

**BEFORE THE ACCIDENT COMPENSATION APPEAL AUTHORITY  
AT WELLINGTON**

[2014] NZACA 11

ACA 01/06

**IN THE MATTER** of the Accident Compensation Act  
1982

**AND**

**IN THE MATTER** of an appeal pursuant to s 107 of  
the Act

**BETWEEN** **PETER JOHN FIRMIN**  
Appellant

**AND** **ACCIDENT COMPENSATION  
CORPORATION**  
Respondent

**HEARING** On the papers

**AUTHORITY**

Robyn Bedford

**COUNSEL**

K Murray, advocate for the appellant

H Evans, counsel for the respondent

**DECISION ON COSTS**

[1] The substantive decision under *Firmin v ACC* [2013] NZACA 15 was issued on 8 November 2013. Leave was reserved to the parties to file submissions on costs if agreement could not be reached, and this process was completed on 6 March 2014.

[2] Mr Murray referred me to extensive case law, which included decisions in the District Court, and submitted that the following legal principles apply to an award of costs made by the Authority:

- There is a discretion as to whether costs will be awarded and at what amount.
- The discretion is to be exercised in accordance with principles and not arbitrarily.
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- Equity and good conscience are to be considered on a case-to-case basis.
- Costs are not to be used as punishment or as an expression of disapproval of the unsuccessful party's conduct, although conduct that increases costs unnecessarily can be taken into account in inflating an award.
- It is open to the Authority to consider whether all or any of a party's costs were unnecessary or unreasonable.
- Frequently costs are judged against an hourly rate.

- Each case must be considered on its own facts.

[3] Mr Murray also referred me to *Cox v Accident Compensation Commission*<sup>1</sup> and quoted the passage where the Supreme Court held that there is no restriction or caveat on the Authority as to what may be regarded as reasonable costs in any given situation and nor is there a scale of costs such as applies in the District Court. Mr Murray also noted Judge Middleton's decision in *W v ACC*<sup>2</sup> that increased costs can be incurred where there is a need for ACC to carry out an investigation that ends up being undertaken by the lawyer, and the cushioning principle accepted as the starting point for a costs award in *Gibson Aero Ltd v ACC*.<sup>3</sup>

[4] Applying the principles to Mr Firmin's appeal, Mr Murray said that after the directions conference in Christchurch, on 14 February 2013, a proposal was put to ACC, which would have resolved the matter, which he said was in line with the substantive decision.<sup>4</sup> ACC was also put on notice by Mr McDouall's correspondence dated 30 June 2009 (in which Mr McDouall sent ACC a copy of the determination by the Secretary of Defence and said it was not a determination by the Commissioner and that he would test this in court if he must, but that it may be more appropriate for ACC to consider the primary decision because it was clearly in error).<sup>5</sup>

[5] Regarding his attendances on which the costs claim was based, Mr Murray said that he was engaged "after 30 June 2009" to represent Mr Firmin. I note, however, that Mr McDouall was acting until at least 13 February 2012, and Mr McDouall brought the back appeal into the Authority's jurisdiction. The record suggests that Mr Murray commenced representing Mr Firmin after this, and the date Mr Murray took over acting on the reinstatement of the appeal should have been clearly stated.

[6] Mr Murray's attendances, without any stated start or finish date, were generically listed in his submissions to support "chargeable fees" of \$23,968.88, GST inclusive, for attendances totalling 119.1 hours at an Advocate rate of \$175.00 per hour plus GST. Mr Murray also listed disbursements of \$1430.96, which gives a total of \$25,399.84.

[7] Mr Murray also sought \$1,344.00 for payment of Mr Firmin's ferry travel costs for his Christchurch trips in February, June and October 2013 to attend the conferences and the appeal hearing and added another \$2,200 for his driving costs at the reduced legal aid rate, which gives a total of \$3,544.00, but Mr Murray claimed \$3,642.24 at what he described as a reduced legal aid rate for the mileage. This brought the total claim in the submissions to \$29,042.08.

[8] Mr Murray attached an invoice dated 25 November 2013 and invoices for Mr Firmin's ferry travel to the submissions and submitted that this distinguished the present appeal from cases such as *Tangi v ACC*<sup>6</sup>, in that invoices were produced to ACC for the legal fees charged to successfully prosecute the appeal. However, the invoice is as generic and uninformative as the fees claim in the submissions and it contains quite glaring mistakes and once again, no start or finish date was stated,

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<sup>1</sup> [1982] NZAE 534

<sup>2</sup> [1995] NZAR 58

<sup>3</sup> [1990] ACAA 308

<sup>4</sup> The proposal was not produced.

<sup>5</sup> See the substantive decision at paragraphs [28] – [34].

<sup>6</sup> [2012] NZCAC 4 and [2013] NZCA 14

and nor were the attendances itemised with any particularity to demonstrate that all were specifically related to the conduct of the appeal from March 2012.

[9] Mr Murray identified his charge out rate as \$205.00 per hour, which is in fact his \$175.00 Advocate fee plus GST. He charged \$18,855.01 for 93.6 hours where the attendances were described as comprising taking instructions from an ACC client, following up the instructions in relation to a ACC law issue, which included legal research, reading of documentation and consulting with third parties. Preparation of submissions and the casebook, attendance at the three case conferences and a 1-day hearing, were charged at \$5,131.88 for 25.5 hours. Travel time and disbursements were listed and Mr Murray then added GST of \$3,315.78, despite this already being included in the charge out rate and being already included in the disbursements. The total costs and disbursements were charged at \$25,420.84 (however the correct total is actually \$27,421.70). With the \$3,642.24 added in, the total claimed is \$29,063.08.

[10] For reasons I am yet to understand in what appear on the face of it to be contingent fee costs applications, practitioners and advocates routinely submit that as the starting point, there is some sort of scale of costs that the Appeal Authority applies which is 66% of actual and reasonable costs. Despite his submission that there is no scale of costs and the Authority's discretion is to be exercised in accordance with principles, not arbitrarily, which make it clear that the idea of a set percentage is completely contrary to the established exercise of the Authority's unfettered cost's discretions, as an alternative to his submission that full indemnity costs are warranted due to the actions of ACC (which clearly would not be successful), Mr Murray sought a costs award of 66% of what he described as being his actual and reasonable costs. Based on the total costs used in the submissions, Mr Murray calculated this at \$15,819.46. Mr Murray did not attempt to explain the disparity between the figure used in his submissions and the invoice he put to Mr Hunt.

[11] For his submissions in reply, Mr Evans produced Mr Hunt's letter to Mr Murray dated 10 December 2013 in reply to the proposal which Mr Murray put to him on 9 December 2013, which was apparently for payment of indemnity costs of \$25,420.84 as per the invoices dated 25 November 2013, plus the listed disbursements and \$2,200.00 for Mr Firmin's attendance for three hearings based on his combined costs of ferry crossings and mileage.

[12] Mr Hunt declined the proposal on ACC's behalf and referred Mr Murray to the Authority's decisions in *Tangi v ACC*<sup>7</sup> and *Smith v ACC*<sup>8</sup>, and the attendances involved in those cases and the awards ultimately made of \$6,500.00 and \$1,500.00 respectively. ACC offered costs of \$5,000.00 together with reasonable disbursements. This did not include the \$384.00 telephone charges, Dr Moore's fee of \$500.00, or Mr Firmin's \$2,200.00 travel claim. The disbursements associated with printing of \$297.65 were accepted.

[13] In his submissions, Mr Evans referred also to the costs awards made by the Authority in *Edwards v ACC*<sup>9</sup> and in *Smith v ACC*<sup>10</sup>, where the Authority applied a

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<sup>7</sup> [2012] NZCAC 4 and [2013] NZACA 9

<sup>8</sup> [2013] NZCAC 12

<sup>9</sup> [2013] NZACA 10

<sup>10</sup> [2014] NZACA 3

“rule of thumb” approach and awarded costs of \$2,800.00 plus reasonable and proved disbursements. The *Smith* appeal concerned substantive issues as well as an appeal against the costs awarded on the review that gave rise to the appeal, and in that case I was critical of the pro-forma “invoice” that the appellant’s advocate produced for the appeal hearing, to support the costs identified in the submissions for the review. I did not consider the invoice when upholding the Reviewer’s costs award, except to explain the difference between the charge out rates, as the invoice was stated to be GST inclusive, and higher than the figures used in the submissions.

[14] Mr Evans submitted that while there is no set tariff of costs, the decisions reflect an award of costs within the range of \$1,500.00 to \$6,500.00, and an amount at the upper end would only be made in a particularly complex appeal. The appeal was relatively straightforward, and on this basis, Mr Evans suggested that an appropriate award would be about \$2,000.00 to \$3,000.00, rather than the \$5,000.00 that ACC had first offered.

[15] Mr Evans refrained from criticising Mr Murray’s conduct of Mr Firmin’s costs claim, except to the extent of repeating the Authority’s views expressed in *Edwards*, that adding up attendances and claiming a percentage is unacceptable. He also challenged the disbursements claimed and said that the only reasonable disbursement was the cost of printing of \$267.95. He submitted that it was not reasonable and necessary for Mr Firmin to attend the hearing, the claimed telephone charge was excessive, there was nothing to indicate that Dr Moore had played any role in the appeal, and he had not in any event invoiced Mr Firmin for the amount claimed.

## Discussion

[16] I note for the record, that if the figures Mr Murray has bandied about in his letter and invoice to Mr Hunt and in his submissions were presented to the Authority by a practitioner, I would refer that practitioner to the Law Society for investigation of his charging practices. As Mr Murray is an advocate and thus outside the purview of the Law Society all I can do is make my decision clear enough to try to discourage other costs claims such as the one brought by Mr Murray.

[17] Mr Hunt said in his letter to Mr Murray that it was unclear from the invoice whether and if so to what extent, the costs identified were those associated with the judicial review application. Despite this, in his submissions Mr Murray waffled about when he commenced his attendances for Mr Firmin, and as I noted above, it is clear from the court file at least, that he must have commenced acting no earlier than after mid February 2012. This was after Mr McDouall had brought matters to the stage where the Authority was seized of the appeal and substantive submissions were filed on Mr Firmin’s behalf, along with the judicial review consent memorandum that was so important to the determination of this appeal, given that Mr Barnett and Mr McDouall were no longer acting.

[18] By asserting that his fees were actual and reasonable and seeking a flat a 66% contribution, Mr Murray has put the reasonableness of his fees into contention. I cannot comment on whether or not the fees were “actual” in the sense of having been performed, or actually charged to Mr Firmin, but I have been a cost reviser for the Law Society and I have acted in the ACC jurisdiction for almost 30 years and I believe I can make a reasonable assessment of the fees that would have been reasonable to charge from when Mr McDouall ceased to act.

[19] Mr Murray had to familiarize himself with the background information and conduct the appeal according to the directions made. The directions required Mr Murray to file a formal application for reinstatement, obtain Mr Firmin's file to disclose Ms Thistoll's advice and prepare submissions and sworn evidence to support the application for reinstatement, but as far as the substantive issues were concerned, Mr Murray relied very heavily on Mr McDouall's submissions and no new arguments were advanced.

[20] I have no difficulty ignoring the bulk of the 93 hours charged for taking instructions and effectively, talking about the appeal, but I think that the 25.5 hours charged for attendance at the case conferences and preparation of submissions and attendance at the hearing is quite reasonable and should stand. Obtaining Mr Firmin's files and preparing statements and contingencies should also be properly taken into account, as well as travel time for Mr Murray.

[21] In my view, a reasonable fee, based on Mr Murray's charge out rate of \$175.00 per hour and the attendances actually required of him, would appear to be in the vicinity of around \$12,000.00 exclusive of GST, at the very most. That is the starting point that I have adopted and the rest of the exercise involves a balancing of the actions of ACC that unnecessarily increased Mr Firmin's costs, against the cushioning principle that underpins awards of costs in this jurisdiction.

[22] ACC's conduct of the appeal did add unnecessarily to Mr Firmin's costs as ACC raised what arguments on matters that should have been treated as settled, either by agreement, or by operation of law, such as:

- ACC argued against the Authority considering both the application for reinstatement of the appeal and the substantive appeal at the hearing, despite having agreed to this combined process in respect of ACC's strike out application and Mr Firmin's substantive application if the Authority returned the appeal to the High Court to consider under the aegis of Mr Firmin's Judicial Review application.
- ACC argued that non taxable and tax free allowances could not be included in Mr Firmin's relevant earnings calculation because they were excluded under s 52(2)(d) of the Accident Compensation Act 1982, when the law on this matter has been settled since the 1994 decision of Barker J in *ARCIC v Lewis*<sup>11</sup>. ACC's position (as maintained in every appeal that has come before me on this issue) is clearly wrong in law and has been so for the last 20 years.
- ACC insisted that it was up to Mr Firmin to prove that the Commissioner of Inland Revenue ("the Commissioner") had not made a determination under s 73 of the Income Tax Act 1976 to exempt the "*Singapore Allowance*" from tax as a reimbursing allowance. Mr McDouall obtained that proof and provided it to ACC in 2010, but ACC continued to maintain that the allowances were excluded under s 52(2)(d) of the 1982 Act.
- ACC argued that the exemption from tax of the Singapore Allowance in a Declaration made by the Secretary of Defence under s 64(2) of the

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<sup>11</sup> HC Auckland, 149/93, April 1994 per Barker J

Income Tax Act 1976, the purpose being to exempt pay and allowances received by servicemen serving abroad from tax during their period of overseas service, was to be treated as a declaration by the Commissioner under s 73 of the Act to exempt it from tax, as both were inherently tax related, when the wording of s 52(2)(d) is clear and unequivocal in its requirements for the exclusion of an allowance from an employee's earnings for the purpose of paying earnings related compensation.

[23] I think that in the ordinary course, an award of around the \$2,000.00 to \$3,000.00 that Mr Hunt suggested if the cushioning principle only is applied, would be a reasonable exercise of the Authority's discretion. Under the circumstances of this appeal, the \$5,000.00 ACC offered to pay in Mr Hunt's letter of 9 December 2013, is a fairer and more reasonable sum, but it does not take into account the impact of ACC's actions on Mr Firmin's costs, in so far as Mr McDouall had put ACC on notice in his letter of 30 September 2009 that costs would be an issue if the allowances had to be litigated, and ACC continued to advance the same arguments after Mr Murray took over acting. In this context, an award at the higher end of the range Mr Hunt suggested of \$6,500.00 is more appropriate.

[24] Had Mr Firmin asked for costs for Mr McDouall's attendances in relation to his initial investigative work, the removal of the appeal from the jurisdiction of the High Court to the Authority and the memoranda and submissions he prepared, which were absolutely vital to Mr Firmin's successful appeal, then the costs award may well have been closer to the \$15,819.46 Mr Murray sought on Mr Firmin's behalf. However, Mr Firmin has abandoned any claim in respect of Mr McDouall's fees, and those costs must lie where they fall.

[25] As far as the disbursements are concerned, I am satisfied that the printing of \$267.95 and Mr Murray's travel of \$300.00 should be paid. Mr Murray's telephone charges are properly payable by Mr Firmin as a client, not as a litigation disbursement. There is insufficient evidence to support Dr Moore's claimed fee of \$500.00 being directly related to the appeal and as Mr Evans pointed out, Dr Moore has not submitted an invoice for payment. Mr Firmin's attendance at the conferences and the hearing was not necessary, as he was represented throughout, he was not called as a witness and ACC should not have to pay for his decision to be present.

[26] Accordingly, ACC is ordered to pay Mr Firmin costs of \$6,500.00 plus disbursements of \$567.95.

**DATED** at WELLINGTON this 16<sup>th</sup> day of April 2014

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R Bedford