New Zealand Employment Relations Authority Decisions

Rosenberg v Air New Zealand Limited AA431/10 (Auckland) [2010] NZERA 785 (1 October 2010)

Last Updated: 18 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 431/10 5050065

BETWEEN SHELLEY ROSENBERG

Applicant

AND AIR NEW ZEALAND

LIMITED Respondent

Member of Authority: Representatives:

Submissions received:

Eleanor Robinson

Susan Hornsby-Geluk, Counsel for Applicant Kevin Thompson, Counsel for Respondent

30 July and 17 September 2010 from Applicant 06 September 2010 from Respondent

Determination:

1 October 2010

COSTS DETERMINATION OF THE AUTHORITY

[3] This matter involved six days of investigation meeting, with written submissions being submitted subsequent to that. The applicant is seeking an contributory award of $70,000 plus GST towards her actual costs, and disbursements of $7,030.69.

[4] The applicant in support of the level of the claim highlights as significant factors for the consideration of the Authority the fact that this matter was significantly more complex, including the complexities of medical evidence, than the majority of cases which come before the Authority; it involved extensive submissions, and a significant number of witnesses

[5] Ms Hornsby-Geluk for the applicant cited the Employment Court case *Chief Executive of the Department of Corrections v Taiwhiwhirangi1* in support of an additional award of costs in respect of preparation. In that case Shaw J, referring to an Authority case, said:[1]

"The *case undoubtedly required considerable preparation including detailed analysis of closed circuit video footage. In these circumstances a realistic preparation is appropriate."*

[6] The respondent argues that costs should lie where they fall, and further submits that the applicant, having rejected fair and reasonable proposals on costs necessitating the respondent to incur further costs in preparing submissions on the costs issue, should make a modest contribution to the respondent's costs.

[7] The respondent further argues that the applicant has, by virtue of her conduct of the case, incurred costs which could have been avoided. Equally Ms Hornsby-Geluk for the applicant argues that the respondent's conduct of the case unreasonably increased the costs incurred by the applicant.

1 [2008] ERNZ 73

[8] Pursuant to clause 15, Schedule 2 of the Employment Relations Act 2000, the Authority has the power to award costs and expenses to the applicant as the Authority thinks reasonable.

[9] Costs are determined by the Authority exercising its discretion on the basis of established principles and, as set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*[2], the Authority may use a tariff-based approach flexibly to the particular circumstances of the case. The Employment Court observed:

[46] We find there is nothing wrong in principle with the Authority's tariff based approach, so long as it is not applied in a rigid manner without regard to the particular characteristics of the case.

[10] These principles are well settled and of relevance in this instance is the principle that costs will be modest. The Employment Court further observed at para [47]:

"... we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority."

[11] It is unusual for the Authority to allow preparation time per day of the investigation meeting. In this particular case, following a perusal of the file and the extremely detailed costs submissions from both parties, in addition to an appreciation of the additional complexities and preponderance of medical evidence, I am prepared to accept that there was a necessity for preparation in excess of what is usually required for a case falling within the jurisdiction of the Authority.

[12] To a large extent however, the complexity of the case is reflected in the six days of hearing. Adopting a notional daily tariff of the Authority as $3,000, applied to an investigation meeting extending over six days, I take the starting point for costs as $18,000.00.

[13] From that point I take into consideration the following observation by the Employment Court:[3]

The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs

[14] This was a lengthy, multi-faceted and protracted matter. I consider it appropriate to take this aspect into consideration and award an additional $2,500.00. I order the respondent to contribute $20,500.00 towards the applicant's actual costs.

[15] The applicant has also claimed reimbursement of $7,030.69 in respect of disbursements relating to the Authority filing fee, the hearing fee and costs of medical witnesses. Disbursements are normally recoverable and the costs of the medical witnesses are supported by invoices. I am satisfied that $7,030.69 is an appropriate amount for the respondent to contribute.

[16] The respondents are ordered by pay the applicant $20,500.00 plus GST towards its legal costs and $7,030.69 as disbursements.

Eleanor Robinson
Member of the Employment Relations Authority
Pursuant to Schedule 2, clause 16, Employment Relations Act 2000

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[1] Ibid at para [6]
[2] [2005] NZEmpC 144; [2005] ERNZ 808
[3] Ibid at para [46]
