

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 35/06  
ARC 29/05**

IN THE MATTER OF	of a challenge to a determination of the Employment Relations Authority
BETWEEN	STEPHEN ROSS WACKROW Plaintiff
AND	FONTERRA CO-OPERATIVE GROUP LIMITED Defendant

Hearing: Submissions Received 5, 26 May and 2 June 2006

Judgment: 3 July 2006

---

**JUDGMENT OF JUDGE C M SHAW**

---

[1] This is a de novo challenge to a costs determination by the Employment Relations Authority. It was heard on the papers by way of memoranda submitted by counsel.

[2] The Authority heard Mr Wackrow's urgent application for three interim injunctions:

1. To reinstate him to his employment.
2. To restrain Fonterra from requiring him to attend a disciplinary meeting.
3. To restrain Fonterra from dismissing or suspending him on similar reasons relied on for the first suspension.

[3] The determination ordered Fonterra to lift the suspension and reinstate Mr Wackrow to his employment but did not make orders 2 and 3.

[4] Fonterra challenged that determination to the Employment Court where the Authority's determination was in large measure upheld.

[5] Subsequently, both parties sought costs on the Authority's investigation although Fonterra sought an alternative order that costs lie where they fell.

## The Authority's determination

[6] The Authority held that costs follow the event and are awarded to a successful party to compensate for the expense of pursuing the case. The successful party is entitled to a reasonable contribution to costs actually and reasonably incurred.

[7] It accepted Mr Wackrow's submission that he should not be denied a contribution because he did not succeed in all costs. The Authority was not prepared, however, to apply the costs principles in *Binnie v Pacific Health Ltd*<sup>1</sup> and based its determination on the authority of *Harwood v Next Homes Ltd*<sup>2</sup>.

[8] The Authority had been advised that the actual costs incurred by Mr Wackrow had been \$12,080 for senior counsel and \$7,800 for junior counsel plus disbursements of over \$1,850 but found that Mr Wackrow's reasonably incurred costs amounted to \$9,600 based on 2 days of preparation and 8 hours of hearing time at senior counsel's rate of \$400 an hour.

[9] In setting the contribution to be made to these costs, the Authority took into account Mr Wackrow's financial circumstances at the termination of his employment. It ordered that Fonterra was to pay him \$4000 plus \$365.40 general disbursements. His claim for \$1,850 for the preparation of an affidavit by his counsel in criminal proceedings was refused because the Authority had not relied on that evidence.

## The challenge

[10] Mr Wackrow challenges the determination on the grounds that it is wholly inadequate and does not represent a reasonable contribution to the plaintiff's costs actually incurred. In the statement of claim he sought:

- (a) *A proper contribution to his costs and disbursements reasonably incurred in relation to:*
  - (i) *the hearing before the Authority, being the sum of \$24,580.14 (inclusive of GST);*
  - (ii) *preparation of the costs submissions, being the sum of \$1,450 (inclusive of GST); and*

---

<sup>1</sup> [2002] 1 ERNZ 438

<sup>2</sup> [2003] 2 ERNZ 433

- (iii) *interest on the award from the date of notification of the personal grievance to the date of judgment calculated according to cl 14 of schedule 3, Employment Relations Act 2000.*

[11] The challenge is opposed by Fonterra. The decision in this matter was held over pending the finalisation of the full Court judgment in *PBO Limited v Da Cruz*<sup>3</sup> because that decision was to deal with the principles which apply to challenges to costs determinations of the Authority.

## Case for the plaintiff

[12] Mr Drake set out the material facts as follows:

- (a) *The Authority's determination on the plaintiff's urgent interim injunction application was challenged and determined by the Employment Court in the proceeding ARC 26/04, judgment AC 32/04 dated 10 June 2004.*
- (b) *The Court issued a decision on costs in favour of the plaintiff for that hearing by judgment AC 32A/04 dated 17 December 2004. The Court awarded costs to the plaintiff of \$22,666, as a contribution to his actual costs of \$33,668.68, and full disbursements of \$3,873.61.*
- (c) *The plaintiff applied to the Authority for an award of costs to be fixed, the parties being unable to agree on the amount. His actual costs had been \$22,365 and his actual disbursements were \$2,215.14.*
- (d) *An additional amount of \$1,450 (inclusive of GST) were incurred for the costs of preparing and filing the plaintiff's application to the Authority for costs ... . A reasonable contribution for those additional costs were [sic] not sought in the Authority but are [sic] claimed in this proceeding before the Court.*
- (e) *The Authority awarded the plaintiff \$4,000 as a contribution to his costs plus \$365.14 for disbursements.*

[13] Acknowledging that in a de novo challenge it is not necessary to establish errors in the Authority's determination, Mr Drake submitted that errors were made in the Authority which resulted in a failure for it properly to exercise the discretion to award costs which must be exercised according to principle and not arbitrarily.

[14] He submitted that the errors were as follows:

- A failure to include the costs of junior counsel in calculating actual costs when the Authority had acknowledged that the issues were of great importance to the plaintiff and that he was justified in instructing senior counsel. This would have brought the reasonable costs to \$14,400.

---

<sup>3</sup> Unreported, AC 2A/05, 9 December 2005

- A failure to include GST which was payable by Mr Wackrow and not recoverable by him. This would have increased the actual costs to \$16,200.
- In assessing the appropriate legal contribution, the member awarded only 40 percent of the costs which it found were reasonable in spite of saying that it had regard to his financial circumstances and loss of employment.
- Refusing to allow the recovery of the costs of the affidavit from his criminal barrister on the basis that the Authority did not rely on that affidavit in reaching its determination.

[15] To these points, Mr Drake added that the case was complex requiring three affidavits for the plaintiff and two for the defendant. There was also a large amount of documentation. The case was heard under circumstances of particular urgency. Mr Wackrow was facing dismissal if he did not respond to allegations made by the SFO. Mr Wackrow had no alternative but to apply for the interim relief to preserve his right to a fair criminal trial as well as his employment.

[16] Mr Drake noted that the allegations Mr Wackrow faced were not related to his employment by Fonterra, the events having occurred before that company existed.

[17] Mr Drake concluded that in accord with *PBO v Da Cruz* the Authority is not bound by the principles in *Binnie* nor to the same approach as in the Court however the costs award should be a just reflection on the factors present in this case.

### **Case for the defendant**

[18] In her memorandum opposing the challenge, Ms Muir relied on the principles set out in *PBO v Da Cruz*. The full Court held that the role of the Court on a challenge to a costs determination of the Authority is to stand in the shoes of the Authority and to assess the evidence relating to the costs award in that forum. She summarised the relevant principles as being:

1. Costs generally follow the event.
2. Awards will be modest, and
3. Frequently costs are judged against a notional daily rate.

[19] She submitted that based on these principles any award of costs for an Authority hearing should be within the usual range of between \$1,000 and \$3,000 adjusted if necessary taking into account relevant factors.

[20] In the present case, the defendant successfully defended two of the three the interim orders sought by the plaintiff in the Authority. Ms Muir submitted that it is the defendant not the plaintiff who should receive an award of costs. However, she submitted that the costs awarded by the Authority were more than fair.

[21] In relation to the costs incurred by the plaintiff, Ms Muir submits that they were not reasonably incurred because it was not necessary for the plaintiff to proceed to the Authority in order to preserve his rights in relation to the criminal proceeding. In that regard, she relied on what had occurred by way of correspondence and other communications before the Authority hearing.

[22] The Court is not able to judge those matters. It is enough to say that it was the view of the Authority that an interim injunction should issue to prevent Fonterra from asking Mr Wackrow certain questions which may have compromised his criminal trial and this was confirmed by the Employment Court. I do not accept the defendant's position that Mr Wackrow's application was unnecessary.

[23] Mr Wackrow's criminal barrister, Mr Davison QC, adduced evidence by affidavit at the Authority meeting to advise the Authority about the issues in criminal prosecution of Mr Wackrow. Ms Muir submitted that it was unnecessary at that stage as the defendant had stated throughout, including in its statement of reply, that it recognised the plaintiff's right to silence. Mr Davison's evidence was not referred to by the Authority and no weight appeared to have been placed on it, as it was not relevant to the employment setting.

[24] I do not accept that submission. The issue at hand was not whether Fonterra accepted Mr Wackrow's right to silence, a matter of law in any event, but the way in which it chose to recognise that right. Whether or not the Authority actually relied on it in its determination, it was central to Mr Wackrow's case and the preparation of it was, in my view, relevant and was therefore a properly incurred disbursement.

## **Decision**

[25] In setting costs of an investigation hearing, it is particularly difficult to establish actual and reasonably incurred costs because that is an approach designed for an adversarial process. The difficulty is compounded when the Authority tries to assess them as "reasonably incurred costs" without reference to the other part of the *Binnie* test of "actual costs." A more realistic way of assessing costs is to base it on

a daily tariff. In those circumstances, the order of \$4,000 is based on the higher range of the daily rates but is justified because it takes into account the circumstances of Mr Wackrow's application particularly the degree of preparation which needed to be put into it.

[26] I conclude that the award of \$4,000 was therefore appropriate. However, I hold that the Authority should have awarded the costs of preparation of Mr Davison's affidavit. It was a proper disbursement given the close relationship between the criminal proceedings and the employment investigation.

### **Conclusion**

[27] The challenge is allowed to the extent that, in addition to the Authority's order that Fonterra is ordered to pay \$4,000 in costs to Mr Wackrow it is also to pay his actual disbursements of \$2,215.14 which includes the costs of preparation of the affidavit from Mr Davison.

**JUDGE**

Judgment signed at 11.55am on 3 July 2006

Solicitors: