



New Zealand Employment Relations Authority Decisions

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Clarke v Affco New Zealand Limited AA402A/10 (Auckland) [2010] NZERA 876 (19 November 2010)

Last Updated: 29 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 402A/10 5281291

BETWEEN LUCKY CLARKE

Applicant

AND AFFCO NEW ZEALAND

LIMITED Respondent

Member of Authority: K J Anderson

Representatives: S Scott, Counsel for Applicant

G Malone, Counsel for Respondent

Submissions received: 28 September 2010 from Applicant

13 October 2010 from Respondent

Determination: 19 November 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 7th September 2010 (AA 402/10), the Authority found that Mr Clarke was not unjustifiably dismissed. The parties were invited to resolve the matter of costs but have been unable to do so. As the successful party, AFFCO New Zealand Limited ("AFFCO") has filed submissions on costs. Submissions for Mr Clarke have been filed in response.

[2] AFFCO has provided a detailed breakdown of the fees incurred, being the sum of \$5,006.26 (including GST, travel and accommodation). The daily tariff based approach of the Authority is acknowledged and AFFCO submits that a reasonable contribution to its costs would be the sum of \$2,500.00.

[3] It is submitted for Mr Clarke that he does not have the means to pay any costs and that the Authority should exercise its discretion and order that costs should lie where they fall. In support of this proposition the Authority is informed that Mr Clarke has not worked since his dismissal on 16th July 2009. A *Statement of Income* from Work and Income has been produced. From this it appears that that the *Total Income Support* received by Mr Clarke is \$230.12 per week - less \$2.00 per week paid to Work and Income. The Authority is also referred to *Cameron v PBT Couriers Ltd1* where the Authority found that it was appropriate that there should be no award of costs in the circumstances.

[4] But the circumstances pertaining to Mr Cameron were somewhat different to those applying to Mr Clarke. Firstly, the Authority in *Cameron* found that it was a test case and that the respondent company obtained some benefit in regard to clarifying that Mr Cameron (and possibly others in the future) was a contractor rather than an employee. Also, the Authority was satisfied that Mr Cameron was impecunious and that he was paying his lawyer on "a very slow time payment system." Apart from the information received from Work and Income, no evidence has been produced of Mr Clarke's overall financial position or whether he has been able to pay his counsel, albeit I note that Mr Clarke has presumably been able to find the funds to file a challenge against the substantive determination (AA 402/10).

[5] Nonetheless, I accept that it is likely that Mr Clarke faces some financial difficulty and it is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings.

[6] The investigation meeting occupied approximately half of a day and given the accepted tariff based approach of the Authority² to awarding costs and its discretion to raise or lower the tariff, depending upon the circumstances; normally an award of \$1,500 plus reasonable disbursements³ would be appropriate. However, in all the circumstances of this case, including the evidence of the very low income of Mr Clarke and the fact that he remains unemployed, I find that a reduced order for costs is appropriate.

[7] Mr Clarke is ordered to pay to AFFCO New Zealand Limited the sum of \$1,000 as a contribution to its reasonably incurred costs. In the event that Mr Clarke is unable to make such payment in one sum, the parties are invited to agree upon a "time payment" schedule. In the event that such agreement is not possible, leave is granted for the parties to return to the Authority for an appropriate schedule to be set based on specific evidence of Mr Clarke's overall financial position.

K J Anderson

Member of the Employment Relations Authority

[1 CA 30/09](#), 17 March 2009, Member J Crichton.

2 PBO Limited (formerly Rush Security Limited) v Da Cruz [\[2005\] NZEmpC 144](#); [\[2005\] ERNZ 808](#).

³ It is submitted for Mr Clarke that it is not reasonable for AFFCO to include in their costs the use of "out-of-town" counsel. However, the Authority is aware that Mr Malone is the regular counsel for AFFCO and hence it is appropriate that the company would engage his services for this matter.

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