

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 263
5347408**

BETWEEN UNITE UNION INC
 Applicant

AND FIRST SECURITY GUARD
 SERVICES LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Paul Blair, Advocate for Applicant
 Stephen Langton, Counsel for Respondent

Submissions received: 24 July 2012 from Applicant
 3 July 2012 from Respondent

Determination: 1 August 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority (Member D King) issued its determination on 5 June 2012 ([2012] NZERA Auckland 192). In that determination the Authority found that the Respondent, First Security Guard Services Limited (FSGS), had not committed a breach of good faith against the Applicant, Unite Union Inc (Unite),

[2] In particular, the Authority found that FSGS had no intention to undermine the collective agreement between FSGS and Unite (the Collective Agreement), and the Collective Agreement had not in fact been undermined or breached.

[3] The determination of the Authority further found that there had been no breach of clause 35A ‘**No pass-on**’ of the Collective Agreement

[4] In that determination costs were reserved and the parties were to submit memoranda in respect of costs.

[5] This matter involved a half day investigation meeting, with written submissions being submitted subsequent to that by the parties. Mr Langton, on behalf of FSGS, is seeking a contribution of \$6,750.00 (which sum includes \$500.00 incurred in preparing,

filing and serving the costs memorandum) plus disbursements of \$424.00, towards its actual costs of \$25,313.50 (excluding GST) and \$848.15 (including GST) in respect of expenses.

Submissions for the Respondent

[6] In support of the level of costs claimed, Mr Langton submits:

- Although the length of the Investigation Meeting was only half a day, had Unite been ready to present closing submissions at the conclusion of the meeting, which it was not, the meeting would have taken a full day. Accordingly the starting point for consideration of the appropriate level of costs submissions should be the notional daily tariff rate in the Authority of \$3,500.00.
- The Applicant had been put on notice by the Respondent that its claim was futile, and that additional claims would be sought if the matter progressed. Additional costs had been incurred by the Respondent as a consequence of the Applicant pursuing its claims.
- The Respondent incurred considerable cost in preparing for the investigation meeting, namely 3 witness statements, one of which was extensive, and comprehensive submissions in response to the claims of the Applicant.
- The changing nature of the Applicant's claim, which included new claims being raised during the course of the investigation meeting, caused the Respondent additional costs in preparing a defence.
- The Respondent incurred unnecessary costs in preparing evidence in order to address issues raised in the evidence of an Applicant witness. This witness did not attend the investigation meeting and her evidence was withdrawn at that point.
- The Applicant failed to make any proposal to settle costs which necessitated the Respondent incurring additional costs in preparing a costs memorandum.

Submissions for the Applicant

[7] Mr Blair, on behalf of Unite, opposes the level of costs sought by FSGS and submits:

- Notwithstanding that the Applicant had been seeking penalties for breaches of good faith, the main issue for the Authority to determine was on the ‘interpretation, application and operation’ of a clause of the Collective Agreement between the parties. On this basis, Mr Blair submits that costs should lie where they fall.
- Alternatively, and in reliance on *Maritime Union of NZ v TLNZ*¹, because the Authority’s finding that there had been neither a breach of good faith, nor a breach of clause 35A of the Collective Agreement, was a finding of significant importance for all employees covered by the current collective agreement and for those employees who would be engaged in future negotiating and bargaining, this should impact upon the level of any costs awarded and these should be modest.
- Similarly because the Authority’s determination of clause 35A of the Collective Agreement has implications for many situations in which “*no automatic passing on*” clauses are utilised, and the potential to minimise future litigation on the issue before the Authority, and indeed assist with the negotiation of future ‘no automatic passing on’ clauses in collective agreements, any costs awarded should be modest.
- The ability of the Applicant should be taken into consideration. Unite is a relatively small union by New Zealand standards which had sought clarification from the Authority on the lawfulness or otherwise of the Respondent’s actions in this case. An award of costs at the level sought by the Respondent when Unite had been unsuccessful in bringing a dispute would have the effect of locking it out of the Employment Relations Authority jurisdiction

Principles

[8] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 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.*

¹ [2008] ERNZ 91

[9] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*².

[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 Limited (formerly Rush Security Ltd) v Da Cruz*³.

[11] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁴ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁵ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.

[12] I have taken into consideration whether costs should lie where they fall in this matter given that it did involve consideration of the interpretation, application and operation of a clause of the Collective Agreement.

[13] However I have also considered the fact that this case was not solely focussed on contractual interpretation, and in addition have noted in particular the Respondent’s submissions on the changing nature of the Applicant’s claims as the matter progressed necessitating the Respondent incurring additional costs, as did the subsequently withdrawn Applicant witness evidence.

[14] I also observe that FSGS has been wholly successful in all the claims which Unite had brought against it.

[15] Having had regard to the principles set out in *Da Cruz*, and the time taken for the investigation meeting, I consider that a contributory award towards the Applicant’s actual costs is appropriate.

Determination

[16] For a case of this kind \$3,500.00 is accepted by the Authority as the notional daily rate. The investigation meeting involved a half day of meeting time. Taking this as a starting point, and taking into consideration the factors noted above, Unite is ordered to pay FSGS

² [1996] 2 ERNZ 622

³ [2005] 1 ERNZ 808

⁴ [2005] 1 ERNZ 808

⁵ [2001] ERNZ 305

\$4,000 towards its legal costs, and \$424.00 as disbursements pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority