New Zealand Employment Relations Authority Decisions

McCourt v Annas (Wellington) [2018] NZERA 2054; [2018] NZERA Wellington 54 (8 June 2018)

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Last Updated: 4 July 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 54
5641653

BETWEEN

A N D

NANCY JEAN McCOURT First Applicant
GARY ANNAS

Second Applicant

AND

A N D

THE BEAURAIN TRUST (JAMES ROBERT ANDREW AND MARIE HEATHER BUCKLEY (WHAIAPU) AS TRUSTEES)

First Respondent

FRIDGE ON THE RIDGE LIMITED

Second Respondent

Member of Authority: Trish MacKinnon

Representatives: David Oliver, Counsel for Applicants

Bill Calver, Counsel for Respondents

Investigation Meeting: On the papers

Submissions and

Information Received:

from the Applicants from the Respondents

Determination: 8 June 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 28 February 2018 I found neither Nancy McCourt nor Gary Annas had been in an employment relationship with either the Beaurain Trust (the Trust) or Fridge on the Ridge Limited (FOTR).1 I found Ms McCourt to have

been in a profit-sharing business relationship with Mr Andrew and Ms Buckley (Whaiapu) through her directorship and shareholding in FOTR. Accordingly I had no jurisdiction to deal further with Ms McCourt's claims.

[2] With respect to Mr Annas I found no evidence that he was in business on his own account or that he was an employee of either the Trust or FOTR. If anyone employed him, it was Ms McCourt, his life partner. Accordingly, I dismissed his claim to have been unjustifiably dismissed by either of the respondents.

[3] The respondents seek an order for costs and, through counsel, submit there is no reason why the normal rules should not apply. Counsel, Mr Calver, asks the Authority to award costs jointly and severally against the applicants in the global sum of $8,000.

[4] Counsel for the applicants, Mr Oliver, opposes the application and submits costs should lie where they fall. In support of this he cites the well-known principles in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz2*, highlighting in particular the principles that costs are discretionary, conduct which unnecessarily increased costs may be taken into account, and costs are to be modest.

[5] Mr Oliver submits Ms McCourt and Mr Annas have incurred significant costs to date which they are not in a financial position to pay. He supplied a statement of the costs they owed to him for his legal services, which were being paid over a period of time and which, at their current rate of repayment, they would not complete for another two years and nine months. Mr Oliver also supplied an email from Ms McCourt in which she itemised weekly and monthly expenses which was close to the household's weekly nett income.

[6] Counsel for the applicants further submits that the costs his clients incurred were increased by the respondents' lack of good faith behaviour in mediation and in the vacation of the original June 2017 date for the Authority's investigation meeting.

In Mr Oliver's submission this increased his clients' pre-hearing costs between July

and October 2017.

2 [2005] NZEmpC 144; [2005] ERNZ 808 (EmpC), confirmed in *Fagotti v Acme & Co Ltd* [2015] EmpC 135.

[7] Finally, counsel submits that if it had not been for an appallingly drafted agreement, it was unlikely Ms McCourt and Mr Annas would have brought their claims to the Authority. He notes the state of the agreement was acknowledged by counsel for the respondents.

[8] In reply submissions Mr Calver says impecuniosity should be taken into account to a limited extent, if at all, noting that issues of enforcement would be for the respondent to manage. He submits that mediation is confidential and should not be taken into account in considering costs in the Authority. In relation to the agreement, which he concedes was very poorly drafted, counsel for the respondents submits it was but one part of the factual matrix and that it should have been clear to the applicants that it was not an employment agreement.

[9] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000, which is set out below:

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[10] Underpinning the award of costs are principles which have been developed and applied over several years. I have already referred to the principles which were referred to with approval by the Full Court in *Da Cruz*. More latterly the principles have been revisited and confirmed by the Full Court in *Fagotti v Acme & Co Limited*.3

[11] After considering the views of counsel I find it is appropriate that costs follow the event in this instance, in accordance with the principles referred to above. I find the starting point for an award of costs should be the Authority's notional daily tariff. That is currently $4,500 for the first day of an investigation meeting and $3,500 for the second and subsequent days. In this instance the investigation meeting took two days, which makes the starting point $8,000.

[12] I agree with counsel for the applicants that the poorly drafted agreement he referred to may have been one reason Ms McCourt and Mr Annan initially made their

claims against the respondent. The agreement was purportedly an Occupancy Agreement but, as I noted in my determination of the substantive issue, appeared to be the product of cutting and pasting from a variety of other documents. It contained elements of commercial premises occupancy, business arrangements, hospitality industry obligations, accommodation/tenancy and employment provisions.

[13] From the time the applicants obtained legal advice on their situation, however, it should have been obvious they would have difficulty relying on such a "dog's breakfast"4 of a document as the basis for their claims to have been employed. I do not accept that document provides good reason for any more than a modest downwards adjustment of the daily tariff. I assess that adjustment as $1,000.

[14] I decline to take into account counsel for the applicant's submission regarding mediation and accept Mr Calver's submission on that matter. With regard to the applicants' submissions on the effect of the delayed investigation meeting, I note Mr Oliver had no objection to the delay at the time and commented that more preparation time was always welcome when running a full case load of matters. I do not find the delay merits a downward adjustment of the tariff.

[15] The ability to pay is a relevant factor in any consideration of costs as a matter of equity and good conscience. I accept Ms McCourt's evidence of the applicants' remuneration and financial commitments and consider their financial situation warrants a downward adjustment of the tariff. I assess that adjustment at 30 percent of the adjusted tariff of $7,000.

Determination

[16] After consideration of the factors discussed above, I order Nancy McCourt and Gary Annas, jointly and severally, to pay the respondents, the Beaurain Trust and Fridge on the Ridge Limited, costs in the sum of $4,900.

Trish MacKinnon

Member of the Employment Relations Authority
