

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 107
5317052**

BETWEEN CRISTINA CASARES
 Applicant

AND AAV NEW ZEALAND LIMITED
 (trading as Oktober)
 Respondent

Member of Authority: Eleanor Robinson

Costs Submissions 21 February and 10 March 2011

Determination: 22 March 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2011] NZERA Auckland 34 the Authority found that Ms Casares was an independent contractor to AAV New Zealand Limited (“AAV”) and not an employee.

[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. By memorandum, Mr Cook and Ms Mayes sought the Authority’s determination of costs and Mr Henry and Ms Knapp lodged a memorandum in reply.

[3] Both parties refer in their submissions to *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹ and submit that the principles and the approach adopted by the Authority on which an award of costs is made are well settled. In accordance with that approach a daily tariff is taken as the starting point for setting costs, following which the Authority will consider any factors in the particular circumstances of the case which require an adjustment up or down of that rate.

[4] Mr Cook and Ms Mayes sought an order for actual solicitor/client costs of \$37,050 (plus GST) and disbursements of \$513.75 (plus GST). In doing so, they sought an uplift of the Authority’s typical daily tariff of \$3,000.00 for a one-day investigation meeting. The factors argued for such an uplift were:

¹ [2005] 1 ERNZ 808

- Recognition of preparation time, citing the Employment Court case *Chief Executive of the Department of Corrections v Taiwhiwhirangi*² as authority for the proposition that an uplift in respect of a realistic allowance for preparation time for an Authority investigation meeting was appropriate
- Costs should be awarded on an indemnity basis, it not being appropriate nor equitable for the Authority to adopt the daily tariff approach in a case which involved an independent contractor’s claim for commission on a substantial commercial contract based on the principle of quantum meruit.
- Costs should follow the event, AAV having been entirely successful on all issues before the Authority.
- Ms Casares had chosen to “forum-shop”, bringing a claim in the Authority more appropriately brought in the District or High Court, resulting in a significant waste of time and cost to AAV and to the Authority.

[5] Mr Henry and Ms Knapp, in reply, sought an order that costs should be measured by the modest rate of \$2,000.00 per day, citing *South Tranz Ltd v Strait Freight Ltd*³. They submitted such an outcome was appropriate for the following reasons:

- The investigation meeting concerned a preliminary matter only, necessitating submissions on the preliminary issue alone.
- Indemnity costs should apply only in the situation in which the applicant has exhibited “*exceptionally bad behaviour*”⁴, which has no application in the present case.
- Ms Casares genuinely believed she was in the correct forum for deciding the matter of jurisdiction, and further genuinely believed that she was an employee.

² [2008] ERNZ 73

³ EmpC Christchurch CC3/08, 8 April 2008

⁴ *Bradbury v Westbank Banking Corporation* [2009] 3 NZLR 400 at para [8]

Determination

[6] The investigation meeting addressed the preliminary matter of whether Ms Casares was an employee or an independent contractor. This is a matter within the jurisdiction of the Authority and which falls to be determined by the Authority from time to time.

[7] The principles on which the subject matter of the determination is based are well established and I find should not involve either party in extensive preparation time. Moreover, it is unusual for the Authority to allow preparation time per day of the investigation meeting.

[8] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁵ that costs are modest.

[9] For a case of this kind \$3,000.00 is accepted as the notional daily rate. Accordingly, Ms Casares is ordered to pay AAV \$3,000.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[10] Mr Cook and Ms Mayes for AAV have claimed disbursements of \$513.75 (plus GST) but have not provided evidence of what constitutes these disbursements. Without evidence of actual disbursements, I am unable to assess whether such costs have been properly incurred, and consequently cannot award an amount in respect of disbursements.

Eleanor Robinson
Member of the Employment Relations Authority

⁵ [2005] 1 ERNZ 808