IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 265
5336716

	BETWEEN	ALAN GARVIN Applicant
	AND	PROGRESSIVE EQUIPMENT LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	M Hammond and P Dawson, Counsel for Applicant E Burke, Counsel for Respondent
Submissions received:	16 April 2012 and 8 May 2012 from Respondent 11 May 2012 from Applicant
Determination:	2 August 2012

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination dated 20 March 2012[1] the Authority found that apart from a very minor matter,[2] pertaining to share options due to Mr Garvin under the terms of his employment agreement, the claims of Mr Garvin against the respondent, Progressive Equipment Limited (PEL) were not successful. As the successful party, PEL have filed submissions on costs. Mr Garvin has filed submissions in response.

[2] Counsel for the respondent has objected to the late filing of the costs submissions for the applicant and has referred me to two determinations of the Authority[3] whereby it was held that the applicant (SFWU), and the respondent (Apex General Ltd), in the respective cases, was denied the opportunity to have their costs submissions considered by the Authority; due to a failure to comply with the timetable

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[1] [2012] NZERA Auckland 101
[2] It has subsequently transpired (according to the calculations of the respondent) that the value of the share option is 28 cents and the applicant has not disagreed with this assessment.
[3] *SFWU v Pacific Flight Catering Ltd* [2011] NZERA Auckland 129; and *Michael Maher v Apex General Ltd* [2011] NZERA Auckland 372.

set by the Authority member. In both cases, the affected party failed to seek an extension of time for filing costs submissions. In this matter, on 4 May 2012, an extension of time to file costs submissions was sought by the applicant, albeit some 3 days after the date the submissions were due. In the event, the submissions for the applicant were received on 11 May 2012.

[3] The points made by Ms Burke, for the respondent, are largely valid. But there is no apparent disadvantage to the respondent by acceptance of the submissions for the applicant. The Authority is also required to comply with the principles of natural justice; and it has an equity and good conscience obligation. Given the professed financial status of Mr Garvin, it is appropriate that the submissions about his overall circumstances should be given consideration in any determination about appropriate costs to be awarded.

Submissions for the respondent

[4] The submissions for the respondent acknowledge the accepted principles established by the Employment Court in *PBO Limited (formerly Rush Security Limited v Da Cruz*[4] and the current daily tariff approach of the Authority. And of course, it is accepted that the daily tariff can be increased or reduced, taking into account the particular nature and general circumstances that may apply to specific proceedings. The respondent seeks an award of $7,000, that is, double the usual daily tariff of $3,500. In support of such an award, the respondent advances several propositions (in summary):

(a) *That the proceedings should have been scheduled for two days*

[5] The hearing of this matter did take longer than anticipated but was still concluded by shortly after 6:00pm. Ms Burke submits that the hearing would have taken longer (or required part of a second day) if she had chosen to re-examine the principal witness for the respondent, Mr Sharp. But there was nothing of any real substance that could have arisen from any such re-examination; and the reality is that it was not required. But even if it had been otherwise, and counsel for the respondent had asked, extra time would have been made available.

[4] [2005] ERNZ 808

However, I accept that the hearing took longer than it should have due to the manner in which the proceedings were conducted for the applicant. This is for two reasons. Firstly, the applicant required six witnesses to be summoned, but at the commencement of the hearing, acknowledged that only one of those witnesses would be required to give evidence to the Authority. While this substantial change of position had the obvious effect of reducing the hearing time, I accept the submission of Ms Burke that she was required to prepare a response to the anticipated evidence that may have been elicited from the summonsed witnesses. The second aspect that contributed to the hearing lasting longer than required is that at the eleventh hour, the applicant presented a number of documents that he wished the Authority to take into account. Given that this matter had been set down for a hearing for some time, there was really no good reason why these documents could not have been provided earlier and some time was expended by the respondent (and the Authority) in order to digest and assess the relevance and/or weight that should be given to this material.

(b) *The documents prepared for the applicant were of an unnecessary length*

[6] While the Authority certainly encourages the parties to prepare their pleadings and witness statements in a concise manner, I do not accept that there is any validity to the submission that the nature of the applicant's documents contributed to the expenses incurred by the respondent. It is not unusual for there to be extraneous content provided within witness statements and other documents, but experienced advocates (and the Authority) are usually adept at sorting the "wheat from the chaff" as it were and this is what largely occurred here.

(c) *False information in the applicant's witness statement*

[7] The submissions for the respondent allude to "a significant amount of false information" that required the preparation of appropriate responses. But of course, as with many matters that come before the Authority, the credibility of the protagonists becomes part of the tapestry of the case. There was nothing particularly egregious about the evidence presented in this case that would warrant extra consideration in regard to an appropriate costs award, albeit the credibility of Mr Garvin was found wanting in regard to some of his evidence.

(d) *Too much time was occupied by the applicant's counsel in regard to the share option issue*

[8] While it is correct that the share option issue subsequently turned out to be materially nugatory, neither party had made a meaningful assessment of the substance or otherwise of this claim, either before the hearing or at it. Certainly the Authority was not presented with any tangible evidence of the value (or lack of) in regard to this claim. Indeed, as an outcome of the substantive determination, the parties were left to subsequently assess the value of the contractual share option and it has now been revealed to literally worthless. But the facts were certainly not established during the hearing by either party. It follows that this cannot be a matter to be taken into consideration in regard to a lift in the costs to be awarded.

An appropriate award of costs

[9] In regard to an appropriate award of costs the starting point is the current daily tariff of $3,500 but I accept that this should be lifted somewhat to take into account that the hearing took longer than usual and that the respondent was required to prepare in anticipation of the evidence that might have been elicited from the summoned witnesses whom (except for one person) were subsequently dispatched by the applicant. I conclude that an appropriate award of costs to the respondent for this matter is $4,500.

Submissions for the applicant

[10] In addition to presenting arguments in opposition to those advanced for the respondent, the submissions for the applicant are (in summary) firstly, that there are no grounds for an increase to the daily tariff and secondly, Mr Garvin is impecunious. In support of the latter, it is submitted that the circumstances of Mr Garvin are "dire" in that he is unemployed, and in receipt of the unemployment benefit. A detailed declaration of his financial means and circumstances has been provided. In summary, the evidence is that Mr Garvin has a wife and four very young children to support and little in the way of income.

[11] In addition to effectively being insolvent, Mr Garvin declares that he has no property. But the evidence provided by the respondent shows a property with a capital

value of $420,000 as of 1 August 2011, albeit it seem that the property may be worth substantially more than this as the building value, as at 31 August 2006, according to the District Council *Code Compliance Certificate*, was then $420,000 and it can be taken as within the knowledge of the Authority that property values in that area have appreciated considerably. Nonetheless, there appears to be a family trust in existence, the details of which are not revealed. Therefore, it may have to be accepted that the property is not, in legal terms, an asset owned by Mr Garvin. However, listed as an asset is a *Bayliner Classic* boat insured for the sum of $5,000; but on the other side of the ledger, there are considerable liabilities, including his legal costs for the substantive proceedings. .

The ability to pay

[12] The issues surrounding the liability for costs of an unsuccessful but impecunious litigant have ben canvassed on a number of occasions. For example, in *Metallic Sweeping (1998) Ltd v Ford*[5] the Employment Court stated that:

> Where the ability to pay is in question, it must be assessed by reference to the whole financial position of the party concerned. This should include not only income and outgoings but also assets and liabilities.

And in *Gamble v Agresearch Ltd*[6] the Court held that:

> The accepted principles are that a party will be presumed to be able to pay an award of costs unless the Court [Authority] is satisfied on proper evidence that to do so would cause undue hardship.

Determination

[13] While I accept that Mr Garvin has serious financial circumstances, he must be deemed to have weighed the risks of resigning from his employment and actively pursuing legal proceedings. Indeed, as the submissions for the respondent point out, Mr Garvin had a legal advisor at his home immediately before making the decision to resign from a well paid job and thereby exposing himself to a serious financial situation. Mr Garvin cannot expect the respondent to bear the totality of the costs that it incurred in defending itself against his largely unfounded claims. Balancing this is the fact that it is not the role of the Authority to impose undue hardship on Mr Garvin. However, upon full consideration of the evidence pertaining to Mr Garvin's assets and

[5] [2010] ERNZ 433 at [53].
[6] CC 6A/09, 10 September 2009 at [16].

liabilities and his probable ability to obtain future employment, or an income by other means, (if he has not already done so), I conclude that it is appropriate that Mr Garvin should make a contribution to the costs incurred by the respondent. Mr Garvin is ordered to pay to Progressive Equipment Limited the sum of $4,500, plus a further $500 towards the preparation of the respondent's costs submissions; a total of $5,000.00.

K J Anderson
Member of the Employment Relations Authority