



# New Zealand Employment Relations Authority Decisions

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## Pollett v Browns Real Estate Limited [2011] NZERA 284; [2011] NZERA Auckland 204 (13 May 2011)

Last Updated: 23 May 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 204 5328171

BETWEEN NEIL POLLETT

Applicant

AND BROWNS REAL ESTATE

LIMITED

Respondent

Member of Authority: Representatives:

Memoranda received:

R A Monaghan

N Pollett in person

D Pine, counsel for respondent

21 April 2011 from respondent

4 May 2011 from applicant

Determination:

13 May 2011

### COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 30 March 2011 I found Mr Pollett was not an employee of BREL.

[2] Costs were reserved and the parties have filed memoranda on the matter.

[3] BREL sought a reasonable contribution to its costs, and nominated the sum of \$15,000 plus GST, plus disbursements of \$2,149.13. It cited the principles in *PBO Ltd (formerly Rush Security Ltd) v da Cruz* [1], and submitted that the notional daily tariff should be increased because:

- (i) Mr Pollett was warned of the significance of the written and signed contractor's agreement, but proceeded anyway;
- (ii) No legal argument was presented in support of Mr Pollett's position;
- (iii) The lack of clarity in Mr Pollett's argument put the BREL to extra and unnecessary cost in its attempts to address the argument;
- (iv) Mr Pollett made allegations about matters not within the Authority's jurisdiction, but nevertheless required a response;
- (v) Mr Pollett filed a further document after the investigation meeting which underlined his refusal to accept his legal position; and

(vi) Mr Pollett pursued arguments that were without merit and had no prospect of succeeding.

[4] Mr Pollett asked that costs lie where they fall. He submitted that BREL was unreasonable in not engaging in mediation in respect of the termination of the parties' relationship, and said he had no funds or assets to pay for legal assistance and is still in no position to pay the respondent's costs as claimed.

## 1. Costs

[5] The principles in *da Cruz* determine the Authority's approach to costs, in that:

- . the Authority has a discretion as to whether costs should be awarded, and in what amount;
- . the discretion must be exercised in accordance with principle; . costs can be approached on a case by case basis;
- . costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct, although conduct which increases costs unnecessarily can be taken into account;
- . it is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable; . costs generally follow the event; . awards will be modest;
- . frequently costs are judged against a notional daily rate; and . the nature of the case can influence costs.

[6] BREL was the successful party in this matter, and is entitled to a contribution to its costs. In assessing an appropriate amount I begin with a notional daily rate for a meeting of more than half but less than a full day, which I fix at \$2,750. I adjust that amount upwards because Mr Pollett was warned that on the face of the matter the existence of the written contractor's agreement was a barrier to proceeding in the Authority. In pursuing such a weak claim as far as the ability to proceed in the Authority is concerned, and in the face of a warning regarding his chances of success, he increased BREL's costs unnecessarily.

[7] Additional matters such as difficulty caused by the lack of clarity in the argument presented should not sound in costs here. Similarly, while Mr Pollett did make allegations about matters that were clearly not within the Authority's jurisdiction, beyond pointing this out no response was necessary. That BREL did respond further is another matter that should not sound in costs here.

[8] Mr Pollett's ability to pay is a relevant consideration. He asserted that he is not in a position to contribute to costs, but has not provided any financial information in support. Accordingly I do not give the assertion weight in determining costs. Regarding the concern about mediation, mediation was referred to in the provision for dispute resolution in the parties' contract. Because the document was not an employment agreement any alleged breach of the relevant provision is also outside the jurisdiction of the Authority and not relevant to costs here.

[9] Mr Pollett should understand that, having initiated a legal proceeding, he was always at risk of an order for costs against him should he be unsuccessful. Since he has been unsuccessful, he must now take the consequences including the application for an order for costs against him. There is a relatively standard approach for determining such matters, which has been identified and applied here. The approach allows for the consideration of additional matters in the circumstances of particular cases, and I have indicated the matters I consider relevant.

[10] For the reasons set out above Mr Pollett is ordered to contribute to BREL's costs in the sum of \$5,000.

## 2. Disbursements

[11] BREL's request for disbursements in the sum of \$2,149.13 comprised office expenses, travel and accommodation. The travel and accommodation costs were incurred because the general manager was resident in Queenstown, counsel was resident in Invercargill, and the matter was heard in Auckland. I accept that the general manager's flights and accommodation costs for one night should be reimbursed, but since Auckland-based counsel could have been instructed I make no order for the reimbursement of counsel's travel costs.

[12] I make no other order in respect of the disbursements claimed. On the invoices provided, disbursements are calculated as:

\$363 (flights) + \$157 (accommodation) = \$520

[13] Mr Pollett is further ordered to pay disbursements of \$520.

R A Monaghan

Member of the Employment Relations Authority

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