IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 1A/09
5133638

	BETWEEN	ROBERT HOUGHTON Applicant
	AND	THE PERFECT FOOD COMPANY LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Andrew Riches, Counsel for Applicant John Shingleton, Counsel for Respondent
Determination:	25 February 2009

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination dated 6 January 2009 I upheld Mr Houghton's claim of a personal grievance and awarded remedies of compensation and reimbursement of lost wages totalling $5,000.00. Costs were reserved. I have now received an application from the respondent company for an order that costs lie where they fall while the applicant seeks an order of costs against the company on a reasonable contribution basis. This determination resolves the disputed question of costs.

[2] To summarise the points made by counsel for the respondent in support of the submission that costs should lie where they fall: Mr Houghton claimed 10 times more compensation than was awarded which was a barrier to settlement; Mr Houghton acted in bad faith by secretly recording a phone conversation with his employer and not disclosing that until he was asked directly by the Authority during the investigation meeting; that Mr Braid (the respondent's managing director) acted honestly and candidly throughout; and that Mr Houghton denigrated Mr Braid during the investigation meeting.

[3] The usual approach to costs is that the successful party is entitled to a contribution to costs reasonably incurred in accordance with the principles enunciated in *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. The first point for resolution is whether there is any reason to depart from this approach in the circumstances of this case.

[4] The point about Mr Braid acting honestly and candidly compared to Mr Houghton is answered by reflecting on what happened. The company through Mr Braid breached Mr Houghton's rights by unlawfully withholding wages and holiday pay and by unjustifiably dismissing him. Mr Braid's claim for the moral high ground founders on those rocks.

[5] It is common enough for a party's award of compensation to fall well short of the sum claimed. Here, $5,000.00 was awarded in total so Mr Houghton must be viewed as the successful party on any measure when the whole picture is considered. That answers the point about the amount awarded compared to the amount claimed. It was also suggested that the claim was a barrier to settlement. A formal claim might not be a reliable guide to a party's settlement position but I cannot assess that in this case without resort to *without prejudice* negotiations, which I should not do.

[6] On reflection I do not think Mr Houghton's conduct in secretly recording his employer disentitles him to an award of costs. In *PBO Ltd* the Employment Court made it clear that costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct. The same applies to a successful party: see for example *White v Auckland DHB* [2008] NZCA where the Court of Appeal confirmed that blame worthy behaviour that results in a reduction of remedies for a successful grievant is not relevant when assessing costs. The part of Mr Houghton's conduct that is presently relevant is his failure to disclose the recording prior to the investigation meeting despite the Authority's order to disclose all relevant documents. That was apparently counsel's fault but it makes no difference to its relevance. The failure prejudiced the possibility of the matter being resolved without an investigation meeting and it increased the time taken for the investigation meeting. As a result I will make a modest reduction in the costs that would otherwise be ordered.

[7] This was a routine constructive dismissal personal grievance. Each side had one main witness for whom witness statements were prepared and there was a second witness for the company who appeared briefly at the Authority's request. The meeting finished before 3pm. I see no reason to depart from a daily tariff approach to assessing costs. A full award of costs in the present circumstances would be $2,000.00 but taking account of the reduction mentioned above I order The Perfect Food Company Limited to pay Mr Houghton the sum of $1,750.00 in costs plus a further $70.00 for the lodgement fee.

[8] While there has not yet been a reply to Mr Shingleton's query about the composition of Mr Houghton's costs, the answer would not affect this result since I have not assessed costs as a proportion of the costs incurred by the successful party.

Summary

[9] The Perfect Food Company Limited to pay Mr Houghton the sum of $1,820.00 in costs

Philip Cheyne
Member of the Employment Relations Authority