

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 70A/10
5289304

BETWEEN BEN THOMPSON
 Applicant

AND ASUREQUALITY LIMITED
 AND AFFCO NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: P R Stapp

Submissions received: On the papers by 24 June 2010

Determination: 29 July 2010

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an application for costs from AFFCO New Zealand Limited. The applicant claims that costs should lie where they fall. AsureQuality Limited is not involved.

[2] AFFCO has applied for actual costs of \$13,980.89 because the application was hopelessly misconceived. That claim is denied by the applicant.

Issues

[3] How much costs, if any should apply?

Determination

[4] AFFCO successfully defended the matter. It has provided receipts and invoices. The applicant has accepted the sum claimed is the actual costs but says the sum is not reasonable.

[5] Both sides had some success in the matter; where the applicant defended a frustration claim and AFFCO successfully defended a privity claim. It has to be remembered that the frustration claim had more to do with AsureQuality' role in the matter, rather than AFFCO, since AsureQuality was the employer.

[6] Mr McKenzie (for the applicant) has relied upon properly raising the claim on the trespass/Animal Products Act being relevant to the frustration claim. This was a late matter claimed that reasonably required research and a reply.

[7] Further, Mr McKenzie reminded me that the privity matter was a novel issue and possibly a matter for removal to the Employment Court. Dealing with the last point first the matter was not removed to the Court and fell within the usual range of work in the Authority. It was a novel issue but that is not unusual in this jurisdiction.

[8] Also, Mr McKenzie has requested that I consider the power imbalance between Mr Thompson and AFFCO. Mr Thompson has lost his job and career of 15 years. He is unemployed in a region where it is difficult to get work. AFFCO is a major commercial business with considerable income. I observe that Mr Thompson was represented by experienced Counsel. Mr Thompson pursued the matter with it being open to him to take advice prior to the investigation meeting on the replies, statements and documents produced in advance.

[9] Mr Thompson has criticised AFFCO for raising the matter of costs some 32 days after the Authority's determination and did not apply for costs in 28 days, which is the standard time. Firstly, the Authority's determination reserved costs without any timetable. Secondly, this is a matter deliberately left to the parties and for experienced Counsel and representatives to discuss, negotiate and try to resolve. That may take some time. Thirdly, 32 days is reasonable to apply for costs where no timetable has been provided. There is no rule about the time, so long as it is

reasonable. I do not accept that Mr Thompson has been disadvantaged by any deal he did with AsureQuality with costs outstanding from AFFCO. I can not conclude that Mr Thompson would have done anything differently if he had known that AFFCO was to pursue costs earlier. Mr Thompson included AFFCO as a party and it was open to him and his representative to also deal with AFFCO and could have raised it as an issue himself. It was not incumbent on AFFCO to alert Mr Thompson to a claim before 32 days, although it would be desirable for any party wanting to pursue costs to pursue them as early as possible. I hold that 32 days fits a reasonable time to request costs.

[10] Mr McKenzie prevailed on me to consider the injustice to Mr Thompson to have to pay costs, especially where there may be public policy issues. That goes to the substance of the case, and I am not going to reconsider the merits because the risks were a matter for the applicant.

[11] Finally, Mr McKenzie submitted that the Authority has no jurisdiction to award costs against NUPE. I agree. NUPE is not a party and whatever the arrangements between Mr Thompson and NUPE they are for them, and since Mr Thompson is a party he has the party to party responsibility in the employment relationship problem.

Orders of the Authority

[12] AFFCO has been put to unnecessary costs to defend the claims. It was successful in the defence of the matter raised against it. However, I do not consider that this is a matter for actual costs. This is because there was nothing exceptional about the case and the issues. The employment relationship problem was not a hopeless cause and was not misconceived. There were genuine issues for all three parties, including AFFCO. The issues were intertwined, but there was always a risk associated with the claims from Mr Thompson against AFFCO given the nature of the law, I hold.

[13] On balance Mr Thompson will need to meet some of AFFCO's costs. This is not a matter for costs to lie where they fall. The Authority has routinely approached costs on a tariff basis. I do not intend to depart from this, despite being aware of the

actual costs incurred by AFFCO. There was preparation and attendances, including telephone conferences in this matter. The investigation meeting involved a one day fixture. All parties agreed to a Wellington hearing. I consider that the daily tariff should apply. Reasonable disbursements less travel and accommodation are \$120.68.

[14] My assessment is that a fair contribution to costs is \$3,000.

[15] I order Ben Thompson to pay AFFCO \$3,000 contribution to costs and \$120.68 disbursements.

P R Stapp
Member of the Employment Relations Authority