

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Donna Marie Levay (Applicant)
AND H and J Smith Limited (Respondent)
REPRESENTATIVES Mary-Jane Thomas, Counsel for Applicant
Janet Copeland, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
SUBMISSIONS RECEIVED 25 July 2005
16 August 2005
DATE OF DETERMINATION 20 December 2005

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 10 May 2005, I declined Ms Levay's personal grievance claim and reserved costs while encouraging the parties to attempt a resolution of this matter.

[2] On behalf of the respondent, counsel sought a substantial order for costs, that being 80 per cent of the actual costs incurred by the respondent in defending its position. Ms Copeland has referred me to a range of precedents in a costs setting and in particular refers me to a *calderbank* offer made to the applicant following mediation by a letter dated 25 June 2004. That offer was of a compensatory payment of \$2000.00 plus a \$1000.00 towards the applicant's legal costs. This offer was declined by the applicant. In this context I was referred to *Ogilvy and Mather (NZ) Ltd v Darroch* [1993] 2 ERNZ 943.

[3] In her submission Ms Copeland states that the applicant had sufficient time to consider the offer which was made in June before the Authority hearing in November 2004. She submits that the bulk of costs was incurred following the mediation and outlined those in the body of her submissions. Counsel sets out the work undertaken in respect of this case on behalf of her client between May 2004 and November 2004, the total work done representing a sum of \$15,688.39 plus disbursements of \$222.65.

[4] In her response Ms Thomas submits that consideration of 80 per cent of the actual costs incurred by the respondent does not accord with the case law relating to costs. I note also that Ms Thomas accepts that the costs as set out by counsel on behalf of the respondent are not unreasonable.

[5] A recent decision by the full Employment Court bench must be considered. I refer the parties to *PBO Limited v Eneida Leonor Christo Da Cruz* 9/12/05, Colgan, CJ, Travis and Shaw, JJ, AC 2A/05. The full Court here lists with approval some of the principles applied by the Authority in costs decisions.

[6] The Court noted in *PBO Limited* that the majority of costs awarded in the Authority are now in the range of \$2000-\$2499 for a one day investigation meeting. The Court approved a tariff based approach provided that such an approach is not applied rigidly without reference to the features of a particular case. There was nothing complex about the present case and the investigation meeting was completed comfortably within a day.

[7] However there are some matters which I have considered in determining costs in this matter, in particular, the need for counsel for the respondent to issue a number of summonses to witnesses it sought to have appear on its behalf. In the last analysis the Authority has to balance the legitimate claims of a successful party against the ability of an unsuccessful party to pay in a costs setting. It needs also to consider the refusal of a *calderbank* offer made at an early stage in the proceedings. Having considered the submissions of counsel in the light of the appropriate precedents, I order the applicant to pay the respondent the sum of \$3,200.00 as a contribution to its reasonably incurred costs, and \$222.65 in disbursements.

Paul Montgomery
Member of Employment Relations Authority