

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 347
5320576

BETWEEN

LYALL MAY
Applicant

AND

ARMOURGUARD SECURITY
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Helen White, counsel for Applicant
Andrew Shirnack, counsel for Respondent

Submissions Received 7 and 13 June, 1 July 2011

Determination: 4 August 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] Armourguard Security Ltd has applied to the Authority for an order against Mr Lyall May requiring him to pay costs on an investigation carried out under the Employment Relations Act 2000.

[2] For many years Mr May undertook armoured vehicle, security and courier services for and on behalf of Armourguard. He signed several written agreements setting out terms and conditions under which he performed the work and was remunerated by Armourguard. In each he expressly agreed that he was in “an independent contractor relationship” with Armourguard and that the agreement was not “a contract of employment.”

[3] In August 2010 the company gave notice that it was exercising a right to terminate the agreement under a provision of it. Three months notice was given to end Mr May’s work in November.

[4] Mr May challenged the company's action. He claimed he was not a contractor but an employee under an employment relationship created by the contract and the way it had been performed, and he sought an acknowledgement of that from Armourguard. He advised he would seek a determination from the Authority to that effect if his employee status was not confirmed by the company. When it was not, he applied for an investigation and determination of his contended employment relationship problem arising from the termination of work.

[5] The Authority investigated as a preliminary issue the question of whether Mr May had been an employee of Armourguard or a contractor to the company. Mr May had indicated that if held to be an employee he would seek to have resolved a personal grievance in relation to Armourguard's actions.

[6] In a determination dated 17 May 2011 ([2001] NZERA Auckland 208) the Authority found in favour of Armourguard, holding that Mr May had not been employed under a contract of service by the company but that the underlying and true nature of the parties' relationship was one of independent contractor.

[7] The issue of costs was reserved in the determination. When Mr May and Armourguard were unable to resolve the question themselves the company applied to the Authority for an order for costs.

[8] Armourguard has sought an award of \$11,500, or approximately half of the company's total costs of participating in the Authority's investigation from the time a without prejudice offer, or *Calderbank* offer, made to Mr May before the investigation meeting had expired without acceptance. It is submitted that where a party has rejected such without prejudice offer and is subsequently unsuccessful in an investigation, the Authority may use its notional daily tariff as a starting point and adjust that rate upward to take into proper account the unaccepted offer.

[9] In some of the cases referred to in costs submissions made for Armourguard the successful party has recovered costs of approximately 50% of actual costs incurred after the offer was made.

[10] For Mr May it is submitted that costs should lie where they fall. In particular it is submitted that in applying to the Authority he had sought to resolve the matter of his termination as quickly and efficiently as possible, that the *Calderbank* offer had been unclear in some respects and that Mr May no longer has employment following

the termination of his work. He is 75 and at that age unlikely to work again, a least full time on a long term career basis. It is submitted that meeting an order for costs will cause him significant hardship as he has no source of income or significant assets but is dependant for income on national superannuation. He provided by affidavit a Statement of Financial Position in the form used by the Legal Services Agency to determine eligibility for legal aid. A form in the name of his wife was also provided, although it is unsigned and appears to have been filled in by the same hand to be seen on Mr May's form.

[11] The legal principles in relation to costs awards in the Authority are set out in the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. Of particular relevance to this case are the principles that;

- the Authority has a discretion whether to award costs and as to the amount
- costs are not to be used as an expression of disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account
- without prejudice offers can be taken into account
- awards of costs will be modest
- frequently costs are judged against a notional daily rate.

[12] The relationship between Mr May and Armourguard was undoubtedly contractual. Whether the contract was 'of service' or 'for services,' Mr May and Armourguard had been free to enter into either relationship.

[13] It is the situation with work relationships that contracting parties have some choice as to the jurisdiction in which they may commence a claim to resolve a dispute. Even where, as in this case, parties have expressly agreed in writing signed by them that they will be in an independent contractor relationship, they may apply to the Authority and be found by it to be in an employment relationship under the Employment Relations Act 2000.

[14] No doubt this situation encourages some contracting parties to apply to the Authority for a remedy in preference to a civil court or tribunal where a decision may

take longer or require a higher level of legal cost. It is a situation that arises partly because under the Act a person's employment status under an agreement is decided by considering the real nature of the relationship, and in reaching a decision about that the Authority is required to not treat as determinative any statement by contracting parties that describes the nature of their relationship.

[15] The problem in this contractual relationship between Mr May and Armourguard arose out of the termination of it by the company, an action Mr May has claimed was unlawful. He had access to legal remedies to have that claim determined, either in the Disputes Tribunal or District Court, or in the Authority. Mr May chose the Authority. Although it has found he was not an employee and his claim is not therefore within the jurisdiction of the Authority, that does not prevent him from seeking his remedy in the civil jurisdiction.

[16] The fact that Mr May genuinely considered his termination to be a breach of contract in some way is of little significance to the question of costs incurred in determining that the Authority does not have jurisdiction to consider that problem. Of much greater significance is the fact that Mr May had expressly agreed with Armourguard at formation that the relationship was one of independent contractor and had also agreed that "neither this agreement nor anything contained herein, or implied, shall constitute any other relationship". Mr May's evidence to the Authority was that he had intended to be a contractor. He repeatedly signed an agreement expressly to that effect during the relationship.

[17] On that basis I consider it would have been reasonable for Mr May to have commenced his claim in the civil jurisdiction, at least to begin with rather than ignoring the choice of relationship he and Armourguard had expressly made when signing the contract.

[18] Having decided to behave counter to the contractual expression and seek a remedy in the Authority, and by doing so take the risk that eventually was realised by the Authority's determination, Mr May acted unreasonably in rejecting the clear and unambiguous *Calderbank* offer, as I find it was, that had been made to him. Armourguard offered without prejudice to pay a contribution to his legal costs of \$3,000 plus GST and pay him \$7,000. Armourguard also offered to buy Mr May's customised courier vehicle at a fair market value. That offer provided a real

opportunity for Mr May to discontinue his claim in the Authority and avoid incurring greater cost.

[19] In considering the ability of Mr May to pay costs, the information contained in the Legal Services Agency Statement of Financial position form leaves a number of questions unanswered. Mr May is 75 years old and has had a working life of over 40 years, yet does not own or have an interest in a home or in any other property or land. There are no significant assets declared by him and he does not get or is not entitled to any money or benefits from a trust. He is the recipient of New Zealand Superannuation. I assume he pays no rent for the accommodation he has. There is also the question of the courier van that he bought himself for the work with Armourguard. Whether that has been disposed of and payment received by Mr May's company for the vehicle is not clear. What his outgoings are he has to meet from superannuation is not clear.

[20] However I accept that given the age and circumstances of Mr May as far as they can be ascertained from the affidavit provided, he is likely to have difficulty meeting an award of costs at a level that might otherwise have been made. As a matter of equity and good conscience that should be taken into account by the Authority.

[21] I consider that the amount claimed by Armourguard is reasonable as a contribution to actual costs, because generally this type of case is one that is legally and factually complicated. Applicants seek to have the Authority deem a relationship to be one that the parties have previously declared solemnly it was not. The daily tariff of around \$3,000 - \$3,500 is too low for use in cases of this kind.

[22] In all the circumstances I consider it is just that Mr May contribute to the legal costs of Armourguard. I consider that taking into account his negligible assets and very limited employability, and also his financial dependence on national superannuation, he should pay \$4,250 to Armourguard.

Determination

[23] Exercising its discretion pursuant to clause 15 of Schedule 2 of the Employment Relations Act, the Authority orders Mr Lyall May to pay costs of \$4,250 to Armourguard Security Limited.

A Dumbleton
Member of the Employment Relations Authority