IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 39A/08
5088134

	BETWEEN	WILLIAM BRIAN PLEACE Applicant
	AND	TREVOR CUNNINGHAM Respondent

Member of Authority:	James Crichton
Representatives:	Jenny Guthrie, Counsel for Applicant Jarrod Lovely, Counsel for Respondent
Submissions received:	28 April 2008 from Respondent 11 May 2008 from Applicant
Determination:	13 May 2008

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 11 April 2008, the Authority dealt with the employment relationship problem between these parties by determining that Mr Pleace had no employment relationship with Mr Cunningham and no personal grievance with TM Cunningham Panelbeaters Limited, Mr Pleace's employer.

[2] Costs were reserved.

The claim for costs

[3] Mr Cunningham, as the successful party, seeks a contribution to his costs in the sum of $3,000 having incurred a little over $4,000 in total costs. In his costs submissions, Mr Cunningham relies on the contention that there was a wealth of evidence available to suggest that Mr Cunningham was never Mr Pleace's employer

and that Mr Pleace was given a number of opportunities to settle the matter before the investigation meeting of the Authority, including by way of a *Calderbank* offer of $1,000.

[4] Mr Pleace, conversely, argues that costs should lie where they fall on the footing that first Mr Pleace has struggled to obtain gainful employment since he ceased employment with TM Cunningham Panelbeaters Limited and has only recently obtained full time employment again. Mr Pleace is currently making reductions in his legal costs with his counsel at a very modest rate and even at the present rate of progress, the repayment of Mr Pleace's indebtedness to his counsel will take nearly three years to repay in full.

[5] Furthermore, Mr Pleace says that a portion anyway of both Mr Cunningham's costs and his own costs were incurred as a consequence of the quite unreasonable delay in Mr Cunningham responding to the personal grievance claim. I agree with that submission and accept it.

[6] In saying that, though, I want to make clear that my acceptance of that submission from Mr Pleace is in no way to be seen as a criticism of Mr Cunningham's present counsel, Mr Lovely, who has dealt with matters promptly and professionally. It is nonetheless a fact that when the personal grievance was first raised, the matter was dealt with by other advisers to Mr Cunningham and was not dealt with in a timely fashion at all.

[7] Mr Pleace says, quite accurately, that it was nine months from the point at which he raised his grievance until he received a formal response from Mr Cunningham. In that time, Mr Pleace indicates that he incurred around $1,700 in costs, the bulk of which presumably was incurred simply in legal costs endeavouring to have Mr Cunningham respond.

[8] Even when the matter was filed in the Authority, Mr Cunningham took an inordinate period to file a statement in reply. While I understand that parties engage advisers for the purpose of dealing with the legal process, they still have an obligation to ensure that that process is being actively followed and, in my judgment, cannot be seen to profit by what is a quite unreasonable delay in addressing a matter of this kind.

[9] Given that the evidence supports the conclusion that Mr Pleace spent $1,700 simply pursuing Mr Cunningham for a reply that he was entitled to as of right, it is not

unreasonable to imagine that had Mr Cunningham instructed Mr Lovely at first instance, as well as dealing with the matter expeditiously, the costs may well have been less than they are currently.

[10] I chose to exercise my discretion against considering the Calderbank offer for the reasons advanced by counsel for Mr Pleace. In particular, the timing of the offer after the earlier inordinate delay by Mr Cunningham made it completely implausible that such an offer could be accepted.

The legal principles

[11] The recent decision of the Full Bench of the Employment Court in *PBO Ltd v. Da Cruz* ACA 2A/05 sets out the relevant principles.

[12] In particular, Judge Shaw, in giving the decision of the Court, makes it clear that the principles usually identified by the Authority in making costs awards are *consistent with* [the Authority's] *functions and powers*.

[13] In addition, Her Honour observes that there is *nothing wrong in principle with the Authority's tariff-based approach* so long as it is not applied rigidly and without regard to the particular facts of the case.

Determination

[14] This is a matter which was dealt with in half a day. Applying the tariff-based approach, a contribution to costs in the order of $1,000-1,500 might be appropriate, all other things being equal, for an investigation meeting of that duration.

[15] However, I find that in this particular case, all other things are not equal. I consider I am entitled to take into account the ability to pay of the unsuccessful party and I certainly do not want to unreasonably disturb Mr Pleace's ability to repay his own counsel, particularly in circumstances where some anyway of the costs Mr Pleace has incurred has been as a consequence of Mr Cunningham's previous adviser's default.

[16] Furthermore, even if I were minded to ignore Mr Pleace's straightened financial circumstances and make an order of costs against him, there would need to be a deduction for the amount of costs he has unreasonably had to bear from his own

counsel as a consequence of the unresponsiveness of Mr Cunningham's original adviser.

[17] In those circumstances, given that that additional cost is about $1,700 and that the amount one might award for a hearing of this length would be less than that, on a tariff-based approach, I think the proper course of action is for the Authority to exercise its discretion to not make an award on this occasion and to determine that costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority