IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 97A/07
5046870

	BETWEEN	KATHRYN TAYLER and ORS Applicants
	AND	OFFICE MAX NEW ZEALAND LIMITED Respondent

Member of Authority:	J Crichton
Representatives:	Phil Shamy and Kathryn Dalziel, Counsel for Applicants Anthony Drake, Counsel for Respondent
Submissions received:	1 October 2007 from Applicants 5 October 2007 from Respondent
Costs Determination:	18 October 2007

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 9 August 2007 the Authority decided that each of the applicants had a personal grievance for disadvantage.

[2] Costs were reserved.

The claim for costs

[3] The applicants seek an award of $2,500 to $3,000 per day or part thereof per applicant. Given that there are 11 applicants and the matter was heard over two days, that would make for a potential costs award of a maximum of $66,000 which would be an extraordinary award in the Authority's jurisdiction.

[4] Conversely, the respondent proposes that it make a contribution of $6,000 in total to the costs incurred by the applicants.

[5] The arguments of the parties in relation to the costs setting are similar. Each considers the question of whether there was a need for an investigation meeting at all or whether the matter could simply be determined on the papers. Each blames the other for the fact that an investigation meeting needed to take place at all. In the end, it was the Authority's decision that an investigation meeting was required in order to hear the witnesses and assess them in person.

[6] Next, both parties consider that the factual matrix was a relatively confined one and that in fact there was significant similarity in the evidence of the applicants.

[7] Third, is the issue of hearing the applicants' claims together. The respondent correctly points out that it agreed to that course of events to assist the Authority and the applicants in dealing with the matter expeditiously.

[8] Fourth, because the applicants' evidence was, in many respects so similar, the investigation meeting was less complex and than it need otherwise have been and the preparation for it by counsel therefore less detailed than would otherwise have been required.

The legal principles

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

[10] 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*.

[11] In addition, Her Honour observed 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 facts of the particular case.

Discussion

[12] On the basis of the commonly used daily tariff based approach, an award of $6,000 as a contribution to the applicants' costs might well be seen as appropriate. The Authority would depart from the tariff based approach where there are particular circumstances which justify that departure.

[13] Whether adopting the tariff based approach or not, the Authority has traditionally taken the view that because of the largely informal and inquisitorial style of proceeding adopted in the Authority, costs awards have generally been more modest than have been the case in the adversarial setting of a Court of Record.

[14] That being the position, a costs award of the magnitude sought by the applicants would be quite extraordinary and in the absence of any evidence that the matters in contention were so complex or so out of the ordinary as to require a uniquely high award, the Authority would be loathe to make such a decision.

[15] In the particular circumstances of this case, there were no areas of particular complexity save for the plethora of applicants which to some extent was set off by the similarity of their evidence. Indeed, as I made clear already, the decision to proceed to hear the matter rather than to decide it on the papers was made by me and it was made principally on the basis that there were issues of credibility revolving around the similarity of the evidence of the applicants and the allegation made by the respondent that the applicants had colluded at their evidence. In those circumstances, it is difficult to see how the Authority could have unravelled those competing contentions without actually hearing the witnesses.

[16] In the result, the Authority heard the witnesses and was absolutely satisfied that the allegation of collusion was not made out and that, although the evidence of the applicants was in many cases very similar indeed, their individual hurt and distress as a consequence of the way they had been treated by the respondent was palpable.

[17] It follows that I am not persuaded that this is a case that justifies an extraordinary costs award. While it is true that there were a larger than usual number of applicants, the evidence was very similar and as a consequence it was easy to deal with the matter in one fixture, a decision which was assisted by the ready agreement of the respondent for that course of events to happen.

[18] If each of the applicants had brought their own claim against the respondent on the basis of the facts discerned in this particular matter, the issues would have been likely able to be dealt with in less than half of one sitting day so a realistic costs award might have been as little as $500. Applying the mathematics of that calculation to the present proceedings leads one to the inevitable conclusion that the proposal made by the respondent in respect to a costs award is a reasonable one in all the circumstances.

[19] Against that must be set the arguably additional complexity for counsel in dealing with a group of applicants in what effectively became a group action, notwithstanding the fact that each applicant filed separate proceedings. As the successful party, the applicants are, in the Authority's view, entitled to a reasonable contribution to their costs in bringing this action but with the exception of the claim for $2,500 to $3,000 per applicant, the Authority is given no assistance by the applicants' counsel in identifying what the costs of the legal representation the applicants received actually amounted to.

[20] In all the circumstances, the Authority is persuaded that the figure proposed by the respondent is a reasonable starting basis but it needs to be augmented by an allowance for the additional complexity of running a group action.

Determination

[21] I am satisfied that an appropriate contribution to the costs of the applicants is $8,000 and I direct that Office Max is to pay that sum to the applicants as a contribution to their legal costs in bringing this proceeding.

James Crichton
Member of the Employment Relations Authority