

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 17
5271965

BETWEEN CHRISTOPHER MICHAEL
ROBB Applicant
AND AWAROA LODGE LIMITED
Respondent

Member of Authority: James Crichton
Representatives: John Levenbach, Counsel for Applicant
Alyn Higgins, Counsel for Respondent
Submissions Received: 13 December 2011 from Applicant
9 January 2012 from Respondent
Date of Determination: 31 January 2012

COSTS DETERMINATION OF THE AUTHORITY

Introduction

[1] By determination dated 5 September, 2011, the Authority resolved the employment relationship problem between these parties by determining that Mr Robb had been unjustifiably dismissed by Awaroa Lodge Limited but was unsuccessful in his claim that he was employed by Awaroa Lodge in a cleaning capacity (the Authority determined that he was a contractor) and was unsuccessful in his claim to be reimbursed for food and accommodation costs during the earlier employment.

[2] Costs were reserved.

The claim for costs

[3] The applicant (Mr Robb) through counsel, seeks a contribution to his costs alleging that he was the substantially successful party and therefore, in the usual way, he was entitled to costs because they typically follow the event.

[4] The respondent (Awaroa Lodge) through counsel, resists the application on the footing that each party was partially successful and accordingly costs should lie where they fall.

[5] It is the position that there was a measure of success achieved by both parties. However, the Authority thinks it fair to conclude that the primary claim brought by Mr Robb against Awaroa Lodge was the claim that he had been unjustifiably dismissed from his employment. On the evidence heard by the Authority, it had little difficulty in determining that the various breaches associated with the unjustified dismissal of Mr Robb were egregious and on that footing, were that the only matter before the Authority, a higher than usual award would have been justified.

[6] However, in the present case, there were a large number of claims made by Mr Robb, not all of which were successful. As the Authority has already noted, two significant portions of his claim were struck-out by the Authority. The only fair way to determine what Mr Robb's entitlement is in the present is to identify whether his claim to have been unjustifiably dismissed by Awaroa Lodge (which was successful in the Authority) is the central and most important part of his claim, or not. The Authority considers that it was the central and most important part of his claim. Evidence on that aspect took the majority of the time of the Authority and dominated the determination. On that basis then, the Authority feels able to conclude that Mr Robb was substantially more successful in his claim than Awaroa Lodge was in resisting it. However, because Mr Robb was not successful in the totality of his claim, the costs award that he might otherwise have received if he were completely successful must be reduced by the effect of his failure to prove all of his claims.

The legal principles

[7] Both parties refer in their submissions to the decision of the Full Bench of the Employment Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 as identifying the salient principles to be used by the Authority in a costs setting environment. Mr Robb also refers appropriately to a decision of the present Chief of the Authority in *Graham v. Airways Corporation of New Zealand Ltd* (2004) 7 NZELC 97 which proposes a three-step process to be used in determining costs, namely:

- (a) Consideration of the actual costs incurred by the party entitled to an award;

- (b) The question whether those costs were reasonably incurred or not;
- (c) The question of what percentage of those costs ought to be contributed to by the unsuccessful party.

[8] Applying the principles in *Graham*, Mr Robb advises the Authority that he has incurred fees totalling around \$25,000 in the successful prosecution of his claim. Mr Robb seeks a higher award of costs than would be available to him if the Authority's commonly applied daily tariff approach were to be adopted and he claims that the daily tariff starting point of \$3,000 plus GST is out of step with commercial reality.

[9] Before considering that aspect, it is useful to reflect on whether the costs incurred by Mr Robb are reasonable. For Mr Robb, it is alleged that the costs incurred were higher than would normally be the case partly because of the devastating series of Christchurch earthquakes which made the determination of the issue problematic (because of the absence of files, notes and other materials) and partly because it is alleged that the respondent made it difficult for the Authority to investigate matters in a cost effective way.

[10] The Authority accepts that an aspect of the costs incurred by Mr Robb relates to the difficulties the Authority had in concluding the investigation and issuing its determination as a consequence of the disruption caused by the Christchurch earthquakes. A portion of additional cost then can be attributed to that fact and can go to the reasonableness of the total fee incurred.

[11] The Authority is also invited to conclude that a further aspect of the costs incurred by Mr Robb was the behaviour of the respondent which, it is alleged, made it more rather than less difficult for the Authority to conclude its investigation and reach a determination on the issues raised by Mr Robb. The Authority accepts that contention at face value. As filed, this was a straightforward personal grievance which ought to have been dealt with expeditiously by the Authority. A single day's hearing would, in the normal course, have been sufficient to complete an investigation of this matter. However, Awaroa Lodge chose to respond to Mr Robb's claim by offering up only one substantive witness and that witness was unable to offer any commentary on a significant period of time when the witness was not physically present at the place of employment. As a consequence of all of that, the Authority

insisted on hearing from another witness (who ought to have been available to the Authority at first instance) and that witness could best be described as elusive. There were arrangements made to talk to that witness (thus incurring costs) which came to nought because the witness failed to make himself available.

[12] While Mr Robb relies on the absence of good faith from Awaroa Lodge as a basis for claiming higher than usual costs, it would, in the Authority's view, be more accurate to categorise the behaviour of Awaroa Lodge as being such as to contribute adversely to the costs incurred by Mr Robb.

Determination

[13] Mr Robb has been successful in his principal claim. He is entitled to an award of costs. He is entitled to have his higher than usual costs contributed to by Awaroa Lodge because its behaviour added to the costs that Mr Robb incurred. However, Mr Robb is not entitled to costs in relation to the aspects where he was not successful because costs follow the event.

[14] On balance, the Authority considers that the appropriate way to proceed is to look at Mr Robb's entitlement as if he were completely successful and then rebate that amount by the partial success which Awaroa Lodge had in defeating a portion of Mr Robb's claim.

[15] On that basis then, if Mr Robb had been completely successful in the present matter, taking as it has five days to hear, much of which has to be apportioned to the Authority's difficulty in getting evidence from Awaroa Lodge that assisted it to resolve the matter, Mr Robb might have expected an award of costs of perhaps \$15,000. However, he was not completely successful and the Authority considers that perhaps he was unsuccessful in a third of the total claim, so an award of \$10,000 in costs is appropriate.

[16] The Authority directs that Awaroa Lodge Limited is to pay to Mr Robb the sum of \$10,000 as a contribution to his costs.

James Crichton
Member of the Employment Relations Authority