IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 492
5308030

BETWEEN	CONTINENTAL CAR SERVICES LIMITED Applicant
AND	JASON JOYCE First Respondent
AND	RICHARD GORDON Second Respondent

Member of Authority:	K J Anderson
Representatives:	R Towner and N Van der Sluis, Counsel for Applicant C Blake and S Van der Waal, Counsel for Respondents
Submissions Received:	7 October 2011 and 12 October 2011 for the Applicant 7 October 2011 for the Respondents
Determination:	15 November 2011

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination issued on 12th September 2011,[1] the Authority ordered the First Respondent, Mr Jason Joyce, to pay to the Applicant, Continental Car Services Limited (CCSL) damages in the sum of $6,675.70 along with interest on that sum (8.4% per annum) from 31st March 2010 until the date of payment. Mr Joyce was also ordered to pay various penalties in the total sum of $20,000. The Authority made no findings against the Second Respondent, Mr Gordon.

[2] The Authority invited the parties to resolve that matter of costs but a resolution was not reached. Submissions have now been received from the parties. The Authority member (Y Oldfield) who determined the substantive matters is no longer a

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[1] [2011] NZERA Auckland 393, Member Y Oldfield.

member of the Employment Relations Authority and pursuant to clause 16 of the Second Schedule to the Employment Relations Act 2000; I now proceed to determine the matter of costs.

[3] While neither party has provided an analysis of how such have been arrived at, given the standing of the firms involved, it is accepted that the costs incurred by the parties, as submitted, has been substantial. For CCSL its costs are $142,000 and the combined costs for Mr Joyce and Mr Gordon are "in excess of" $82,985. Given the accumulation of such costs, it is immediately obvious that even with the most generous application of the discretion of the Authority, in determining the matter of fair and reasonable costs, both parties will be left with much to reflect upon as to whether there was a better way to resolve matters.

[4] As there are multiple parties to the proceedings (two respondents), with the outcome being that CCSL was partially successful against the First Respondent, Mr Joyce, but totally unsuccessful against the Second Respondent, Mr Gordon, I am required to determine the issue of appropriate costs on a basis that recognises the separate outcomes. However, before proceeding to do so, it seems appropriate that I record two particular material aspects that require consideration; taking into account the principles recognised by the Employment Court in *PBO Limited (formerly Rush Security Limited v Da Cruz.*[2]

(a) *The hearing time*

[5] I understand that the hearing of the substantive matters involved a preliminary investigation meeting that took a half day (29th October 2010). This was followed by a substantive investigation meeting that took two days (8th and 9th December 2010); hence for the purpose of establishing a base or a daily multiplier, relevant to the established tariff based approach of the Authority, we have a total of 2.5 days.

(b) *Any conduct which increased costs unnecessarily*

[6] It is submitted for CCSL that the denials of both respondents and the failure of them to be more forthcoming about some of the matters that were in dispute, led to the proceedings being more extensive than would have been the case if the respondents had been more "honest" about revealing certain information. On the other hand, it is

[2] [2005] ERNZ 808

submitted for the respondents that the manner in which CCSL ran its case, was "overly legalistic" with the result that "considerable expense" was incurred. I am obliged to acknowledge that as I was not the Authority member involved with the parties during the substantive investigation of the issues in question, I am further removed from the process than would be ideal. Nonetheless, an analysis of the substantive determination and the respective costs submissions for both parties, brings me to a measured conclusion that there was a considerable amount at stake for both parties; hence the resources utilised in advancing their respective positions, whilst clearly costly for both parties, cannot be seen to be unnecessary, albeit given the final outcome, it is understandable if the parties think that may be a moot point.

(c) *Some other principles from PBO Limited*

- There is discretion as to whether costs would be awarded and in what amount.
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.
- Costs generally follow the event.
- That awards will be modest.
- Frequently, costs are assessed against a notional daily rate.

[7] It is also relevant (and perhaps timely here) that the Court in *PBO Ltd* sounded a cautionary note:

> Finally in accord with the Court of Appeal in *Binnie*[3] and this Court in *Harwood*[4] we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.

Consideration of costs for Mr Gordon (the Second Respondent)

[8] Via a memorandum dated 12th October 2011, it is accepted by CCSL that because there were no findings against Mr Gordon, and hence he was successful in defending the claims against him, he is entitled to an award of costs. It is submitted for CCSL that it is appropriate that the company pay the sum of $6,000 as a contribution to the costs incurred by Mr Gordon. Currently, the daily tariff adopted by

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[3] [2002] 1 ERNZ 438
[4] [2003] 2 ERNZ 433

the Authority is usually $3,000 for each full day of an investigation meeting, with a pro rata approach for a half day i.e. $1,500. The practice of the Authority is to increase or decrease the daily tariff, taking into account the particular circumstances of a specific case that may warrant an increase or decrease.

[9] Therefore, adopting the above process, I conclude that given the total hearing time of 2.5 days and a daily tariff of $3,000; a reasonable costs award to Mr Gordon would be $7,500. I find that there are no particular circumstances that warrant increasing or decreasing that sum. An order follows accordingly.

The costs determination for CCSL against Mr Joyce

[10] The primary submission for CCSL is that as Mr Joyce was unsuccessful with his defences to the claims of the company, and having regard to the conduct of Mr Joyce and the credibility findings by the Authority against him, there should be an award of costs in favour of CCSL in the sum of $30,000.

[11] The submissions for CCSL acknowledge the tariff based approach of the Authority when awarding appropriate costs and the principles established by *PBO Ltd.*[5] Applying the general approach of the Authority, as adopted in determining an appropriate award of costs to Mr Gordon, CCSL would be normally entitled to a similar award; that is the sum of $7,500. But CCSL says that this sum should be increased, because Mr Joyce's "complete and emphatic denials of a large number of the allegations made by the company, resulted in the hearing being needlessly prolonged." Examples of the denials of Mr Joyce, in regard to some of the various allegations made by CCSL, have been expanded upon in the submissions. It is also submitted for CCSL that had Mr Joyce been "honest" about some of the matters that he presented denials to, CCSL would not have incurred the "considerable expense" associated with briefing 15 witnesses and filing a number of interlocutory applications to refute the "deliberate dishonesty" of Mr Joyce.

[12] Conversely, the submissions for Mr Joyce refer to the remedies sought against him totalling $125,112.89 and the outcome of the determination of the Authority being that the total sum awarded against Mr Joyce was $26,675.60; hence he

[5] Ibid

successfully defended the substance of the claims against him. And, Mr Joyce had to "commit significant resources" by incurring legal fees (referred to above). Presuming that Mr Joyce and Mr Gordon have agreed to equally share the legal fees incurred, Mr Joyce would have to pay the sum of $41,495.50.[6]

[13] Nonetheless, while Mr Joyce was able to successfully defend many of the allegations made against him by CCSL, it is apparent from the substantive determination that the actions of Mr Joyce were especially blameworthy in regard to each of the four breaches relating to: "misappropriation including misuse of the Bilstein flush machine."[7] Ms Oldfield found that:

> [104] I am satisfied that high levels of penalty are in order for all of these breaches since they have been shown to involve deliberate dishonesty. Each amounts to serious misconduct for which there are no mitigating circumstances.

Penalties to the total amount of $20,000 were awarded against Mr Joyce.

[14] While given the overall circumstances, I have some understanding of why CCSL are seeking an award of costs at the level submitted. However, it seems to me that given the penalties awarded against Mr Joyce and observing the not insignificant legal fees he has incurred, for the Authority to award more than the sum assessed applying the usual daily tariff, it would effectively be imposing a further punishment and/or expressing further disapproval of his conduct. That of course, by legal principle, is something that the Authority cannot do. Therefore, I conclude that costs in the sum of $7,500 should be awarded. An order follows.

Determination

[14] For the reasons set out above, I make the following orders pursuant to clause 15 of Schedule 2 to the Employment Relations Act 2000:

1. Continental Cars Services Limited is to pay to Mr Richard Gordon the sum of $7,500.00 as a contribution to the costs incurred by him.

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[6] Because the Authority has not been provided with the details of how the legal fees for the respondents were incurred, it can only be presumed that the fees are equally shared.
[7] [2011] NZERA Auckland 393, para [103].

2. Mr Jason Joyce is to pay to Continental Cars Services Limited the sum of $7,500.00 as a contribution to the costs incurred by the company.

K J Anderson
Member of the Employment Relations Authority