

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 127
3024840

BETWEEN PAUL ALGAR
 Applicant

A N D SOUTH ISLAND HOTELS LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Philippa Tucker, counsel for the Applicant
 Robert Thompson, advocate for the Respondent

Investigation Meeting: On the papers

Submissions Received: 30 January 2019 from the Applicant
 21 December 2018 from the Respondent

Date of Determination: 6 March 2019

COST DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 4 December 2018, I dismissed Paul Algar's claims against South Island Hotels Limited.

[2] In my determination, I reserved costs in order to give the parties an opportunity to try to resolve the question of costs. The parties have been unable to agree costs and now South Island Hotels seeks costs.

Application for costs

[3] Mr Thompson on behalf of South Island Hotels, says:

- (a) Costs should follow the event and therefore costs should be awarded to South Island Hotels.
- (b) That a cost award should be based on the daily tariff for two days of investigation meeting.
- (c) So, the starting point is that I should award \$8,000.00 as a contribution to South Island Hotels' costs.
- (d) South Island Hotels accepts that Mr Algar was legally aided for this matter and the normal position is that a costs award cannot be made against a legally aided person unless the court (the Authority in this case) is satisfied that there are exceptional circumstances¹ - and there are exceptional circumstances in this case.

Effect of legal aid

[4] The first issue for me to address on the application for costs is whether there are exceptional circumstances in this case which mean I can make a costs award against Mr Algar.

[5] In terms of exceptional circumstances Mr Thompson says Mr Algar pursued a frivolous claim in this matter, which was his claim relating to the smokehouse BBQ trailer (the Trailer).

[6] It appears to me that there are three aspects to this:

¹ Section 45 of the Legal Services Act 2011.

- (a) The Authority never had jurisdiction to deal with the claim for the Trailer as it was not a claim related to the employment relationship.
- (b) In any event, if the Authority did have jurisdiction it could not make the orders originally sought - Mr Algar sought possession of the Trailer – as the Trailer was rightly possessed by a third party.
- (c) Mr Algar also increased the time and costs spent on this claim by seeking an interim injunction, which was a frivolous claim in itself for the two reasons outlined above.

[7] Philippa Tucker, counsel for Mr Algar, says there are no exceptional circumstances in this case:

- (a) Mr Algar genuinely believed and was entitled to argue that the Trailer was an integral part of the employment relationship as he brought it into the employment and he used it during his employment.
- (b) Any amendments to Mr Algar's claim only occurred because of the late disclosure of material documents.
- (c) The action for an injunction was prompted by South Island Hotels listing the Trailer for sale. This led Mr Algar to believe it had possession and ownership – it transpires that South Island Hotels could not sell the Trailer as it was owned by a third party who subsequently obtained possession of it.

[8] Section 45(3) of the Legal Services Act 2011 refers to exceptional circumstances. It states:

(3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:

- (a) any conduct that causes the other party to incur unnecessary cost:
- (b) any failure to comply with the procedural rules and orders of the court:
- (c) any misleading or deceitful conduct:
- (d) any unreasonable pursuit of 1 or more issues on which the aided person fails:

- (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:
- (f) any other conduct that abuses the processes of the court.

[9] In *Laverty v Para Franchising Limited*² the Court of Appeal said that for circumstances to be exceptional they have to be quite out of the ordinary.³

[10] So, applying s 45(3) of the Legal Services Act and *Laverty*, it seems to me that in order for there to be exceptional circumstances I need to be satisfied that there is conduct, which is quite out of the ordinary, that meets one of the subsections of s 45(3).

[11] Applying what appear to be the applicable subsections of s 45(3) to this matter, I need to be satisfied that:

- (a) There was conduct by Mr Algar, which was quite out of the ordinary, that caused South Island Hotels to incur unnecessary costs; and/or
- (b) Mr Algar's pursuit of the Trailer claim was unreasonable, insofar as that pursuit was quite out of the ordinary.

[12] Having reviewed Mr Algar's conduct in both respects and having considered the submissions of Ms Tucker, I am not satisfied that there are exceptional circumstances in this case and therefore will not make an order for costs against Mr Algar as a legally aided person.

What order for costs would have been made?

[13] Section 45(5) of the Legal Services Act states that if no order for costs is made because of s 45 then an order may be made specifying what order for costs would have been made if s 45 had not applied. So, I will consider what costs I would have awarded but for the application of s 45.

Costs in the Authority

[14] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are

² [2006] 1 NZLR 650.

³ At [31].

outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*⁴ and other relevant Employment Court and Court of Appeal decisions⁵.

[15] It is against these principles that I will assess what order for costs I would have made.

Costs for South Island Hotels

[16] In this case costs would follow the event and South Island Hotels would be entitled to an award of costs – it has reasonably incurred costs and is entitled to be compensated for some of those costs as the successful party.

Daily tariff

[17] The next decision is whether I would depart from the normal practice of the Authority when setting costs, of applying the daily tariff, that is, a set amount for each day of the investigation meeting.

[18] In this case applying the daily tariff would have been the appropriate method.

Length of the investigation meeting

[19] The first issue in applying the daily tariff is the length of the investigation meeting and therefore the multiplier to the tariff. The investigation meeting in this matter took two days and the daily tariff applied to two days provides an award of \$8,000.00.

Adjusting the daily tariff

[20] The second issue with applying the daily tariff is considering whether I should reduce or increase the tariff to reflect any particular circumstances of this case.

[21] The only relevant consideration in this regard would have been Mr Algar's financial position. On this point, I am satisfied that Mr Algar's financial position would have warranted a reduction in the daily tariff by \$1,000.00 per day.

⁴ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808

⁵ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135, *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127

Conclusion

[22] I would have awarded costs to the South Island Hotels based on the daily tariff for two days adjusted down for a total of \$6,000.00

Order

[23] There is no order for costs against Mr Algar as he was legally aided and there are no exceptional circumstances justifying a costs award being made against him.

[24] However if s 45 of the Legal Services Act had not applied I would have ordered Mr Algar to pay \$6,000.00 as a contribution to South Island Hotels' costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority