

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 268
5356396**

BETWEEN KEVIN DIXON
 Applicant

AND SKY NETWORK TELEVISION
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Sherridan Cook, Counsel for Respondent

Submissions received: 23 July 2012 from Applicant
 9 July 2012 from Respondent

Determination: 3 August 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority (Member D King) issued its determination on 11 June 2012 ([2012] NZERA Auckland 197). In that determination the Authority found that there was no contractual relationship and no employment relationship between the Respondent, Sky Network Television Limited (Sky) and the Applicant, Mr Kevin Dixon.

[2] Accordingly the Authority determined that it had no jurisdiction to hear Mr Dixon's claim that he had been unjustifiably dismissal by Sky.

[3] Sky was wholly successful and is entitled to a contribution towards its actual costs. Costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and the parties have filed submissions in respect of costs.

[4] This matter involved just under one day of an investigation meeting, with written submissions being submitted subsequent to that. Mr Cook, on behalf of Sky, citing actual costs of approximately \$45,000.00 (including GST and disbursements), is seeking a contributory award of \$7,000.00 towards the actual costs.

Submissions for the Respondent

[5] Mr Cook in support of the level of the claim highlights as a significant factors for the consideration of the Authority:

- There was no merit in Mr Dixon's claim: Mr Cook submits that Sky had made its position clear to Mr Dixon from the outset i.e. that there had been no contractual relationship, and certainly no employment relationship, between the parties. The legal principles on the issue were well-established. However Mr Dixon had persisted in bringing his claim despite the Respondent's position being made known to him at an initial stage in the proceedings, and Sky had been put to unnecessary time and cost in defending it.
- Mr Dixon's conduct: Mr Cook submits that Mr Dixon contributed unnecessarily to the time and cost of the determination by:
 - filing documents which were complicated, repetitive and difficult to follow;
 - making numerous requests of the Authority by email prior to the investigation meeting with which Sky was required to deal; and
 - failing to put evidence that was crucial to the assessment of whether there was a contractual employment relationship with Sky in a tripartite type arrangement.
- The level of preparation required: Mr Cook submits that Sky prepared detailed and principled legal submissions canvassing the key issues in establishing whether there was a tripartite employment arrangement. Additionally there was preparation of three witness affidavits.

Submissions for the Applicant

[6] Mr Dixon submits that it is his belief that 'some very important facts' failed to be taken into consideration by the Authority Member in reaching her decision, and on this basis he submits that no costs should be awarded to the Respondent.

Principles

[7] 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.

[8] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[9] 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*².

[10] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁴ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.

[11] It is unusual for the Authority to allow preparation time per day of an investigation meeting. In this particular case, following a perusal of the file and the detailed costs submissions from both parties, I am prepared to accept that there was a necessity for preparation in excess of what is usually required for a case falling within the jurisdiction of the Authority.

[12] Having had regard to the principles set out in *Da Cruz*, the time taken for the Investigation Meeting, and the conduct of the parties, I consider that a contributory award towards the Applicant’s actual costs is reasonable.

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

Determination

[13] Adopting the notional daily tariff rate of the Authority as \$3,500.00, I take that as the starting point for costs. From that point I take into consideration the following observation by the Employment Court:⁵

The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs.

[14] I consider it appropriate to take the factors identified by the Respondent into consideration and award an additional \$2,500.00. I order Mr Dixon to contribute \$6,000.00 towards Sky's actual costs.

Eleanor Robinson
Member of the Employment Relations Authority

⁵ Ibid at para [46]