

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 30/09
5083020

BETWEEN IAN WHAREAUAHI
RAKURAKU
Applicant
AND HAULAGE TRANSPORT
LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Michael McAleer, Counsel for Applicant
Douglas Abraham, Advocate for Respondent
Submissions received: 24 November 2008 from Applicant
4 November 2008 and 2 December 2008 from Respondent
Determination: 19 March 2009

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 17 July 2008 the Authority decided the employment relationship problem between these parties. The effect of that decision was a finding that the respondent, Haulage Transport Limited (Haulage Transport) was substantially successful.

[2] Costs were reserved.

The claim for costs

[3] As the successful party, Haulage Transport seeks to recover its costs in the sum of \$8,400.84 being the total costs it incurred in defending the claim unsuccessfully brought against it by Mr Rakuraku, the applicant in this matter.

[4] Haulage Transport alleges that the way in which Mr Rakuraku argued his case added to its costs. In particular, Haulage Transport refers to more than one amendment to the statement of problem and more than the usual number of telephone conferences to deal with interlocutory matters.

[5] A two day investigation meeting was scheduled and held on 23 and 24 October 2007 and because a *90 day* issue came into sharp focus during that investigation meeting, I requested submissions exclusively on the 90 day matter and then issued an interim determination dated 14 February 2008 which disposed of that issue substantially in favour of Haulage Transport.

[6] In effect, the Authority's decision was that, except in one very narrow fact situation, no personal grievance had been properly raised by Mr Rakuraku within the 90 day period. It followed that leave was required to be applied for in respect of the wider issues, if Mr Rakuraku was to seek to proceed.

[7] That interim determination of the Authority also held out the possibility that the parties might wish to try to settle matters by agreement or, in the alternative, Mr Rakuraku could make an application for his grievance to be brought on out of time or the Authority could simply determine the issue on the grievance that was found to be brought within time, the Authority having already heard the evidence on that issue.

[8] In the result, no application to consider grievances out of time was filed by Mr Rakuraku and the parties elected to have the Authority determine the live substantive grievance issue which, to do justice to the parties, was the subject of yet more submissions on the grievance issue itself.

[9] It follows that although the matter is by no means complex, it is fair to say that the employment relationship problem brought by Mr Rakuraku has followed a rather convoluted process which I hold is through no fault of Haulage Transport.

[10] In submissions filed on behalf of Mr Rakuraku, counsel urges on me the proposition that the *most important principle used by the Employment Relations Authority (in the costs setting) is the party's ability to pay*. I do not accept that principle as being anything more than a factor which the Authority must take into account. It is certainly not, in my considered opinion, *the most important principle* as Mr McAleer wishes me to accept.

[11] However, Mr McAleer does make the important observation that the Authority frequently adopts a *daily tariff* approach to the setting of costs and I am told that Mr Rakuraku is not in a strong financial position to meet a costs impost. An affidavit as to means is helpfully attached to the submissions on Mr Rakuraku's behalf.

[12] The issue of Mr Rakuraku's means is particularly relevant because Haulage Transport is seeking full advocate/client costs and is submitting that Mr Rakuraku has the means to meet a costs award because he owns rental properties.

[13] In effect, I think that both parties' submissions about Mr Rakuraku's means are accurate and well intentioned. The effect of Haulage Transport's submission is that Mr Rakuraku is capital rich while the effect of Mr Rakuraku's own submissions, while not denying that fact, indicates that he has limited income.

The legal principles

[14] The Full Court in *PBO Ltd v. Da Cruz* AC2A/5, identifies the salient principles and confirms that the Authority's approach in determining costs awards is broadly appropriate and that the *tariff based approach* often used by the Authority is appropriate so long as the particular circumstances of the individual case are taken into account as well.

Discussion

[15] Haulage Transport seeks full costs (albeit on a modest basis) and contends that the justification for that claim is at least in part a function of the way in which Mr Rakuraku proceeded with his claim. I accept there is some merit in that argument, but by no means all of the delay was occasioned by Mr Rakuraku's management of his claim. One of the reasons for the delay was confusion about an early direction of the Authority which the parties each read differently. That difference certainly cannot be blamed on Mr Rakuraku.

[16] The usual rule is that costs should follow the event and there is no reason to depart from that principle in this case. Haulage Transport was substantially successful and it is entitled to a contribution to its costs insofar as those costs were reasonably incurred.

[17] There is no issue at all about the reasonableness of the costs incurred. Indeed, Mr Abraham is to be commended for the proper way in which he has effectively divided the costs in two given the Authority's decision that this particular matter would be dealt with conjointly with a similar matter brought before the Authority against the same respondent, by another applicant, also represented by Mr McAleer.

[18] However, I am not persuaded that Mr Abraham is entitled to succeed in his argument that full costs ought to be recovered. I think the appropriate course of action is for an award of costs to be made based on the daily tariff approach, but having regard in part to some of the difficulties occasioned by the way in which Mr Rakuraku chose to bring his claim and prosecute it.

[19] While I am sympathetic to Mr Rakuraku's income position, the fact of the matter is that he brought an unsuccessful claim against his former employer, thereby putting his former employer to significant cost and it is not appropriate that he be completely excused the obligation to contribute to those costs in a proper way, given that his argument has not been found to be a successful one.

Determination

[20] The matter was heard over two days of the investigation meeting, but because of the other attendances that were necessary in relation to the preliminary matters, I think the appropriate course of action is to treat the total attendances as effectively being equivalent to a three day investigation meeting.

[21] On that basis, I direct that Mr Rakuraku is to pay to Haulage Transport the sum of \$6,000 as a contribution to the latter's legal costs. In view of Mr Rakuraku's income position as disclosed in his affidavit, I direct that Mr Rakuraku is to have a reasonable time in which to meet his obligations and in particular is to be allowed to pay his obligations off over time.

James Crichton
Member of the Employment Relations Authority