

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 32
5422567

BETWEEN ROBERT HELLESOE
 Applicant

AND ALTO PACKAGING
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Sione Fonua, Counsel for the Applicant
 Daniel Erickson, Counsel for the Respondent

Submissions: 11 December 2013 from the Respondent and 20 January
 2014 from the Applicant

Determination: 29 January 2014

COSTS DETERMINATION OF THE AUTHORITY

- A. There were no exceptional circumstances in this case that would have permitted the Authority under the Legal Services Act 2011 s45(2) to order Mr Hellesoe, a legally aided person, to pay costs to Alto Packaging Limited (APL).**
- B. An order of costs of \$4000 would have been made against Mr Hellesoe if his liability for costs was not affected by s45 of the Legal Services Act.**

[1] Following the Authority's determination that Alto Packaging Limited (APL) fairly investigated a workplace incident involving Robert Hellesoe and that his subsequent resignation was not a constructive dismissal, the company sought an order for costs.¹ Mr Hellesoe had a legal aid grant to bring his personal grievance claim to

¹ [2013] NZERA Auckland 516.

the Authority but APL submitted his reasons for bringing the case amounted to “*exceptional circumstances*” such that the usual rule preventing costs orders against a legally aided person should not apply: section 45(2) and 45(3) of the Legal Services Act 2011 (LSA).

[2] One category of such exceptional circumstances stated in the LSA is “*unreasonable pursuit*” of an issue on which the aided person fails: s45(3)(d). APL submitted this category applied to Mr Hellesoe’s case because his own evidence showed he resigned of his own free will rather than being pushed to do so by any unfair or unreasonable action by APL. Instead, in APL’s submission, Mr Hellesoe was really trying to clear his name and have the Authority find that he had been assaulted by a co-worker when the only matter that the Authority could properly consider was whether APL had acted as a fair and reasonable employer would have in investigating the incident and reaching the conclusions it put to Mr Hellesoe (whose response was to resign).

[3] I do not accept APL’s argument that the issue of constructive dismissal was unreasonably pursued. Mr Hellesoe resigned (after taking advice from his union representatives present at the disciplinary meeting) in response to what the APL managers had told him about what they thought had happened. The managers’ thoughts were based on prompt and thorough interviews with Mr Hellesoe and other workers who were present during the various events on the relevant day. If the Authority had found that the managers’ conclusions from their investigation were not fairly and reasonably reached, Mr Hellesoe would have had grounds for his argument that their unjustified actions induced his resignation and amounted to a constructive dismissal. In that sense the two basic issues in the case – whether the employer’s actions and conclusions were fair and whether Mr Hellesoe chose to resign without pressure from APL managers – were interwoven. That the Authority, after a two day investigation meeting in which eight witnesses gave evidence, comprehensively determined those issues in APL’s favour made Mr Hellesoe’s pursuit of them unsuccessful, but not unreasonable.

[4] On that basis I cannot make an order for costs against Mr Hellesoe. APL asked that, if the Authority reached such a conclusion, the Authority make an order specifying what costs would have been awarded against Mr Hellesoe if s45(2) of the

LSA had not affected his liability. Such a notional order is permitted by s45(5). In making such an order I have considered the general principles applying to the Authority's statutory discretion to award costs which includes use of a daily tariff (currently around \$3500), awards being modest, and taking account of the financial circumstances of the party ordered to pay costs.²

[5] The means of both parties and what is reasonable for an aided person to pay are also recognised as relevant factors in s45(1) of the LSA and still applies, as I read the section, to the notional exercise permitted in s45(5). Mr Hellesoe's reply memorandum on costs does not address his financial capacity but his evidence during the Authority investigation meeting was that he was unemployed and had not earned any money from work since his dismissal. While I do not know if that situation has changed, it is likely a factor warranting a significant reduction in the usual daily tariff to \$2000.

[6] On that basis I have concluded that an order of costs of \$4000 would have been against Mr Hellesoe if his liability for costs were not affected by s45 of the LSA.

Robin Arthur
Member of the Employment Relations Authority

² Clause 15(1) of Schedule 2 of the Employment Relations Act and *PBO Limited v Da Cruz* [2005] 1 ERNZ 808.