

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 11B/10
5126876

BETWEEN CHRISTINA JOHNSON
Applicant

AND NEW ZEALAND HEALTH
INSURANCE BROKERS
LIMITED
First Respondent

AND GEOFF KLOOGH
Second Respondent

Member of Authority: R A Monaghan

Representatives: Jenny Beck, counsel for Applicant
Werner van Harselaar, counsel for Respondents

Memoranda received: 17 and 30 August 2010 from applicant
13 and 27 August and 24 September 2010 from
respondents
17 September 2010 from Community Insurance and
Investment Group Limited

Determination: 12 October 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 1 July 2010 I found Ms Johnson was dismissed unjustifiably by the first respondent, NZHIBL. I found also that the second respondent, Mr Kloogh, was not Ms Johnson's employer in his personal capacity.

[2] Costs were reserved. Costs also remained outstanding in respect of a determination by the Authority on the joinder of CII Group as a party to the employment relationship problem¹.

¹ Member Doyle, 21 January 2010, CA 11/10

[3] The parties have filed memoranda in respect of these matters.

Ms Johnson's claim for costs

[4] Ms Beck sought an order for costs against NZHIBL and in favour of Ms Johnson on the ground that Ms Johnson was successful in her claim of unjustified dismissal against NZHIBL. The full amount of the costs charged to Ms Johnson was sought, in the sum of \$7,150.23.

[5] The Authority's approach to costs is as set out in **PBO Limited (formerly Rush Security Limited) v da Cruz**². In general the successful party is entitled to a contribution to costs, and awards based on a notional daily rate are acceptable provided the circumstances of a particular case do not require otherwise.

[6] Nothing in the way in which this employment relationship problem was conducted amounted to bad behaviour of the kind which could attract an order for the payment of full costs,³ and nor was behaviour of that kind alleged. Instead I understood a significant reason for seeking an order for the reimbursement of full costs concerned the cost of bringing the claim against the level of compensation Ms Johnson received. The total amount awarded in Ms Johnson's favour was \$14,475.37, \$5,000 of which was awarded under s 123(1)(c)(i) and was the sum on which the submission was based. I do not accept it is appropriate to focus only on the compensatory component in assessing the extent to which Ms Johnson might be deprived of the fruits of her victory by receiving an unduly low award of costs.

[7] Reference was also made to the parties' attempts to settle, but no further details of these were available so I do not take that matter into account.

[8] Otherwise since Ms Johnson was the successful party in respect of her personal grievance against NZHIBL, I consider an application of a notional daily rate to be appropriate here. The investigation meeting took a little under a full day. I therefore order NZHIBL to contribute to Ms Johnson's costs in the sum of \$3,000.

² [2005] 1 ERNZ 808

³ Examples of which were summarised in **Bradbury v Westpac Banking Corporation** [2009] NZCA 234

Mr Kloogh's claim for costs

[9] Mr van Harselaar sought an order for costs in favour of Mr Kloogh on the ground that Mr Kloogh was successful in defending the claim that he was Ms Johnson's employer in his personal capacity. Actual post-mediation costs of \$5,319.07 were cited, but a reduction to \$4,000 was suggested because of an acknowledged overlap between the cases for NZHIBL and Mr Kloogh respectively. It was submitted in the alternative that the Authority should make an order in favour of Mr Kloogh based on a one-day meeting for the substantive matter and a half-day in respect of an adjourned investigation meeting.

[10] Regarding the adjourned meeting, Mr Kloogh was cited as the only employer party when this employment relationship problem was first lodged in the Authority. A late application for the joinder of NZHIBL led to the adjournment of a scheduled investigation meeting. Mr Kloogh incurred costs on his own account in preparing for the meeting, and the Authority recognised that in adjourning the meeting. In those respects I accept Mr Kloogh incurred costs separately from NZHIBL.

[11] Mr Kloogh was successful in defending the claim that he was Ms Johnson's employer in his personal capacity when the investigation meeting went ahead. At the same time most of the evidence and argument on the identity of the employer was also directly relevant to whether NZHIBL was the employer, which was also denied but not successfully.

[12] On balance I consider Mr Kloogh is entitled to recognition in costs of his success, but on my assessment of the nature and effect of the overlapping matters I set the amount at \$750. I order Ms Johnson to contribute that sum to Mr Kloogh's costs.

Costs on the joinder

[13] The question of joinder arose out of the denials in statements in reply of both NZHIBL and Mr Kloogh that they were Ms Johnson's employer, and their assertions that CII Group was the employer and should be joined. For her part Ms Johnson did not wish to proceed against CII Group. The Authority heard from the parties, and CII Group, and determined the matter.

[14] CII Group sought an order for costs against NZHIBL on the grounds that it successfully defended the application for joinder, and the Authority found against NZHIBL in the substantive matter. Full costs of \$936.56 were sought.

[15] Overall the determination turned on a practical assessment of the Authority's ability to effectively dispose of the matter according to its substantial merits and equities without joining CII Group. This was in turn influenced by the indication that Mr Campbell, the director of CII Group, would be available to give evidence at any investigation meeting. Hence while CII Group was not joined as a party, the outcome was not a reflection of the merits of its position on whether it was Ms Johnson's employer. Further, although Ms Johnson may have no intention of doing so, the determination did not close the door on the prospect of her proceeding against CII Group at a later stage.

[16] CII Group also referred to the fact that NZHIBL was unsuccessful in denying during the investigation of the substantive matter that it was Ms Johnson's employer. That is true, although it does not fully reflect the outcome on the point.

[17] For these reasons I accept Mr van Harselaar's submission that CII Group should bear its own costs on the matter of the joinder.

Summary of orders

[18] NZHIBL is ordered to contribute to Ms Johnson's costs in the sum of \$3,000

[19] Ms Johnson is ordered to contribute to Mr Kloogh's costs in the sum of \$750.

R A Monaghan

Member of the Employment Relations Authority