IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA199A/10
5280339

	BETWEEN	SHANE HELLER Applicant
	AND	ATLAS QUARRIES LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Marcus Steele for Applicant James Turner for Respondent
Submissions:	24 May 2010 from Respondent 24 May 2010 and 14 June 2010 from Applicant
Determination:	26 July 2010

COSTS DETERMINATION OF THE AUTHORITY

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[1] By determination AA199/10 (30 April 2010) the Authority declined to grant Shane Heller leave to raise a personal grievance against Atlas Quarries Limited (AQL) outside 90 days.

[2] The parties were encouraged to resolve any issues of costs between themselves but were unable to do so. AQL has lodged a memorandum seeking a "*substantial contribution*" to its legal costs which are said to have totalled more than $10,000.

[3] Mr Heller, through Mr Steele, asked the Authority to delay any determination of costs until an application for rehearing was submitted. By letter received by the Authority on 14 June 2010 Mr Steele said he had advised Mr Heller to complete an application for the investigation to be reopened and to pay the $150 fee for lodging such an application.

[4] No such application has been lodged since that date and I now proceed to determine the application for costs sought by AQL.

[5] Before doing so I can indicate that the basis on which Mr Steele indicated a reopening of the investigation would be sought was unlikely to have been successful.

[6] Mr Heller's application for leave to raise a personal grievance out of time had relied on the exceptional circumstances provisions of s114(4) and s115(c) of the Employment Relations Act 2000 (the Act). He submitted that the references in his employment agreement to the personal grievance procedures did not meet the requirements of s65(2)(vi) of the Act for inclusion of a plain language explanation of those provisions. That requirement includes "*a reference to the period of 90 days in section 114 within which a personal grievance must be raised*".

[7] Mr Heller was correct that AQL had not complied with the technical requirements of s65(2)(vi) in the wording of his employment agreement. However that was not enough to come within the requirements for leave under s114(4)(a). That is because the provision requires two steps – firstly an exceptional circumstance and secondly that the circumstance "occasioned" the delay in raising the grievance. Occasioned in this sense means caused.

[8] In the particular circumstances of his situation, the Authority found that AQL's failure to properly comply with s65(2)(vi) did not cause the delay because his employment agreement has a separate sentence stating the 90 day period for making a personal grievance claim. By reference to that agreement, the delay cannot be said to have been caused by Mr Heller not knowing of the 90-day period.

[9] The substance of that issue was traversed in the Authority's investigation. No evidence was omitted. While Mr Heller might have a different view on that point than was reached in the Authority's determination, that could have been the basis of lodging a challenge in the Employment Court rather than a re-opening of the Authority's investigation.

The approach to costs

[10] Costs are determined by the Authority exercising its discretion on the basis of established principles and may use a tariff-based approach applied flexibly to the particular circumstances of the case.[1]

[1] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.

[11] Costs generally follow the event, which in this case entitles AQL to a contribution to its reasonably incurred costs in responding to Mr Heller's unsuccessful application for leave to pursue a personal grievance claim.

[12] Taking the notional daily rate of the Authority as $3000, applied to an investigation meeting lasting a little over two hours, I take the starting point for costs as $1500.

[13] From that point I take account of these observations made by the Employment Court:[2]

> *[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.*
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> *[47] Finally, in accord with the Court of Appeal in* Binnie *and this Court in* Harwood *we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.*

[14] In that light I consider $1000 an appropriate level at which to award costs for these reasons:

i. AQL has not provided itemised invoices confirming the level of legal expenses said to have been incurred so the Authority could assess whether those costs were reasonable; and

ii. Mr Heller's evidence at the investigation meeting confirmed he was of limited means and could not pay a more substantial contribution to costs; and

iii. Costs awards are to be modest and not punitive.

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[2] *Da Cruz*, above.

Order for costs

[15] Mr Heller is ordered to pay $1000 to AQL as a reasonable contribution towards its costs.

[16] An arrangement may need to be made for Mr Heller to pay those costs in instalments over some months. Leave is reserved to revert to the Authority for further orders if such arrangements are sought and cannot be agreed.

Robin Arthur
Member of the Employment Relations Authority