IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 462
5421482

	BETWEEN	MARIO BRAVO Applicant
	AND	ACE INSURANCE LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	D Vinnicombe, advocate for applicant M Bravo in person on costs P Kiely, counsel for respondent
Memoranda received:	19 September 2013 from applicant 10 and 25 September 2013 from respondent
Determination:	8 October 2013

COSTS DETERMINATION OF THE AUTHORITY

A. Mario Bravo is ordered to contribute to the costs of Ace Insurance Limited in the sum of $700.

[1] Mario Bravo lodged an employment relationship problem in the Authority, but has withdrawn it citing health reasons. Ace Insurance Limited (AIL) - said to have been Mr Bravo's employer and cited as the respondent party to the problem - has sought an order for costs.

[2] AIL sought a contribution to its costs in the sum of $1,500. Its actual costs were slightly less than $10,000. The costs were incurred in the preparation of a statement in reply, and in the preparation for and participation in a teleconference between the Authority and the parties. Although the matter was withdrawn before any meeting had been scheduled or any need to prepare evidence had arisen, AIL says it needed to prepare extensively for the teleconference in particular.

Background

[3] Mr Bravo sought holiday pay and sick pay, and a payment for long service leave. He also said he had a personal grievance in respect of the failure to make the payments. His claim concerned the period commencing in August 1991. That was the date when, in Australia, Mr Bravo began what he said was an employment relationship with an Australian company subsequently purchased by AIL. He said his terms and conditions of employment, including service-related entitlements, were preserved on the purchase. He said further that in 2003 his employment was transferred to AIL's New Zealand division.

[4] AIL said that in 1991 Mr Bravo was engaged as an independent contractor by the Australian branch of an American insurance company. From 2000 Mr Bravo continued to contract to the Australian branch through a company of his own. He moved to New Zealand and was engaged as an independent contractor by the New Zealand branch of the American company between 2003 and 2006, before he registered a new company of his own in New Zealand. That company contracted with the New Zealand branch between 2006 and 2008. In March 2008, Mr Bravo resumed contracting with the New Zealand branch in his personal capacity.

[5] In 2010 the business of the New Zealand branch was transferred to AIL pursuant to an order of the High Court of New Zealand. AIL entered into a novation deed with Mr Bravo and the American company under which the American company was released from its obligations under its agreements with Mr Bravo, and AIL took its place. In 2011 AIL entered into independent contractor agreements with Mr Bravo in his personal capacity.

[6] AIL said this background raised issues of: whether there was an employment relationship; limitation issues[1]; whether the alleged grievance was raised within the 90-day period required under the Employment Relations Act 2000[2]; and whether Australian or New Zealand law applied to the whole or part of the claim. The complexity of the background caused the need for the extensive preparation it said it undertook even at that early stage of the proceeding.

---

[1] With reference to the Limitation Act 1950, although if there was an employment relationship limitation issues also arise under s 142 of the Employment Relations Act 2000.
[2] This issue played only a minor role and is not addressed in any detail here.

Determination

[7] Mr Bravo drew attention to a judgment of the Full Court of the Federal Court of Australia in *Ace Insurance Limited v Trifunovski*[3]. Five insurance agents had sought payments for annual leave and long service leave, and the question was whether the respective parties were in employment relationships. The court found they were, with the judgment of Buchanan J setting out a detailed discussion of the law as well as its application to the findings of fact made by the trial judge.

[8] Although not binding on the Authority, *Trifunovski* is persuasive. Mr Bravo was entitled to consider that the combined effect of that judgment and the judgment of the New Zealand Supreme Court in *Bryson v Three Foot Six Limited*[4] meant he had at least an arguable claim.

[9] However it would have assisted if the statement of problem had taken appropriate account of the statutory limitation periods applicable to the claim. The statement in reply set out a full history of Mr Bravo's arrangements with the companies in question - with reference to the issues which may in turn arise - being work which should not have been necessary. Substantial documentary information was also provided in support.

[10] Taking into account the work done in preparing the statement in reply and attending the teleconference, as well as the timeliness of the withdrawal, I conclude that AIL is entitled to a contribution to its costs in the sum of $700. I order accordingly.

R A Monaghan
Member of the Employment Relations Authority

[3] [2013] FCAFC 3
[4] [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372