Determination Number: CA 59A/06
File Number: CEA 96/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Michael Anthony Heffernan (Applicant)
AND	Estate of Patrick David Heffernan (Respondent)
REPRESENTATIVES	Werner van Harselaar, Counsel for Applicant Peter Churchman, Counsel for Respondent
MEMBER OF AUTHORITY	Philip Cheyne
MEMORANDA	26 May 2006 from respondent's counsel 9 June 2006 from applicant's counsel 14 June 2006 from respondent's counsel
DATE OF DETERMINATION	23 June 2006

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 3 May 2006 I rejected claims by Mr Heffernan for arrears of wages in respect of work said to have been performed between late November 1999 and January 2003 pursuant to an employment agreement allegedly entered into in 1999. This determination resolves costs following the receipt from counsel of memoranda.

[2] I should note at the outset that the claims arose under both the Employment Contracts Act 1991 and the Employment Relations Act 2000 and that one consolidated hearing in the form of an adjudication hearing before the Employment Tribunal was held.

[3] The respondent's costs total $57,916.88 including GST. The respondent seeks party and party costs or at least an award of a very substantial proportion of the actual costs. The applicant says that if a costs award is to be made, *it should follow the tariff approach used with consistency in the Authority….*

Should there be a costs award?

[4] The parties here are a son and his father's estate represented by the estate trustees who include the applicant's sister. Sometimes one might find it just and equitable not to make an award of costs between close relatives but dispute and litigation are part of the fabric of this family relationship so the relationship is no reason to avoid the usual consequences of losing.

[5] I see no other reason to depart from the usual principle that the unsuccessful party should have to pay some or all the costs reasonably incurred by the successful party.

The proper approach in this case

[6] A full bench of the Employment Court referred to the Authority's approach to costs in *PBO Limited v Da Cruz* unreported, Colgan CJ, Travis, Shaw JJ, 9 December 2005, AC 2A/05. There the Court commented that cost awards in the Authority will be modest and frequently judged against a notional daily rate. The Court considered that there is nothing wrong in principle with a tariff based approach so long as it is not applied in a rigid manner without regard to the particular characteristics of the case.

[7] In the present case, setting costs by reference to a notional daily rate at a modest level would visit a considerable injustice on the respondent. I accept the points made by the respondent that the vague and open ended manner in which the claim was framed then supported by statements of evidence meant it had to incur significant preparation costs. The claims were first made after Mr Heffernan's death and referred to events of which only the applicant and Mr Heffernan could have first hand knowledge. There was a lack of specificity. Many irrelevant matters were disputed given the background of family disharmony.

[8] The second point is that the whole matter (by agreement) was conducted as if it was an adjudication hearing before the Employment Tribunal. In part it had to be because much of the cause of action arose under the Employment Contracts Act 1991. It follows that costs are properly assessed by reference to the principles applied by the Tribunal following the jurisprudence of the Employment Court. I accept that cases such as *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38 and *Okeby v Computer Assoc (NZ Limited)* [1994] 1 ERNZ 613 are relevant.

Assessing costs – material factors

[9] I agree with counsel that greater than usual costs were caused by the vague pleadings in respect of a matter not pursued during the lifetime of one party. It is correct that the proceedings were lodged just in time to meet a deadline agreed in the settlement of High Court proceedings that included the same parties but I cannot see that lodging just in time caused additional costs. I agree that some extra time had to be spent at the hearing dealing with the applicant's extravagant and insulting claims. That required extra time in cross examination and extra time in evidence in chief to answer points that were largely irrelevant to the arrears claim but which in fairness could not just be left unanswered. The time spent on a number of those matters helped the Authority to form credibility views so the respondent cannot be criticised for reacting unnecessarily.

[10] Referring to unfounded allegations by the applicant about one of the trustees, counsel refers to the applicant in *Binnie v Pacific Health Limited* [2002] 1 ERNZ 438 who was obliged to pursue proceedings to clear his name and who was eventually awarded 80% of his costs. The present case is different as the trustee did not initiate proceedings and dealing with the unfounded allegations simply caused the expenditure of additional time. It is a factor properly included in the preceding point.

[11] I accept that this is not a typical case and the time required for effective preparation was significantly greater than usual. For example, it was necessary to analyse the applicant's bank and visa statements to the extent they showed his location on particular days over the period of the claim and compare that with other evidence in order to throw doubt on the probability of the applicant's assertions about his activities. Since the applicant said that he worked continuously during the period of the claim, the respondent needed to prepare evidence tending to show the contrary - no simple task years later and following the death of the person

best placed to comment. In particular the respondent had to contend with two written documents said to have been signed by Mr Heffernan both of which (if so signed) tended to support the applicant's claims. Significant time would have been required to effectively present a defence in the face of those documents of which only copies were ever provided. In the end I was not satisfied with the *bona fides* of the documents so the applicant must bear responsibility for the costs caused by their production in evidence. The applicant makes the point that an affidavit sworn by his father supported the view of permanent employment for the duration of the claim. However, the applicant is the only person alive with first hand knowledge of his arrangements with his father and, given the substantive findings, I must assess costs on the basis that he has made claims which he must have known are untrue.

[12] I also accept that the case was very important to the respondent. The claim was $120,000.00 (net). Success would have diluted the value of the estate available for distribution to the beneficiaries. The applicant was not one of the beneficiaries because of earlier family arrangements but he (and others) made Family Protection Act claims for a share being the High Court proceedings mentioned above. In effect the present claim was another way of advancing the applicant's claim for a share of the estate against the interests of the beneficiaries given the history of family disharmony. The respondent cannot be criticised for deploying significant legal resources to resist the claims.

[13] No issue is made about ability to pay. The applicant does make a general point about cost containment, the entry-level nature of the Authority forum and not discouraging claimants by making large costs awards. Those points are usefully made in the ordinary case and no doubt encouraged the view expressed by the Employment Court in *Da Cruz*. However, for the reasons expressed above, this is not a case for a modest award on a tariff basis.

[14] Three further points should be mentioned. The applicant's costs are $8,000. That reflects the fact that this was a claim easier to make that defend. It is also said that the respondent did not need to engage experienced counsel at $350.00 per hour (plus GST). However, the same counsel was involved in the High Court proceedings so the background knowledge of family circumstances represents a saving. It was also a matter meriting the appointment of senior counsel. In any event, I do not intend to take the respondent's actual costs as a starting point. The respondent made a *Calderbank* offer on 24 June 2005 open for acceptance until 7 July 2005, before preparation for hearing. Most of the litigation costs could have been avoided. It is a factor that supports a substantial award of costs against the applicant.

Assessing reasonable costs

[15] The case took about four hearing days. The complexity of the case calls for the application of a multiple of at least three so that formula gives about 96 hours professional time against the 132.5 hours spent by counsel and 21 hours spent by the solicitor. Inevitably, in litigation of this nature, representatives are called on by clients to attend to instructions which are not strictly necessary for the purposes of the litigation and I mean no criticism of counsel by reference to the above formula.

[16] The factors referred to above lead me to conclude that the applicant should meet 90% or nearly all the assessed reasonable costs incurred by the applicant, a figure of approximately $34,000.00. There are disbursements of $1,020.00 being counsel's airfares and accommodation. That cost too should be met by the applicant.

Summary

[17] The applicant is to pay the respondent $34,000.00 in costs and $1,020.00 in disbursements.

Philip Cheyne
Member of Employment Relations Authority