IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 24
5343237

	BETWEEN	ALLAN WALLACE Applicant
	AND	BROADWAY GENERAL CARRIERS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Jeff Goldstein, Counsel for Applicant Keith Church, Director of the Respondent
Submissions Received	18 January 2012 from Counsel for the Applicant; No submissions received from the Respondent.
Determination:	15 February 2012

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination dated 16 December 2011 the Authority found that the Applicant's personal grievance for unjustified dismissal had been made out. Costs were reserved and the parties were invited to make written submissions in relation thereto. The applicant, being successful, claims his costs. The respondent, although given an ample opportunity to make written submissions in response to those made on behalf of the applicant, failed to do so. Although Mr Church had indicated at the investigation meeting that he was moving to Australia very shortly afterwards, he had provided an email address for the use of the Authority, which turned out to be incorrect. However, communications were sent to Mr Church's New Zealand email address, and I am satisfied that sufficient efforts have been made by the Authority to ensure that Mr Church has been given an opportunity to comment on the applicant's application for costs.

[2] The evidence and submissions in respect of the substantive investigation meeting were heard in the morning of 16 December 2011. The applicant was

represented by counsel, whereas the respondent was represented by Mr Church, a director of the respondent.

[3] Counsel for the applicant submits that a contribution of $5,000 costs, plus the Authority's filing fee, be ordered, relying upon the following principles:

a. The way in which the case was conducted;

b. The conduct of the parties at the hearing;

c. The importance of the case to the parties;

d. The amount of time required for effective preparation over or under that which would ordinarily be inferred;

e. Whether arguments lacking substance were advanced or whether unduly technical or legalistic points were needlessly taken; and

f. The actual costs incurred.

[4] These principles were enunciated by Chief Judge Goddard in *Okeby v Computer Assocs (NZ) Ltd* [1994] 1 ERNZ 613 at 619 as the major factors to be considered in awarding costs in personal grievance cases in the Employment Tribunal (the forerunner of the Employment Relations Authority). However, the leading case on the award of costs in the Authority is now *PBO Ltd v Da Cruz*, [2005] 1 ERNZ 808, in which case the full Employment Court questioned the relevance of *Okeby* when setting costs in the Authority. The principles governing the setting of costs awards in the Authority as promulgated in *Da Cruz* included:

a. There is a discretion as to whether costs would be awarded and what amount.

b. The discretion is to be exercised in accordance with principle and not arbitrarily.

c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

d. Equity and good conscience is to be considered on a case by case basis.

e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

g. That costs generally follow the event.

h. That without prejudice offers can be taken into account.

i. That awards will be modest.

j. That frequently costs are judged against a notional daily rate.

k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[5] Applying first the principle that costs generally follow the event, I am satisfied that there is no reason why that principle should not be applied in this case.

[6] Counsel for the applicant submits that the Authority should put great weight on the way that the respondent dealt with the claim, asserting that the respondent was unco-operative and effectively obstructive in regard to the applicant's claim. The history of the claim's progress through the Authority is worth briefly stating when considering this submission. The respondent had initially been represented by a firm of solicitors which had lodged a statement in reply which had asserted that the applicant had never been employed by the respondent. That firm was apparently disinstructed by the respondent when it realised that the firm had made an error in that respect. The respondent indicated that the solicitors had been at fault. However, the respondent did not alert the applicant, or the Authority to that change in position and it only became clear during the telephone directions conference on 30 November 2011 that the respondent accepted that it had in fact employed the applicant. The respondent maintained, however, that the respondent had not dismissed the applicant.

[7] In addition, although both the applicant's counsel, and the Authority had requested the respondent to produce wages and time records for the applicant, these were not produced, and no cogent reason given for the failure.

[8] It is possible that the failure to advise the applicant in a timely fashion that the respondent accepted that it had employed him, together with the failure to produce wage and time records had caused the applicant's counsel to expend more time on the conduct of the matter than would otherwise have been the case. However, counsel for the applicant does not identify to what extent that conduct by the respondent increased his work, and subsequently the costs incurred on behalf of the applicant. It is not appropriate for me to speculate upon the effect and hence I am unable to factor in these aspects of the respondent's conduct in assessing costs.

[9] The respondent denied dismissing the applicant. Although I found in the investigation meeting that the applicant had been dismissed, and unjustifiably to boot, I do not believe that Mr Church adopted the stance he did in bad faith. Mr Church had not been represented at the investigation meeting and, when he asserted that he had not dismissed the applicant, he had been relying upon the dictat of Freight Lines that the applicant must not work for them any more. Therefore, although the laws of New Zealand required a fair process to have been followed by Mr Church, as far as he was concerned, Freight Lines' requirement that the applicant be dismissed left him with no choice. Therefore, I do not accept that the respondent denying dismissal was a wholly unreasonable stance for it to have taken so as to justify awarding higher costs than would otherwise be the norm.

[10] Taking all this into account, I see no reason to depart from the normal practice of awarding costs on the basis of a daily tariff of $3,000. As the investigation meeting lasted half a day I award costs in the sum of $1,500.

[11] I also award costs in relation to the filing fee of $71.56 incurred by the applicant.

David Appleton
Member of the Employment Relations Authority