

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Flight Centre (NZ) Ltd (Applicant)
AND Stacey Keys (Respondent)
REPRESENTATIVES Chris Patterson, counsel for the applicant
Stephen Caradus, counsel for the respondent
MEMBER OF AUTHORITY Helen Doyle
SUBMISSIONS RECEIVED from respondent 20 June 2006
from applicant 6 July 2006
from respondent 21 July 2006
DATE OF DETERMINATION 11 August 2006

DETERMINATION OF THE AUTHORITY

[1] This employment relationship problem came before the Authority by way of an ex parte application for injunctions and an Anton Piller order. An Anton Piller order was made by the Authority on 18 March 2005 and executed on 21 March 2005.

[2] The High Court has, in a subsequent unrelated case, *BDM Grange Ltd v Parker* [2006] 1 NZLR 353, concluded that the Employment Relations Authority is not empowered to make Anton Piller orders. This conclusion was upheld by a very recent judgment of the full Court of the Employment Court in *Axiom Rolle PRP Valuation Services Ltd v Rahul Kapadia* AC 43/06.

[3] Following the execution of the Anton Piller order there were a number of telephone conferences held with the Authority and counsel. Mediation and tentative dates for an investigation meeting to deal with the substantive issues were discussed.

[4] The parties attended mediation in August 2005 and by agreement the dates for the investigation meeting were vacated.

[5] From time to time the Authority asked for updates as to progress.

[6] On 17 May 2006 Mr Patterson advised that the applicant discontinued its claims against the respondent and that Flight Centre wanted to be heard on any issues relating to costs.

[7] The Authority set a timetable for submissions that neither party adhered to. Mr Caradus indicated that he had trial commitments and lodged a memorandum of counsel as to costs on 20 June 2006. Mr Patterson objected to the filing of this out of time and said that the respondent was not entitled to costs.

[8] I asked the support officer to advise Mr Patterson and Mr Caradus that I would enlarge the time for the respondent's submissions and grant the applicant two weeks until 10 July 2006 for its response. Mr Patterson's submissions were duly lodged and served on 6 July 2006 in accordance with that advice.

[9] I then received a further memorandum from Mr Caradus on 12 July 2006 in which he asked the Authority to refuse leave for Mr Patterson's memorandum to be filed.

[10] This memorandum caused me to consider the file and it would seem that an email advising of enlargement of time and granting the applicant time for a response was unfortunately only sent to Mr Patterson. In the circumstances I had a support officer indicate to Mr Caradus that he could provide a further memorandum if he felt that necessary in response. Mr Caradus did feel that it was necessary and a further memorandum was lodged and served on 21 July 2006.

Submissions

[11] The respondent seeks an order that the applicant pay actual costs incurred of \$8978.50 plus reasonable disbursements. The respondent says that \$7,161.00 of actual costs relate to the dispute between the applicant and respondent at the Authority and \$1,817.50 to the mediation that took place. There were other proceedings in the Employment Court.

[12] Mr Caradus on behalf of the applicant seeks actual costs because:

- This was a substantial matter involving a claim of \$5000.00 for each alleged breach and \$25,000.00 in exemplary damages against the respondent.
- The applicant's original claim was voluminous with numerous issues of law which when properly analysed contained little substance.
- The respondent was forced to prepare for a full investigation.
- The applicant did not take steps that would resolve the matter after mediation.
- The respondent was the victim of a wider commercial objective as demonstrated by the mediation process and has lost considerable working hours.

[13] Mr Patterson on behalf of the applicant says that there is no basis for actual costs to be awarded and they should be allowed to lie where they fall and makes the following submission:

- The respondent is not entitled to costs arising from mediation – *Eniata v AMCOR Packaging (NZ) Ltd* (unrep, Employment Court Auckland Colgan J 24 May 2002 AC 19A/02).
- Costs are not to be used as a punishment or expression of disapproval.
- There is no evidence to support that the respondent was part of a wider commercial objective.
- It is questionable whether the costs were necessarily or reasonably incurred and who they were paid by.
- Generally costs are modest and executed in accordance with principle, not arbitrarily.

Determination

[14] The full Court of the Employment Court considered the issue of costs in a challenge against a cost determination from the Employment Relations Authority in *PBO Limited (formerly Rush Security Limited v Da Cruz* (Unrep) 9 December 2005, AC 2A/05.

[15] The Authority exercises its discretion with respect to an award of costs by taking a principled approach. The types of principles that are consistent with the Authority's functions and powers are set out and approved in *PBO Limited*. Awards in the Authority for costs will generally be modest and are frequently judged against a notional daily rate. The majority of costs awards in the Authority fall within the range of \$2000 to \$2499.00 as recognised in *PBO*.

[16] I need to consider whether all the respondent's costs were necessary.

[17] I am not prepared to award costs for attendance at mediation. There is an expectation that parties will attend mediation and in good faith attempt to resolve employment relationship problems. The mediation process was undertaken separately to the investigation process. In those circumstances I am not prepared to award costs in terms of that process even if, from the respondent's view, it was unsatisfactory as it did not ultimately resolve the employment relationship problem.

[18] Mr Patterson discontinued the proceedings on behalf of the applicant against the respondent on the basis of economic considerations.

[19] Whilst this matter did not proceed to an investigation there were a number of telephone conferences which the respondent's representative was required to attend. Although the claim against the respondent was substantial it was no more so than many before the Authority but I accept that it had a degree of legal complexity. As the matter did not proceed to an investigation meeting I was not able to hear evidence which may or may not have led me to the view that the claim was brought against the respondent for wider commercial reasons. There is no direct evidence that Ms Keys' current employer funded the defence to the employment relationship problem.

[20] The respondent provided a statement in reply to an amended statement of problem and a lengthy affidavit. The matter was then, from the respondent's perspective, ready for an investigation meeting. I do not consider therefore as Mr Patterson submits that the respondent did not take any of the normal steps associated with preparing for an investigation meeting.

[21] I am of the view that there should be an award of costs to the respondent but there are no grounds in my view to justify an actual award of costs. Awards in the Authority are generally modest. The amount of costs sought by the respondent is higher than I would have expected in the circumstances for preparation for the investigation meeting. I would have considered reasonable costs to be about \$3000.00 even for experienced counsel.

[22] Disbursements sought were not specified.

[23] I am of the view in this case that whilst this case did not proceed to an investigation meeting it would be fair and reasonable in all the circumstances to make an award that would be higher than would normally be the case for a claim discontinued before investigation. I am of the view that an award of \$2000.00 toward the respondent's costs and disbursements is fair and reasonable.

[24] I order Flight Centre (NZ) Limited to pay to Stacey Keys the sum of \$2000.00 being costs and disbursements.

Helen Doyle
Member of Employment Relations Authority