Determination Number: CA 75/06
File Number: CEA 299/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Carolyn Margaret Osborne (Applicant)
AND	Crop and Food Research Institute (Respondent)
REPRESENTATIVES	John Fitchett and Andrew Challis, Counsel for Applicant Linda Penno, Counsel for Respondent
SUBMISSIONS RECEIVED	28 September 2005 from the respondent 14 October 2005 from counsel for the applicant 14 October 2005 from Ms Osborne
MEMBER OF AUTHORITY	Paul Montgomery
DATE OF DETERMINATION	24 May 2006

DETERMINATION OF THE AUTHORITY IN RESPECT TO COSTS AND AN APPLICATION FOR JOINDER

The costs application

[1] In a determination issued on 8 September 2005, I invited the parties to attempt to resolve the issue of costs. However, as that has not been achieved it falls to the Authority to determine the matter.

[2] On behalf of the respondent, Ms Penno seeks the sum of $18,634.50 as a contribution to the respondent's actual costs of $31,204.46 (inclusive of GST and disbursements). Ms Penno's submissions state that disbursements totalling $389.97 for mileage and airport car park fees are included in the figure. Further, she states that the respondent's costs for air fares have not been included in the claim. Also included is the sum of $3,460 for the time deployed by Mr Turnbull who assisted in defending the action. The costs relating to mediation have not been included.

[3] Relying on the principles established in *Okeby v Computer Associates (NZ) Ltd* [1994] 1 ERNZ 613, Ms Penno submits that two aspects of this case are of high importance in supporting the respondent's claim for an award of actual reasonable costs. Those aspects are the amount of time required for effective preparation over or under that which would ordinarily be inferred and where arguments lacking substance were advanced, or whether unduly technical or legalistic points were needlessly taken. In respect of the former, Ms Penno refers to the series of interlocutory matters initiated by the applicant which in her submission were *doomed to failure*. In regard to the latter, counsel points to the applicant's continual assertion that the dismissal was unjustified both substantively and procedurally yet in the early stages of the investigation meeting Ms Osborne unequivocally conceded that the respondent was entitled to withdraw the role the applicant was

undertaking and that the respondent was entitled to disestablish her role in Nelson on the basis of lack of funding.

[4] Ms Penno submits *in view of this extraordinary admission, the personal grievance on the basis of a lack of substantive grounds, should not have been taken. The fact that it was, had a significant impact on the respondent's preparation and in particular on the amount of professional time required to comply with the applicant's request under the Official Information Act 1982. Had the applicant properly confined her personal grievance to alleged procedural defects, the Official Information Act request would have been significantly reduced.*

[5] On behalf of the applicant, Mr Fitchett submits that the respondent has submitted no time sheets nor invoices and that the applicant finds it difficult to accept that costs relative to a one day investigation in Nelson and the preparation therefore, could exceed $18,500 when the costs relevant to a half day mediation in Nelson were less than $2,600.

[6] Referring me to clause 15 of Schedule 2 of the Employment Relations Act 2000 and to *Okeby, Graham v Airways Corporation of NZ Ltd* (AA39/04) and *Callaghan v Poutiri Charitable Trust Inc* (AA284A/04), counsel submits that this is not a case for a multiplier approach to be applied. Basing his submission on the decision in *Callaghan*, Mr Fitchett submits that an appropriate costs award should lie in the $2,000 and $3,000 range for a one day hearing.

[7] In addressing Ms Penno's submissions regarding the amount of time required for effective preparation and where arguments lacking substance were advanced, counsel for the applicant submits that both interlocutory matters were necessary adjuncts to the main application and were necessary in terms of natural justice and were, it is submitted, forced upon the applicant following the actions of the respondent. In regard to this matter, Mr Fitchett submits that costs of the relevant matters should lie where they fall.

[8] Addressing the second issue, counsel submits that at the time of making the application and at the time of the investigation the applicant considered that her application had substance. In that context, he points to Ms Osborne's answer to the Authority's question being contrary to the tenor and detail of the brief signed by her, and *presumably came as somewhat of a surprise to everyone on* [sic] *the room*.

The history

[9] In my determination of the substantive matter, I was critical of the quality of the advice given to the applicant by counsel. Following release of the determination, Ms Penno lodged an application seeking to join Mr Fitchett to the costs application.

[10] Appropriately, the applicant's solicitors withdrew from representing Ms Osborne's interests and provided submissions on costs and in opposition to the application for joinder. It is also clear that Mr Fitchett advised the applicant that he was no longer able to act for her.

[11] In a letter to the Authority dated 12 October 2005, Ms Osborne stated that she was unable to engage professional advice because of the costs she would incur. She also made it clear that at no time had her then counsel advised her that her case was anything other than winnable. Mr Fitchett says that at all times he acted appropriately under his then client's instructions. He opposes the application for joinder in the light of the principles laid down in *New Zealand Medical Laboratory Workers' Union Inc v Capital Coast Health Ltd* [1998] 2 ERNZ 107.

[12] Counsel also referred me to two English decisions and a Privy Council matter under the jurisdiction of the New Zealand High Court. He submits that there is no inherent jurisdiction within the Authority to join counsel to an action for costs.

Discussion

[13] I have closely considered the application for joinder and in addition to the cases to which I have been referred, I have also considered *De Soysa v Porirua College Board of Trustees* (unreported, Goddard CJ, 10 May 1966, WEC25/96) and *Kamo Sports and Dive Ltd v Harrison Sports (Kamo) Ltd* (1993) 7 PRNZ 321 and *Poa v Cornwell* (1995) 8 PRNZ 588.

[14] In *Poa*, a High Court matter heard before Barker J, the learned Judge, referring to *Y v M* [1994] 3 NZLR 581, and *Harvey v Taste Tease Ltd* (unreported, 2 April 1990, High Court, Rotorua, CP219/88), says:

> *Both Judges emphasised that the personal costs liability of solicitors arises where there has been 'serious dereliction on the part of the solicitor of his duty to the Court'. It does not arise in cases of mistake, error of judgment or mere negligence.*

[15] In *De Soysa* Goddard CJ observed:

> *It seems to me that the history of the case, as traversed by counsel for the defendants, illustrates just how important it is to formulate a plaintiff's case with some degree of precision at the time of launching it.*

[16] I think the Chief Judge's comments to be apposite in this particular matter. As Ms Penno has observed, had the respondent been faced with an allegation based on possible flaws within the consultation process leading to the applicant's redundancy, the matter most likely would not have been placed in front of the Authority. I have also taken into account Mr Fitchett's comment regarding Ms Osborne abandoning her substantive claim of unjustifiable dismissal at the investigation meeting, which was, he says, *contrary to the tenor and detail of the brief signed by her and presumably came as somewhat of a surprise to everyone on* [sic] *the room*.

[17] I think it reasonable to infer from that that Mr Fitchett was as surprised as the Authority at this sudden and unexpected turn of events. However, an accurate analysis and understanding of the events preceding the redundancy and, in particular, the obligations under the collective employment agreement imposed on the respondent, the initial claim should have been more tightly framed. In short, Mr Fitchett misjudged the situation.

Determination in respect to the application for joinder

[18] The application to join Mr Fitchett as a party in a costs setting is declined.

Determination in respect of costs

[19] I have considered the precedents cited by counsel and in addition, the recent decision of the Full Court in *PBO Limited v Da Cruz* AC 2A/05, in which the Court sets out the principles to be considered by the Authority when weighing the issue of costs.

[20] This is a case in which I believe costs need to follow the event. In this case I believe the correct approach is to take $2,500 as the appropriate starting point. I have considered the significant unnecessary costs to which the respondent has been put by the manner in which the applicant's case was pleaded and am of the view that an award of $5,000 is just in the circumstances. In coming to this figure I have taken into account the matters submitted to the Authority by Ms Osborne on her own account.

[21] I direct that the applicant pay the respondent the sum of $5,000 as a contribution to the respondent's reasonably incurred costs.

Paul Montgomery
Member of Employment Relations Authority