

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 341
5319822**

BETWEEN JOHAN HEYNEKE &
BRENNAN PEREIRA
Applicants

AND AIR NEW ZEALAND LIMITED
Respondent

Member of Authority: Eleanor Robinson

Costs Submissions 11 July 2011 from Respondent
25 July 2011 from Applicant

Determination: 28 July 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2011] NZERA Auckland 253 the Authority found that the Respondent, Air New Zealand Limited (“ANZL”) did not breach either the good faith obligations as set out in s 4 of the Employment Relations Act 2000 (“the Act”) or s 12 of the Fair Trading Act 1986, and did not induce the Applicants, Mr Johan Heyneke and Mr Brennan Pereira, to enter into contractual relations by misrepresentation.

[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 both parties have filed submissions in respect of costs.

[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. For a full day Investigation Meeting the normal tariff would equate to an award of \$3,000.00.

[4] Mr Thompson submits that on 10 March 2011 ANZL made an open proposal to the Applicants in respect of the resolution of all matters between the parties. The offer was made

¹ [2005] 1 ERNZ 808

well in advance of the Investigation Meeting which was held on 19 and 20 April 2011. The proposal recognised the on-going employment relationship between the parties and, on the basis that Mr Heyneke and Mr Pereira discontinued their actions against ANZL, offered that no costs orders would be sought by ANZL.

[5] The open proposal to settle was to be held open until 15 March 2011. The Applicants gave no substantive response to ANZL, and the proposal of 10 March 2011 lapsed by default.

[6] On 18 April 2011 the Authority issued a costs determination in relation to the preliminary matter under which the Applicants were each ordered to pay ANZL \$750.00 towards its legal costs.

[7] On 29 June 2011 ANZL emailed the Applicants a further offer to settle the ongoing matters between the parties, stating that: “*By way of a complete resolution full and final settlement of all matters between the parties, the respondent would accept a total payment from each applicant of \$3,000 each ...*” This offer incorporated the preliminary costs award determined by the Authority.

[8] On 8 July 2011 the Applicants filed an appeal on the Authority’s substantive determination in the Employment Court.

[9] Mr Thompson submits that in the circumstances in which a reasonable and timely offer to settle the matters between the parties had been made in relation to the substantive issue, \$4,500 per day would be an appropriate costs award.

[10] Ms Hartdegan submits that Mr Heyneke and Mr Pereira, having appealed the Authority’s determination in the matter to the Employment Court, were not in a position to accept an offer as to costs. Ms Hartdegan submits that a reasonable contribution to costs in the substantive matter would be \$2,000 per day, divided equally between the Applicants.

Determination

[11] It is a principle of *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² that costs are modest. Costs are also at the discretion of the Authority as set out in Section 15 of Schedule 2 of the Employment Relations Act 2000, and as observed by the Chief Judge in *NZ Automobile Association Inc v McKay*³.

² [2005] 1 ERNZ 808

³ [1996] 2 ERNZ 622

[12] Costs normally follow the event, and in this respect I note that in the further proposal to settle dated 29 June 2011, the Applicants were advised that if the issue of costs could not be resolved by agreement, ANZL would be seeking costs awards of \$4,500 per applicant in respect of the substantive matter.

[13] Taking the normal daily tariff as a starting point, I have considered whether this rate should be adjusted upwards or downwards in the circumstances of this case.

[14] Whilst it is unusual for the Authority to take into consideration preparation time per day of the Investigation Meeting, I consider it pertinent that at the time the Applicants rejected the open proposal to settle dated 10 March 2011, they were aware of the number and identity of the witnesses to be called by ANZL, and of the fact that two of those witnesses were located outside of New Zealand. As a consequence the Applicants should have also been aware of the extensive preparation required to be undertaken by ANZL, and of the level of costs which would be accumulating as the matter progressed, a point for consideration highlighted by ANZL in the open proposal letter dated 10 March 2011.

[15] In these circumstances, I find that ANZL made a reasonable offer to settle. I further note that ANZL made a further offer to settle both the preliminary and the substantive costs matters at a level of \$3,000.00 per Applicant. I find this offer to have been reasonable, but it also was not accepted for the reason cited by Ms Hartdegan in her submissions.

[16] The need for a “*more steely*” approach to costs where reasonable settlement proposals have been rejected was noted by the Court of Appeal in *Health Waikato Limited v Elmsley*.⁴

[17] The costs relate to a two day Investigation Hearing. The normal daily tariff rate in the Authority is \$3,000.00 per day. In this case I determine that it is appropriate that the daily rate be increased to \$4,500.00, a total of \$9,000.00 for the two days.

[18] Mr Heyneke and Mr Pereira are each ordered to pay Air New Zealand Limited \$4,500.00 towards its legal costs.

Eleanor Robinson
Member of the Employment Relations Authority

⁴ [2004] 1 ERNZ 172 (CA) at [53]

