

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 145A/08
5074326

BETWEEN WENDY THOMSON
 Applicant

AND METROS PUBLISHING
 GROUP LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Rob Davidson, Counsel for Applicant
 Peter Zwart, Advocate for Respondent

Submissions received: 15 October 2008 from Applicant
 30 October 2008 from Respondent

Determination: 18 November 2008

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 29 September 2008, the Authority resolved the employment relationship problem between these parties by determining Ms Thomson had a personal grievance by reason of having been constructively dismissed.

[2] Costs were reserved.

The claim for costs

[3] Ms Thomson, through counsel, as the successful party, seeks *a significant contribution* to her actual costs which she identifies as \$7,415 exclusive of GST and disbursements.

[4] The application for *a substantial contribution* is resisted by the respondent (Metros) on the footing that costs in the Authority are typically *modest* and the principles applicable would generally not favour an award of the magnitude sought.

The legal principles

[5] Both parties quite properly refer to the recent decision of the Full Bench of the Employment Court in *PBO Ltd v. Da Cruz*, ACA2A/05 as enunciating the relevant principles.

[6] Her Honour Judge Shaw, in giving the decision of the Court, lists the principles that ought usually to apply in the costs setting, but then goes on to observe that costs in the Authority will usually be *modest* and, inter alia, that there is nothing wrong in principle with a *tariff-based approach* so long as it is not applied arbitrarily and without regard to the facts of the particular case.

Discussion

[7] There are no particular factors which single out this matter as special or exceptional. The case was well argued by both representatives and there were no particular lines of argument or evidentiary matters which materially contributed to the extending of unnecessary costs.

[8] One witness was summonsed by the Authority and because of his unavailability for the original fixture date for the investigation meeting, a further date had to be agreed. The applicant, Ms Thomson, not unnaturally, seeks recompense for that additional time in her application; Metros, on the other hand, points out that the witness was the Authority's and not the respondent's and so the respondent ought not to be liable for the additional costs.

[9] Metros also argues that Ms Thomson was not wholly successful and draws my attention to first the finding of contribution which I made against Ms Thomson, and second, the fact that no wages were awarded to Ms Thomson.

[10] As to the contribution issue, Metros relies on Chief Judge Colgan's decision in *White v. Auckland District Health Board*, 15 October 2007. Of course, that decision has been overturned by the Court of Appeal so the contention that there is judicial

support for the notion that an employee's contributory conduct should be considered in a costs setting is no longer true.

[11] As to the wages issue, it is true that no wages were awarded to Ms Thomson, but that is through no fault of hers. No wages were awarded because she was too ill to work so there is no question of any culpability in that regard.

Determination

[12] This was a matter dealt with effectively in a day and a half or thereabouts of hearing time. In fixing costs, I take into account the parties' submissions and I accept to some extent the argument advanced by Metros that it should not have to bear the additional cost that may have been incurred by Ms Thomson in respect of the witness called by the Authority. There is an argument for the view that, in the particular circumstances of this case, the witness ought to have been called by Ms Thomson because certainly his evidence was favourable to her, but no criticism can be levelled at her or her counsel for that decision. What is true is that Ms Thomson's counsel chose to prepare a brief of evidence for the summonsed witness, notwithstanding that the witness was an Authority witness and not a party witness.

[13] Having taken all those matters into account, I fix costs in this matter at \$4,750 and I direct that that sum is to be paid by Metros to Ms Thomson as a contribution to her legal costs, together with a further amount of \$70 being the filing fee disbursement.

James Crichton
Member of the Employment Relations Authority