before there could be any possibility of identifying what if any issues there were regarding payment and even less of identifying the grounds for and whether any penalty was warranted.

[18] Unfortunately, the memorandum in respect of costs on behalf of Dr Greenbaum included a further request for an order for compliance with the part of the Authority's determination concerning pre-termination expenses. The WDHB pointed out that the request was made some 14 days after the date of the determination, and said further that it had a concern about the acceptability of one of the claims for pre-termination expenses. I was advised in any event that payment has since been made. I take the additional request for a compliance order no further except to say that it, too, appeared to be premature.

[19] Overall this matter was of a type capable of resolution in discussions between the parties. Instead it has been the subject of premature entry into litigation, and at times unreasonable requirements for immediate action by the WDHB which were also reflected in litigation in the course of the unsuccessful claims for penalties. This has been so to an extent I consider the approach to the problem to be outside the range of responses reasonably to be expected in problems of this kind – and outside the approach encouraged by the Employment Relations Act. Again the approach has put the WDHB to unnecessary expense.

Determination

[20] Although he was successful in gaining an order in his favour on one aspect of his claim, Dr Greenbaum was successful to such a modest extent overall that I do not consider it appropriate to make an order for costs in his favour.

[21] The WDHB was successful in defending some of the claims for payment and all of the claims for the payment of penalties. I consider it to be the successful party, and entitled to consideration of an order for costs in its favour.

[22] In determining costs I begin with a notional daily rate, which I fix at $1,750 as the investigation meeting took half a day. This is the starting point for an order in favour of the WDHB, although I would adjust the amount down slightly to reflect the degree of success Dr Greenbaum achieved. On the other hand aspects of Dr Greenbaum's conduct of the matter added unnecessarily to the parties' costs, and support an upwards adjustment of the notional rate. I refer in particular to the changing nature of the claims, and the approach taken to the need for litigation.

[23] Dr Greenbaum is therefore ordered to contribute to the costs of the WDHB in the sum of $4,500.

R A Monaghan
Member of the Employment Relations Authority