

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 84/10
5123161

BETWEEN MARK FRANCIS RAYMOND
SIMICH, ALASTAIR
MURRAY STEWART
RUSSELL, BRYAN
TOURELL, KENNETH
CARRAN MACLEAN
FINLAYSON, CHRISTOPHER
ROBERT JAMES PETERS,
WILLIAM MICHAEL BERGE,
PETER MATTHEWS, PHILIP
ROWAN
Applicants

AND AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: R A Monaghan
Representatives: J Roberts, counsel for applicants
K Thompson, counsel for respondent
Memoranda received: 23 December 2009 and 17 February 2010 from applicant
9 February 2010 from respondent
Determination: 23 February 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 27 November 2009 I removed a matter to the Employment Court under s 178 of the Employment Relations Act 2000. Costs were reserved and the parties have filed memoranda on the matter.

[2] The applicants cited costs of \$15,000 (excl GST) in relation to the application for removal, and sought a contribution to these.

[3] The respondent raised two matters. The first concerned the applicants' failure to serve it with a copy of their application for costs, with reference to the timetable set out in [55] of the determination. The second was that an order for costs of \$500 should be made in the respondent's favour because the circumstances of the application for removal were sufficiently unusual to warrant that action.

Failure to serve application for costs

[4] Counsel for the applicants filed an application for costs by emailed message to the Authority on 23 December 2009. The message received in the Authority was directed to the Authority and did not identify that a copy had been sent to counsel for the respondent. The text of the message read that the attached application was being presented for filing 'and by way of service'. Counsel for the applicants has acknowledged that no email copy was sent to counsel for the respondent.

[5] A hard copy of the application was received in the Authority on 13 January 2010. The covering letter asserted (wrongly) that the application was served on the respondent on 23 December 2009. There was nothing in the hard copy to indicate that the hard copy was served on counsel for the respondent, and counsel says he did not receive a copy.

[6] Accordingly counsel for the respondent submitted that the Authority's timetable was not complied with, and it was functus officio. The application for costs could not be addressed.

[7] In support counsel cited a decision of the Employment Court in **Horn v Greenlea Premier Meats Limited**¹. I distinguish that decision because there no steps had been taken in respect of costs in the Employment Court for over a year, and the parties did not take an opportunity to raise their costs in the Employment Court when they could have in the course of the intervening appeal to the Court of Appeal. Here steps were taken promptly and within the Authority's timetable, except that there was a failure to serve the respondent as required by the timetable.

[8] For those reasons I will address the application for costs.

¹ (unreported) Wellington Employment Court, AC 20/04, Judge Shaw 2 April 2004

The pleadings and the application for removal in the Authority

[9] The lack of clarity in the statement of problem posed considerable difficulty both for the Authority and the respondent, with shortcomings in the application for removal to the court posing even more difficulty for the reasons indicated in the determination.

[10] The statement of problem was a lengthy and discursive document, filed before the judgment of the Supreme Court in **McAlister v Air New Zealand Limited**² was issued. The application for removal was filed after the judgment was issued. The application as originally filed did no more than assert that an important question of law arose other than incidentally. It was returned to the applicants. In the course of identifying the questions of law in respect of which removal was sought, the applicants were asked to address whether and how the **McAlister** judgment affected the questions. The result was as discussed in the determination.

[11] I do not accept the applicants' submission that the documents as filed were sufficient to allow the Authority to fully and fairly understand the problem. Discursive statements of problem, such as the one filed here, are common in the Authority. Usually the statements of problem and in reply are sufficient to identify the problem between the parties in a way that enables the problem to be addressed without requiring technical pleadings. If the problem to be addressed cannot readily be identified on the face of the statements of problem and in reply, the matter may be clarified in further discussion between the Authority and the parties.

[12] The role of the Authority is to establish the facts and make a determination according to the substantial merits of a case. To determine a case according to its substantial merits the Authority must apply the law to the facts as it finds them to be. To do that it must be able to identify the law to be applied, and any issues of law arising. In a complex (and probably by its subject matter inherently technical) problem such as this one the mere identification of concerns, in a way that did not facilitate the Authority's or the respondent's identification of the justiciable issues or

² [2009] NZSC 78

the law to be applied, was not in turn sufficient to allow the Authority or the respondent to fully and fairly understand the problem.

[13] I have already commented on the application for removal. While it was unequivocal regarding the applicants' wish to have the employment relationship problem heard in the Employment Court, its exposition of matters relevant to s 178(2)(a) was the opposite. For these reasons I do not approach the question of costs on the basis that, having secured an order for removal, the applicants were the successful parties.

[14] Secondly, according to correspondence filed in support of the applicants' application for costs, while citing full costs of \$15,000 counsel for the applicants had sought a contribution in the sum of \$8,000 plus disbursements of \$150. Counsel for the respondent replied saying that figure was neither reasonable nor appropriate in the light of the Authority's general approach to costs, and suggesting either that costs lie where they fall or that a contribution of \$750 be made to the respondent's costs. This was a common sense approach. That it was not agreed to means, in a costs setting, the respondent has incurred costs it should not have incurred.

[15] As noted the sum of \$15,000 was also cited in the Authority. There was no supporting information. On the material before me I cannot see how such a level of costs could have been incurred in respect of the application for removal, and agree with the sentiments counsel for the respondent expressed in the correspondence.

[16] For all of the above reasons I find the circumstances of the application for removal are sufficiently unusual to warrant an award of costs in favour of the respondent. The applicants are ordered to contribute to the respondents' costs in the sum of \$500.

R A Monaghan

Member of the Employment Relations Authority