

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 278
5561049

BETWEEN

DONALD THOMPSON
Applicant

A N D

MIDDLE EARTH FLYING
SCHOOL LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Richard McNaughton, Advocate for the Applicant
Jeff Lim, Advocate for the Respondent

Submissions Received: 4 September 2015 from the Applicant
21 August 2015 from the Respondent

Date of Determination: 15 September 2015

COSTS DETERMINATION OF THE AUTHORITY

The determination on a preliminary issue

[1] By determination on a preliminary issue, delivered orally on 11 August 2015 and recorded in writing on 14 August 2015¹ it was determined that the applicant, Mr Donald Thompson, was not an employee of the respondent, Middle Earth Flying School Limited (Middle Earth) and therefore the Authority did not have jurisdiction to investigate his personal grievance claims.

[2] Costs were reserved in the hope that the parties would be able to resolve this issue. Unfortunately, they have been unable to do so and Mr Lim on behalf of Middle Earth has filed a submission in respect of costs and Mr McNaughton on behalf of Mr Thompson has filed a response.

¹ [2015] NZERA Auckland 243

The application for costs

[3] The preliminary issue concerning the Authority's jurisdiction took almost one and a half days to hear and determine. Mr Lim, on behalf of Middle Earth, seeks a substantial award of costs totalling \$14,056.66 for time-based costs for services provided to the respondent. An invoice has been provided for \$13,685 including GST. The other component of costs claimed by Mr Lim is \$314.16 being travel costs associated with attending the mediation and investigation meeting.

[4] Mr Lim is also seeking to recover lost revenue of \$6,504.89 it claims Middle Earth has suffered on the 10th and 11th of August 2015 being the days on which the Authority investigated Mr Thompson's claim that he was an employee of Middle Earth and not an independent contractor to it. Mr Lim says the lost revenue is recoverable pursuant to the Undertaking as to damages filed by Mr Thompson at the time he filed his statement of problem in the Authority seeking remedies including urgent reinstatement to his role at Middle Earth.

Submissions for Mr Thompson

[5] In response to Middle Earth's memorandum as to costs, Mr Thompson has filed an affidavit stating that he is unemployed and unable to pay costs. Mr Thompson has attached his Westpac Bank statements and credit card statements to demonstrate that he does not have the ability to pay a large amount of costs.

[6] On Mr Thompson's behalf, Mr McNaughton claims that Mr Thompson is "*financially impecunious*", that his earnings up until 31 March 2014 were modest and he would suffer undue hardship if he had to meet a costs award, even one at the Authority's notional daily tariff of \$3,500.

[7] Mr McNaughton further submits that the way in which Middle Earth conducted itself in relation to attending mediation prior to the Authority's investigation meeting is a ground for not awarding costs in its favour.

Discussion

[8] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

15. **Power to award costs**

- (1) *The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*
- (2) *The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[9] Costs are at the discretion of the Authority. In the recent decision of the full Employment Court in *Fagotti v. Acme & Co Limited*² the full Court refers to the Authority having a *broad statutory discretion* in relation to costs. (supra para.[115]).

[10] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*³. At para.[115] of *Fagotti*, the Court stated:

We have not been persuaded that the broad principles stated by the full Court in Da Cruz should now be departed from or even altered, either in general or in this case in particular. The Authority did not bind itself inflexibly to a daily tariff approach and exercised its broad statutory discretion appropriately.

[11] It is one of the principles set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* that costs are to be modest. It is also a principle that costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct.

[12] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending upon the circumstances. For an investigation meeting which took almost one and a half days, this would normally equate to \$5,250.00.

[13] Costs normally follow the event and Middle Earth is entitled to a contribution to its costs.

[14] Mr McNaughton submits that Mr Thompson will have difficulty in meeting Middle Earth's claim for costs or indeed even costs at the notional daily rate. Mr McNaughton says a costs award would cause Mr Thompson "...undue hardship if

² [2015] NZEmpC 135

³ [2015] 1 ERNZ 808

he had to meet a costs award like the respondent is seeking or if the Authority imposed the notional daily tariff of \$3,500 or more on Mr Thompson.”

[15] As stated in the Employment Court case of *Bishop v. Bennet*⁴ “... assessment of the ability to pay requires consideration of the total financial position of the party concerned including both assets and liabilities and income and necessary expenditure.

[16] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However, in assessing Mr Thompson’s ability to pay, in my view the undertaking as to damages which was filed by him in support of his application for urgent reinstatement on 26 June 2015 is a factor which needs to be taken into account.

[17] Mr Thompson filed an urgent application in the Authority on 26 June 2015 together with an undertaking in relation to an application for interim reinstatement. The undertaking states as follows:

I, Donald Thompson, am, by an application lodged at the same time as this undertaking, applying for an order under s.127(1) of the Employment Relations Act 2000 for interim reinstatement to the position of ‘Business Manager’ at Middle Earth Flying School Limited. I raised the grievance with my employer on 10/6/2015. I agree that I will abide by any order that the Employment Relations Authority may make in respect of damages –

- (a) That are sustained by the respondent through the granting of the order for interim reinstatement; and*
- (b) That the Employment Relations Authority decides that I ought to pay.*

[18] On 3 July, Middle Earth filed a statement in reply which raised at an early stage the issue that it considered Mr Thompson to be an independent contractor and not an employee. Urgency was accorded to the parties in respect of the preliminary matter as to whether Mr Thompson was an employee or an independent contractor and that matter was investigated at a meeting in Hamilton on 10 and 11 August 2015. An oral decision was delivered on 11 August and confirmed in writing on 14 August.

⁴ [2012] NZEmpC 5 at para.30

[19] The parties had attempted mediation prior to the investigation meeting. I do not accept the criticisms made by Mr McNaughton of Middle Earth's conduct in relation to the mediation.

[20] The fact of the matter is that by signing an undertaking as to damages, Mr Thompson acknowledged that he may be liable to pay damages in respect of his application for urgent reinstatement. Because the Authority found that Mr Thompson was an independent contractor and not an employee, it had no jurisdiction to deal with Mr Thompson's substantive claims and therefore his application for reinstatement.

[21] Therefore, the undertaking as to damages was not able to be relied on by the respondent as Mr Thompson was never reinstated as an employee. However, by filing the undertaking, it is my view that Mr Thompson confirmed his ability to pay damages. It is my view that the information that Mr Thompson has provided to the Authority in respect of his ability to pay, does not persuade me that costs should not be awarded in favour of Middle Earth. Some of the information provided by Mr Thompson as to income pre-dates his application to the Authority seeking reinstatement and pre-dates his undertaking as to damages.

[22] The Authority dealt with this matter in just under one and a half days, some of that time was spent preparing the delivery of an oral determination.

[23] In the circumstances, I find that this is a case in which it is appropriate for the Authority to exercise its discretion and award one full day's costs at the notional daily tariff rate.

Determination

[24] Mr Thompson is ordered to pay Middle Earth the sum of \$3,500 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Anna Fitzgibbon
Member of the Employment Relations Authority