

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 111/08
5039361

BETWEEN ERIC NELSON
 Applicant

AND FLETCHER STEEL LTD
 Respondent

Member of Authority: James Wilson

Representatives: Ken Nicolson for the applicant
 Carl Blake for the respondent

Submissions received: 18 January 2008 from the applicant
 31 January 2008 from respondent

Determination: 27 March 2008

COSTS DETERMINATION OF THE AUTHORITY

The substantive Determination

[1] In a determination dated 10 December 2007 (AA387/07) I found that:

- *Fletcher Steel Ltd (FSL) did not mislead Mr Nelson or act in bad faith when offering him a position at PWT.*
- *Although Mr Nelson's position at PWT was at times stressful the stress was no more than could be expected or extra ordinary.*
- *FSL were not aware of any extraordinary stress on Mr Nelson and did take steps to address those concerns that were brought to their attention.*
- *FSL did not breach its duty to provide Mr Nelson with a safe workplace.*
- *Although the stress suffered by Mr Nelson may have precipitated the symptoms of his heart disease there is no evidence that his stress caused that disease.*

- *FSL could not have known that Mr Nelson's stress may precipitate the onset of his heart disease.*
- *FSL did not breach its duty of good faith in the way it investigated Mr Nelson's first personal grievance claim.*
- *Mr Nelson's dismissal from Dimond was unjustified.*

[2] In that determination I reserved the question of costs in the hope that the parties would be able to settle that matter between themselves. Regrettably they have not been able to do so and both parties have now filed submissions seeking a contribution towards their costs.

The respective submissions

Mr Nelson's submissions

[3] For Mr Nelson, Mr Nicolson argues that the Authority found that Mr Nelson's dismissal was unjustified and that this claim, that he was unjustifiably dismissed, was a large part of Mr Nelson's overall claims. He says that while the Authority arbitrarily broke Mr Nelson's claims into compartments, all of those claims were part of an ongoing grievance and those same factors ultimately brought about his dismissal. He says that Mr Nelson should not be penalised for bringing an action that was not successful based on the arbitrary breakdown of claims when those claims had merit, were supported by relevant medical evidence and were all related to the same set of facts.

[4] Mr Nicolson says that Mr Nelson did not waste time on unimportant matters or conduct himself in any way that would prevent or prohibit him from receiving a reasonable contribution towards its costs. On the other hand he says that FSL were *unhelpful and vague and even blatantly evasive and truthful during the investigation.* He says that *no genuine attempts to settle this matter at any time were made by FSL and their attitude towards Mr Nelson, both professionally and personally throughout the proceedings..... was nothing short of arrogant and dismissive to the point of being contemptuous of both Mr Nelson and the process.*

[5] Mr Nicolson says that Mr Nelson incurred actual costs in excess of \$42,000 for the investigation, including time spent on preparation and closing submissions. He suggests that Mr Nelson should receive a *reasonable contribution* towards these costs.

FSL's submissions

[6] For FSL Mr Blake points out that Mr Nelson bought a number of claims against the Company including two disadvantages grievances and an unjustified dismissal grievance, and that FSL successfully defended the bulk of these claims. He also points out that Mr Nelson sought various remedies totalling in excess of \$213,000 but was awarded compensation of only \$7,500 and recovery of lost wages of one half of one month's pay. Mr Blake refutes the claim that the company was unhelpful and vague, blatantly evasive and untruthful. He submits that it was Mr Nelson's attitude rather than that of the company which prohibited any meaningful settlement discussions.

[7] Mr Blake says that FSL's costs in this matter were in excess of \$130,000 plus GST. In addition to attending the investigation meeting itself these costs included briefing witnesses, preparation of briefs of evidence (including that of a medical expert) attendance at various teleconference and meetings, legal research, preparation of submissions etc.

[8] Mr Blake points out that the company had made a "Calderbank" offer to Mr Nelson in December 2006, offering to settle this matter for \$3500, and made a further offer to settle the matter in December 2007. He suggests that the company's offer is far closer to the actual award made by the Authority than the amount sought by Mr Nelson. He suggests that although the award made to Mr Nelson was greater than the amount referred to in the company's offer that offer is still relevant to the issue of costs. Based on this Calderbank letter Mr Blake suggests that Mr Nelson should make a contribution to FSL's legal costs.

Legal principles

[9] In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808 the Employment Court said:

The Authority is able to set its own procedure and has, since its inception, held to some basic tenets when considering costs. These include:

- ***There is a discretion as to whether costs would be awarded and what amount.***
(Emphasis added)
- *The discretion is to be exercised in accordance with principle and not arbitrarily.*
- *The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.*
- ***Equity and good conscience is to be considered on a case by case basis.****(emphasis added)*
- *Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.*
- *It is open to the Authority consider whether all or any of the parties costs were unnecessary or unreasonable.*
- *That costs generally follow the event.*
- *That without prejudice offers can be taken into account.*
- *That awards will be modest.*
- *That frequently costs are judged against a notional daily rate.*
- *The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.*

*We hold that these principles are appropriate to the Authority and consistent with its functions and powers. **They do not limit its discretion and proper application of them should ensure that each case is considered in the light of its own circumstances.** While these general principles are applicable also to the Court, the Authority is not bound by the Binnie principles which extend the range of costs which the Court may award beyond what could reasonably be labelled "modest."*
(emphasis added)

Discussion

[10] Firstly it is important to record that I do not accept Mr Nicolson's comments regarding the way in which FSL conducted itself during the Authority's investigation of Mr Nelson's employment relationship problems. I did not find FSL or its representative *unhelpful, vague, evasive* or *untruthful*. Nor did I observe their attitude towards Mr Nelson to be *arrogant dismissive* or *contemptuous*. Mr Nicolson's comments are inappropriate and certainly not helpful. On the other hand I do accept that Mr Nelson was entitled to pursue the range of grievances he genuinely felt he had against his former employer.

[11] This case is one where it is entirely appropriate for the Authority to use its discretion to consider all of the relevant issues when making any award for costs. It is true that Mr Nelson was successful in only a part of his application. It is also true that some, but by no means all, of the evidence relating to his earlier, disadvantage, grievances was relevant to his successful, unjustified dismissal, grievance. On the other hand FSL had no option but to defend the full range of Mr Nelson's claims, a number of which, in the final analysis were not upheld by the Authority. In determining what is equitable I have considered what the possible outcomes would have been had Mr Nelson bought only his unsuccessful claims, had he bought only his successful claim and had he been successful or unsuccessful in all of his claims.

[12] Had all of his claims been unsuccessful, and in the light of the company's Calderbank offer, Mr Nelson would almost certainly have been required to make a substantial contribution to FSL's legal costs. Equally if he had bought only his unjustifiable dismissal claim the Authority's investigation would have been substantially shorter and FSL could have expected to make a contribution to Mr Nelson's legal costs. On balance equity suggests that neither party should be required to make a contribution to the other parties costs.

Determination

[13] Taking into account all of the circumstances I find that equity is best served in this particular case by making no order for costs. **Costs will lie where they fall.**

James Wilson

Member of the Employment Relations Authority