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Kennedy v Stockman (Auckland) [2007] NZERA 67 (8 March 2007)

Determination Number: AA 63/07 File Number: AEA 1082/05

Under the [Employment Relations Act 2000](#)

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

BETWEEN Damian Kennedy (Applicant)

AND Dean Stockman (First Respondent)

AND Human Resources Integrated Solutions Limited (Second

Respondent)

REPRESENTATIVES Kristina Andersen for applicant.

No submissions received from the respondents.

MEMBER OF AUTHORITY Ken Raureti

INVESTIGATION MEETING On papers.

DATE OF DETERMINATION 8 March 2007

COSTS DETERMINATION OF THE AUTHORITY

[1] The substantive employment relationship problem between the parties was resolved by Authority Member Ulrich in Determination Number AA 173/06 on 2 May 2006. In that determination, the Authority found that Mr Stockman was acting as a representative of the company Human Resources Integrated Solutions Limited and therefore determined the company as the employer. Costs for that substantive matter were resolved in Determination AA 173A/06 where the Authority declined to make an order against Dean Stockman personally as the identity of the employer was determined as HRIS.

[2] On 27 June 2006, the Authority received an application from Mr Stockman for the investigation into the substantive matter to be reopened. During a preliminary conference call between the Authority, Mr Stockman and Ms Andersen, the parties agreed to a timetable for the filing of an affidavit from Mr Stockman, to be followed by submissions from Ms Andersen. Mr Stockman did not file his affidavit, which Ms Andersen noted. On 13 September 2006 Ms Andersen sent a fax to the Authority indicating that the respondent was out of the required timeframe and in the circumstances she requested that the application be struck out and costs be awarded personally against Mr Stockman.

[3] The Authority contacted Mr Stockman and he indicated that he had advised the Authority in writing that he was not going to proceed with his application. Mr Stockman was advised that the Authority had not received a copy of the letter he was referring to and requested that he send a copy of it to the Authority confirming that he was withdrawing the application.

[4] Approximately 2 months after that contact with Mr Stockman, the Authority had not heard from, nor received any further correspondence from Mr Stockman. On 7 November 2006, the Authority wrote to Mr Stockman and advised him that it will be taking no further action on the matter and the Authority's file AEA 1082/05 will be closed.

[5] Ms Andersen has filed a memorandum for the applicant seeking an award of costs personally against Mr Stockman because she says that Mr Stockman's actions in pursuing the

reopening application has caused additional unnecessary legal costs for her client Mr Kennedy. She indicates that Mr Stockman's conduct of failing to abide by timetable deadlines and failing to withdraw the application on a timely basis, and refers to *Reid v NZ Fire Service Commission* [\[1995\] NZEmpC 192](#); [\[1995\] 2 ERNZ 38](#).

[6] Ms Andersen summarised her application for costs by indicating that the respondent's conduct has been particularly poor

by advancing unmeritorious arguments in relation the reopening application, she says that the respondent used insulting language and disobeyed the Authority's timetabling directions which has resulted in additional costs to her client.

[7] The Authority's discretion to award costs is set out in Clause 15 of the Second Schedule of the [Employment Relations Act 2000](#). The principles guiding the Authorities discretion are set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*

- • There is a discretion as to whether costs should be awarded and what amount;
- • The discretion is to be exercised in accordance with principle;
 - • The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- • Equity and good conscience is to be considered on a case by case basis;
 - • Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award;
 - • It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable;
- • That costs generally follow the event;
- • That without prejudice offers can be taken into account;
- • That awards will be modest;
- • That frequently costs are judged against a notional daily rate;
 - • The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[8] In this matter, the respondent has been tardy, less than active in pursuing the application, however I was not provided with any information as to how that conduct has unnecessarily added to the expenses incurred by Mr Kennedy, nor was the Authority provided with any information about any dollar value of the costs incurred by Mr Kennedy, let alone any *additional unnecessary costs*.

[9] It is apparent that both the substantive matter before the Authority and the application to reopen an investigation has been punctuated with delays that have predominantly been occasioned by the respondent. In the Costs Determination AA 173A/06, the Authority was *satisfied that HRIS has "dragged the chain" which resulted in Mr Kennedy being put to additional unnecessary expense*, and made an award of costs reflecting that conduct.

[10] Costs are not to be used as a punishment or as an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account. Ms Andersen says that in this case a tariff based award of costs would be insufficient and inappropriate. However in this matter, I have not been provided with any information as to what costs have been incurred, and therefore I am not in a fully informed position to make a considered award for costs, accordingly there shall be no award for costs for this matter.

[11] I can indicate that even if I had more information, and if I did consider it appropriate to make an award of costs, it is unlikely that I would have made an award for costs personally against Mr Stockman. I am inclined to a similar view expressed in AA 173/06 that Mr Stockman was acting as a representative of the company.

Ken Raureti
Member of Employment Relations Authority