

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 460
5300082

BETWEEN

ALAN MAYNE
First Applicant

JEAN FRANCES CRAIG
Second Applicant

BERNADETTE ANN KERR
Third Applicant

AND

POLYCHEM MARKETING
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Submissions received: 6, 21 and 23 September 2011

Determination: 25 October 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] The applicants, Mr Alan Mayne, Ms Jean Craig and Ms Bernadette Kerr, through the remedy of a compliance order sought their restoration to membership of the group medical insurance scheme the respondent Polychem Marketing Limited (PolyMark) had provided and also paid fees for their cover. The applicants sought an order requiring PolyMark to pay arrears of fees and also pay penalties for breach of their employment agreements and breach of the statutory duty of good faith under s 4 of the Employment Relations Act 2000.

[2] After an investigation meeting the Authority issued a written determination in August 2011 – [2011] NZERA Auckland 360 – finding that the applicants' claims were not employment relationship problems and therefore not within the jurisdiction of the Authority to resolve.

[3] The Authority found that at no time had there been an employment agreement or employment relationship between PolyMark and Ms Craig or Ms Kerr. The Authority found that if Mr Mayne had at any time been an employee that relationship finished in 1990 when he stopped serving PolyMark.

[4] Further, the Authority found that although PolyMark had assumed the role of a provider of the subsidised medical insurance to the advantage of the three applicants, and although in that regard it could be said that PolyMark had volunteered to take on a responsibility from entities it had acquired an interest in, there was no evidence that PolyMark had committed itself to meet a legal obligation in that regard. The Authority rejected an argument put forward on behalf of the applicants based on custom and practice.

[5] The question of costs was reserved in the determination. Counsel were invited to try and resolve it themselves by agreement. A timetable was given for any application to be made and replied to if they could not.

[6] Because the parties advised they were attempting to resolve the question of costs by agreement and needed some more time to do that, an extension of the timetable was sought and approved by the Authority. The submissions received have been made in accordance with the Authority's directions in that regard.

[7] An issue emerged requiring further submissions. This was whether, before the application was made, the parties had reached agreement to settle the question of costs.

[8] Mr Patterson counsel for the applicants submitted that PolyMark had offered, and Mr Mayne had accepted, a payment of \$5,000 as representing a reasonable contribution to PolyMark's actual costs in the circumstances.

[9] Mr Hannan counsel for PolyMark confirmed that an offer to settle costs in the sum of \$5,000 had been made by the company and that there had been communications over the extension of the time limit for acceptance of the offer. Mr Hannan submitted that the offer was not accepted in time and consequently had lapsed.

[10] That is the conclusion I reach after reading the email correspondence between Mr Patterson and Mr Hannan, which I find makes it quite clear that the only offer to

settle costs had been made by PolyMark on the basis that the time for acceptance was extended until 12 noon on Tuesday 30 August 2011. The deadline passed without acceptance of the offer.

[11] There was agreement subsequently to an extension of time for the costs application to the Authority to be made, and I have found that the costs submissions were received within that time. The application therefore remains to be determined by the Authority.

[12] PolyMark applies for an order against Mr Mayne only and not against Ms Kerr or Ms Craig. By Mr Mayne's own admission he was the sole driver of the claim. It is accepted by him that in principle, following the Authority's determination, an order for costs should be made in favour of PolyMark.

[13] Although costs are not sought on a solicitor/client basis, the level of award requested is one significantly above the daily tariff, of about \$3,000 to \$3,500, to reflect the way in which the case was conducted with the consequence that cost was unnecessarily incurred. The applicants are criticised for failing to identify their employer(s) at relevant times, leaving this for the respondent to investigate and discover that Ms Kerr and Ms Craig could not have been employees of PolyMark.

[14] Actual costs billed to PolyMark were \$64,200 plus GST, which included \$23,167 incurred after a *Calderbank* letter had been sent in February 2011 shortly before the investigation meeting.

[15] It is submitted that the amount of time spent on the matter and charged out was appropriate for the time required to prepare effectively for the investigation. This included providing written evidence for three witnesses and reviewing information and records necessary to show the origin of the medical cover provided to the applicants and history of it up to the time Mr Mayne brought the claim to the Authority.

[16] The investigation meeting lasted 1½ days and I accept that there was substantial factual as well as legal complexity in this case and that therefore reasonable preparation time may be allowed for in any costs award.

[17] For Mr Mayne, it is submitted that if the Authority should determine (as it has done) that the question of quantum was not settled by agreement, then costs should be

fixed at no more than \$5,000 applying the principles set out in the *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808, which is the leading decision on costs in the Authority. Counsel are agreed that the principles of the case are applicable.

[18] The Court in *PBO Ltd v. Da Cruz* endorsed the approach of taking the daily tariff and adjusting it up or down where necessary to meet the justice of the case.

[19] The conduct of the applicants in presenting their claim put the respondent unnecessarily to cost in answering the fundamental question of the identity of the employer. I agree with the submission that the claim was fatally flawed in its central factual foundations, the defect going to jurisdiction. The claim was based on an improbable employment relationship and if research had been carried out properly to begin with is unlikely to have been brought at all. Although Mr Mayne, unlike Ms Craig and Ms Kerr, did have some connection to PolyMark he acted largely to protect their interests, as he saw them, rather than his own.

[20] In considering the appropriate degree of adjustment to the \$3,000 to \$3,500 daily tariff, which in this case inevitably must be upwards, I take into account the offer made to the applicants in February 2011, before the investigation meeting began. PolyMark offered to not seek costs against Ms Kerr and Ms Craig if their claims were withdrawn, and if Mr Mayne's claim was withdrawn PolyMark offered to accept agreed costs on a reasonable contribution basis.

[21] When the offers were not accepted PolyMark incurred further legal costs of about \$23,000 in preparing for and attending the investigation meeting. Mr Mayne subsequently rejected the opportunity to settle costs at \$5,000, a very reasonable amount given the known outcome of the case.

[22] I consider that an award of \$14,000 is appropriate as a reasonable contribution to be paid by Mr Mayne to PolyMark, which incurred significantly greater costs. This award covers as well as the investigation meeting some of the considerable preparation required to be undertaken by a respondent in a case of this kind. Putting the award in perspective, at less than a quarter of actual costs it is relatively moderate compensation despite being at a much higher daily rate than normal.

Determination

[23] Exercising the discretion of the Authority in the circumstances, Mr Mayne is therefore ordered to pay \$14,000 costs to Polychem Marketing Limited pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

A Dumbleton

Member of the Employment Relations Authority