New Zealand Employment Relations Authority Decisions

Round v Employers Assistance Limited [2011] NZERA 64; [2011] NZERA Auckland 44 (2 February 2011)

Last Updated: 21 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 44 5296284

BETWEEN MARTIN ROUND

Applicant

AND EMPLOYERS ASSISTANCE

LIMITED

Respondent

Member of Authority: Eleanor Robinson
Costs Submissions 20 December 2010 and 5 January 2011
Determination: 2 February 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination AA 501/10 the Authority found the Applicant, Dr Martin Round, partially successful in respect of his claims that the Respondent had breached certain terms of a settlement agreement pursuant to clause 149 of the Employment Relations Act 2000 ("the Settlement Agreement"). 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.

[2] *PBO Ltd v Da Cruz[1]* sets out the principles to be applied by the Authority in exercising its costs discretion. The Employment Court observed:

[46] We find there is nothing wrong in principle with the Authority's tariff based approach, so long as it is not applied in a rigid manner without regard to the particular characteristics of the case. For example, even an award of costs based on a low daily rate may not be feasible where the liable party does not have the means to pay or, on the other hand, the daily rate may not adequately reflect the conduct of the parties or the preparation required in a particularly complex manner. The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs.

Applicant's submissions

[3] Dr Round submitted that he had incurred costs in respect of the Respondent's counterclaim, which was subsequently withdrawn prior to the Investigation Meeting.

[4] Dr Round further submitted that he had been upset by comments made concerning him during the conduct of the investigation meeting, in particular the reference to him as a 'vexatious litigant'.

Respondent's submissions

[5] Mr McFadden submitted that the Respondent was largely successful in respect of the four claims of breach alleged by the

Applicant:

- Clause 5: the Authority determined there was no evidence supporting the Applicant's contentions of breach, thus the Respondent had been unreasonably put to cost in defending the claim.
- Clause 12: the Authority determined there was no evidence supporting the Applicant's contentions of breach, thus the Respondent had been unreasonably put to cost in defending the claim.
- Clause 4: the breach found by the Authority was determined to be minor and technical in nature and resulted in no penalty being awarded against the Respondent. It was unreasonable of the Applicant to have proceeded on a claim with a small likelihood of success and thus the Respondent had been unreasonably put to cost in defending the claim.
- Clause 1: the breach found by the Authority had not been argued by the Applicant. The breach had not been deliberate and the Applicant had suffered no financial loss as a result of the breach. The relatively minor nature of the breach was reflected in the actual financial award of $1,000.00 made to the Applicant, which had been reduced by a finding of 50% contribution conduct on the part of the Applicant.

[6] The Respondent also submitted that it had been successful in two interlocutory matters, these being firstly the application to the Authority for the removal of paragraphs of the Applicant's original brief as being irrelevant to either the claim or the counterclaim; and secondly being the successful opposition to the Applicant's application for witness summons. In respect of this latter point I note that Dr Round submitted that he did not receive such submissions and consequently did not have an opportunity to respond to the Authority.

Determination

[7] Dr Round represented himself throughout the Investigation process. No evidence has been presented to support his having obtained legal advice in the matter. In these circumstances an award of costs to the Applicant would not be appropriate, even if I had found it to be merited, which I do not.

[8] Dr Round had brought claims in respect of four alleged breaches of the Settlement Agreement. Of these, I determined that there had been breaches in respect of two of these clauses only.

[9] The breach of clause 4 of the Settlement Agreement was determined to be a technical breach only, and I found that the breach was neither flagrant nor deliberate. The Authority determined that there had been a breach of clause 1 of the Settlement Agreement, but this was not held to be deliberate, and significantly the Applicant had suffered no financial loss as a result.

[10] Accordingly both parties experienced some degree of success in the proceedings in that the Applicant had brought four claims in respect of breach of the Settlement Agreement of which only two were successful, and of these one was determined to be of a technical nature only.

[11] In these circumstances I determine it appropriate that costs should lie where

they fall.

Eleanor Robinson
Member of the Employment Relations Authority

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[1] [2005] NZEmpC 144; [2005] 1 ERNZ 808
