

proceedings ought ever to have been brought at all in determining the question of costs.

[5] Mr McMaster also contends that the way in which Mr Leggett advanced his claim caused Mr McMaster unnecessary additional expense in the generation and production of rebuttal evidence in particular.

[6] For his part, Mr Leggett contends that he had an arguable case, that he presented his case in a timely and concise manner and that the costs should lie where they fall.

[7] In the alternative, Mr Leggett suggests a contribution from him of \$1,000 would be appropriate in all the circumstances.

The legal principles

[8] The recent decision of the Full Court in *PBO Ltd v. Da Cruz* (AC2A/05 dated 9 December 2005) sets out the relevant principles.

[9] Her Honour Judge Shaw, giving the decision of the Full Court, sets out the basic tenets which the Authority has applied to costs applications since its inception. The Court makes clear that those tenets are “*appropriate*” and “*consistent with [the Authority’s] functions and powers*”.

[10] The Court also observes that the “*tariff based approach*” frequently adopted by the Authority is appropriate, provided it is not applied rigidly without regard to the particular facts of a case.

Discussion

[11] Despite the suggestion advanced by Mr McMaster that this case was in some sense out of the ordinary, I am not persuaded that the particular factual matrix ought to colour my decision in respect of the matter of costs.

[12] I accept Mr Leggett’s contention that he had a genuine belief that he had suffered a personal grievance and that he wished to subject that belief to the investigative process offered by the Authority.

[13] However, Mr Leggett must accept that the consequences of subjecting his alleged personal grievance to the investigative process of the Authority is that, having

failed to satisfy the Authority that in truth he had a personal grievance, he has put the employer, Mr McMaster, to significant legal cost. It is only proper that Mr Leggett makes a contribution to Mr McMaster for that significant legal cost.

[14] However, it is not appropriate, in my view, that Mr Leggett meet the quantum of cost contribution which Mr McMaster seeks. It would be a very unusual decision of the Authority for an unsuccessful employee to be ordered to pay fully two thirds of the costs incurred by an employer in defending an unsuccessful claim.

[15] There were effectively two days involved, but it was certainly not two full days, and it is unfair of Mr Leggett to seek to reduce the contribution that he makes to Mr McMaster's costs by casting doubt on the necessity for Mr McMaster to call a witness who was not available on the day that the matter was originally set down for hearing. Just as Mr Leggett is entitled to bring his claim before the Authority, so Mr McMaster is entitled to resist Mr Leggett's claim with whatever witnesses he has at his disposal.

[16] I think it proper to commence consideration of the sort of award of costs that ought to be made by looking at the maximum that might be awarded on a tariff-based approach if there were two full days of hearing and then making an appropriate deduction from that point.

[17] On that footing, a costs award of \$5,000 would be the maximum sustainable, but I think in all the circumstances, a lesser amount of \$4,000 is appropriate in this particular case, having regard to the fact that two full days were not necessary to investigate this matter.

Determination

[18] Mr Leggett is directed to pay to Mr McMaster the sum of \$4,000 as a contribution to Mr McMaster's costs.

[19] The parties may need to agree some form of time payment.

James Crichton
Member of the Employment Relations Authority