

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 87
5282890**

BETWEEN	JOHAN AARTS Applicant
AND	BARNARDOS NEW ZEALAND First Respondent COMMISSIONER OF NEW ZEALAND POLICE Second Respondent MINISTRY OF SOCIAL DEVELOPMENT Third & Sixth Respondent THE PRIVACY COMMISSIONER Fourth Respondent THE OMBUDSMAN Fifth Respondent THE SERIOUS FRAUD OFFICE Seventh Respondent THE DIRECTOR OF HUMAN RIGHTS PROCEEDINGS Eighth Respondent THE INDEPENDENT POLICE CONDUCT AUTHORITY Ninth Respondent LANCE LAWSON BARRISTERS AND SOLICITORS Tenth Respondent

Member of Authority: Eleanor Robinson

Representatives: Robert Lee, Advocate for Applicant
Jo Douglas, Counsel for First Respondent
Antoinette Russell, Counsel for Second, Third & Sixth Respondents
Katrine Evans & Delaney Mes, Counsel for Fourth Respondent
David Gee, Advocate for Fifth Respondent
Michael Quigg, Counsel for Seventh Respondents
Gillian Service, Counsel for Eighth Respondent
Allan Galbraith, Advocate for Ninth Respondent
G Burt, Counsel for Tenth Respondent

Costs submissions 29 February 2012 from Applicant
13 February 2012 from Second, Third & Sixth Respondents
14 February 2012 from Eighth Respondent
No submissions from First, Fourth, Fifth, Seventh, Ninth and Tenth Respondents

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] By determination dated 18 January 2012 ([2012] NZERA Auckland 22) the Authority found that Mr Aarts's claim against the Second, Third, Sixth and Tenth Respondents had been brought out of time; that there were no grounds for issuing a summons of discovery of the evidential videotaped interviews held by the Second Respondent; and that the Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Respondents had not incited, instigated, aided or abetted the First Respondent in the alleged breach to the Applicant's employment agreement.

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and the Second, Third, Sixth and Eighth Respondents, and the Applicant have filed submissions in respect of costs.

[3] In this particular case, the Authority made a determination based "on the papers" rather than by way of an Investigation Hearing.

Submissions of the Second, Third and Sixth Respondents

[4] Ms Russell, on behalf of the Second Respondent, the Commissioner of New Zealand Police ("Police"), submits that although the cost of much of the workload was shared with the Third and Sixth Respondents, the Ministry of Social Development ("MSD"), the actual costs to the Police were in excess of \$11,000.00, and the Police is seeking a contribution to costs of \$2,500.00, plus disbursements of \$254.94.

[5] Ms Russell, on behalf of the MSD, submits that although the cost of much of the workload was shared with the Police, the actual costs to the MSD were in excess of \$7,600, and the MSD is seeking a contribution to costs of \$2,500.00 plus disbursements of \$110.49.

[6] Although an investigation meeting was not held, the Police and the MSD submit that an award of costs on a tariff basis is still appropriate in circumstances where they were put to considerable cost. In support of this claim, Ms Russell submits that the following factors are relevant:

- The way in which the Applicant pursued his case was unreasonable;
- Counsel for the Police and the MSD received 29 emails from the Applicant's representative, Mr Lee, all of which had to be read and some of which required a response;
- Three statements of problem were filed, together with a 77 page statement of the Applicant. The Applicant's pleadings were lengthy and impenetrable;
- The claims and issues covered a number of years; and
- The documents had to be carefully analysed to determine the state of the Applicant's knowledge as at various dates.

Submissions of the Eighth Respondent

[7] Ms Service, on behalf of the Eighth Respondent, the Director of Human Rights Proceedings ("DHRP"), citing actual costs of \$8,800.00 excluding GST, is seeking a contribution to costs of \$5,800.00.

[8] In support of this claim, Ms Service submits that the following factors are relevant:

- The DHRP was wholly successful in the claim against it; and
- A considerable number of documents were received by the DHRP, all of which required consideration, and some of which required responses.

Submissions of the Applicant

[9] Mr Lee, on behalf of the Applicant Mr Johan Aarts, submits that no costs should be awarded against Mr Aarts. In support of this submission, Mr Lee submits that the following factors are relevant:

- The Police, the MSD and the DHRP are taxpayer-funded Crown Agencies and as such, were not exposed to personal liability or to incurring personal costs;
- An award of costs against Mr Aarts would be fail to acknowledge and address one of the objects of the Employment Relations Act 2000 ("the Act")

as set out in s 3(a)(i), that being to address the “*inherent inequality of power in employment relationships*”

- Mr Aarts is working part-time and is unable to meet a costs award on the basis of his financial situation.

Principles

[10] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[11] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[12] The principles applicable to awards of costs in the Authority are well established. It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*³ at para [48] “*As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.*”

Determination

[13] Although an investigation meeting was not held, the Respondents have submitted that they were put to considerable cost in defending Mr Aarts’s application to the Authority.

[14] Mr Aarts was wholly unsuccessful in his application to the Authority and it is a principle of *PBO Limited (formerly Rush Security Ltd) v Da Cruz* that costs normally follow the event.

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2001] ERNZ 305

[15] A tariff based approach is that usually adopted by the Authority, and despite the matter having been considered “on the papers” with no investigation meeting taking place, it is appropriate that costs are to be awarded on the Authority’s usual notional tariff based approach⁴.

[16] In the event that it had been decided to hold an investigation meeting rather than the matter being decided “on the papers”, I anticipate that a minimum of two days of hearing time would have been required given the number of parties and the issues to be investigated. In this case, adopting the notional daily tariff of \$3,000.00⁵ would have been reflected in a sum of \$6,000.00 for the two days.

[17] However in the circumstances, I consider that this is an appropriate matter in which to award costs equivalent to that which would have been awarded for a 1 day investigation meeting, and adopt as a starting point the notional daily tariff of \$3,000.00..

[18] The Authority has the discretion to raise or lower the tariff, depending on the circumstances. I have considered all the factors raised in respect of the level of costs sought, and conclude that there is one ground which warrants decreasing the notional daily rate, that is the financial hardship faced by the Applicant.

[19] Mr Lee has entered no financial evidence supporting this submission, nor is there an affidavit in support of this submission from Mr Aarts; however I accept that a costs award at the notional daily rate may incur some degree of financial hardship for Mr Aarts.

[20] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings and this is a case in which it is appropriate for the Authority to use its discretion by lowering the notional daily tariff. As observed by Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*:⁶ “...even an award of costs based on a low daily rate may not be feasible where the liable party does not have the means to pay...”

[21] However I find that in all the circumstances surrounding this case, in particular that a review of the file papers submitted to and held by the Authority support the Respondents’ contentions that a considerable number of documents were received from the Applicant requiring review and response, unnecessarily increasing their costs; the Respondents as the

⁴ *Cliff v Air New Zealand Ltd* (AC47A/06, (unreported) per Judge Shaw at para [10]

⁵ *Executive of the Department of Corrections v Tawhiwhirangi* [2008] ERNZ 73

⁶ 2005] 1 ERNZ 808at para [46]

successful parties are entitled to some recompense for costs. In the circumstances I believe a contribution towards costs of \$1,500.00 is a reasonable contribution.

[22] Accordingly, Mr Aarts is ordered to pay as a contribution towards costs as follows:

- \$1,500.00 to the Police

- \$1,500.00 to the MSD

- \$1,500.00 to the DHRP

[23] Ms Russell has also claimed reimbursement in respect of disbursements of \$254.94 in respect of the Police for photocopying and a courier, and reimbursement in respect of disbursements of \$110.49 in respect of the MSD for photocopying and an air flight.

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[24] Disbursements are normally recoverable, however the cost of the airfare claimed is not supported by an invoice. Without evidence of the actual disbursement in this case, I am unable to assess whether the cost has been properly incurred, and consequently cannot award an amount in respect of the airfare.

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[25] Mr Aarts is ordered to pay the Police \$254.94 and the MSD \$66.79 in respect of the disbursements incurred

Eleanor Robinson
Member of the Employment Relations Authority