

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 338
5525831

BETWEEN	JONATHAN SEGAL Applicant
A N D	INFOR (NEW ZEALAND) First Respondent
A N D	INFOR GLOBAL SOLUTIONS (ANZ) PTY LIMITED Second Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Michael O'Brien, Counsel for the Applicant
Rob Towner, Counsel for the Respondents

Submissions Received: 9 and 27 October 2015 from the Respondents
23 October 2015 from the Applicant

Date of Determination: 30 October 2015

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

A. Mr Segal is ordered to pay Infor NZ and Infor Australia \$3,000 towards their actual legal costs.

The substantive determinations on preliminary matters

[1] By determination dated 20 July 2015¹ (July determination) the Authority declined the respondents' application for a stay of any further investigation by the Authority as to its jurisdiction to investigate the applicant's employment relationship problem and reserved costs.

¹ [2015] NZERA Auckland 213

[2] By determination of the Authority on a further preliminary matter on 28 September 2015² (September determination) it was determined that:

- (a) The applicant, Mr Jonathan Segal, was employed by Infor Global Solutions (ANZ) Pty Limited (Infor Australia) and was never employed by Infor (New Zealand) (Infor NZ);
- (b) Mr Segal's employment by Infor Australia was at all times governed by the State of Victoria, Australia, that New Zealand is not a *forum conveniens* to hear the applicant's claims against Infor Australia; and
- (c) Costs were reserved.

[3] The parties were encouraged to resolve costs by agreement but that has not occurred.

The application by Infor NZ and Infor Australia for costs

[4] Infor NZ and Infor Australia seek an award of costs by the Authority in the sum of \$3,500 on the grounds that they incurred significant costs in defending the applicant's claims. Infor NZ and Infor Australia say that even though the investigation meeting itself took less than a day, because of the extensive work involved in defending Mr Segal's claims the Authority should exercise its discretion to award costs equal to the Authority's daily tariff of \$3,500.

Submissions in reply on behalf of Mr Segal

[5] Mr O'Brien, Counsel for Mr Segal submits that Mr Segal does not "*have the financial ability to pay the costs of \$3,500 plus GST*". In support of this contention, Mr O'Brien has filed email correspondence between Mr Segal and various recruitment agencies and prospective employers reflecting Mr Segal's unsuccessful job applications since the termination of his employment in September 2014. There is no evidence as to Mr Segal's financial means or lack thereof.

[6] Mr O'Brien submits that due to Mr Segal's financial position, it would be reasonable to make a costs award of \$1,200 to the respondents.

² [2015] NZERA Auckland 298

[7] Alternatively, Mr O'Brien submits that if the Authority is going to approach the matter of costs by applying the daily tariff approach, then the investigation meeting occupied half a day and any costs award should be no more than \$1,750 plus GST.

Discussion

Application for stay

[8] By agreement, both preliminary matters were dealt with by the Authority on the papers. A half day investigation meeting was held by the Authority in order for two witnesses for Infor NZ and Infor Australia to be questioned further on their evidence.

[9] Following the investigation meeting, Counsel for Infor NZ and Infor Australia verbally sought a stay of the Authority's investigation. Counsel subsequently filed an application seeking a stay of the Authority's preliminary investigation into its jurisdiction pending the Court of Appeal's judgment in *New Zealand Basing Limited v. Brown*³. Counsel for Mr Segal opposed the application. Comprehensive submissions were filed by counsel for the parties in relation to that matter and a determination was issued by the Authority on 20 July 2015 declining the application and reserving the issue of costs.

[10] Mr Segal successfully defended the application by Infor NZ and Infor Australia for a stay of any further investigation. Mr Segal is entitled to a contribution as to costs.

Preliminary question as to the Authority's jurisdiction

[11] After declining the application for stay, the Authority considered the question concerning its jurisdiction to investigate Mr Segal's claims.

[12] Infor NZ and Infor Australia were successful in this matter, which was the more significant matter for the Authority to determine. Infor NZ and Infor Australia are entitled to a contribution as to costs.

³ [2015] NZCA 168

Authority's power to award costs

[13] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[14] Costs are at the discretion of the Authority. In the recent decision of the Full Employment Court in *Fagotti v. Acme & Co Ltd*⁴, the Full Court refers to the Authority having a “*broad statutory discretion*” in relation to costs.

[15] Mr Towner for Infor NZ and Infor Australia states that the costs incurred to defend Mr Segal's claims were significant and far in excess of the Authority's daily tariff of \$3,500. However, Mr Towner seeks an award of \$3,500 in costs. The sum sought is GST inclusive, not exclusive as submitted by Mr O'Brien on behalf of Mr Segal.

[16] Mr O'Brien in his submissions in reply refers to *Booth v. Big Kahuna Holdings Ltd*⁵, where the Court held:

... parties who choose to incur costs in excess of this [daily] rate are entitled to do so but cannot confidently expect to recoup any additional sums ...

[17] In this case, Infor NZ and Infor Australia do not seek to recoup their full costs which significantly exceed the daily tariff. They seek to recoup costs at the daily rate.

[18] Presumably the risk of costs being awarded against Mr Segal was one of the issues that was factored in when deciding whether or not to pursue legal proceedings against Infor NZ and Infor Australia.

[19] It is my view that the starting point should be the daily tariff. There were 2 matters requiring determination by the Authority which in my assessment equates to a one day matter in the Authority.

[20] Mr Segal was successful in defending the application by Infor NZ and Infor Australia for a stay of any further investigation by the Authority as to its jurisdiction to investigate his employment relationship problem. This is a factor which I will take into account.

⁴ [2015] NZEmpC 135

⁵ [2015] NZEmpC 4 at para.[17]

[21] Infor NZ and Infor Australia were successful in the more significant preliminary matter regarding the Authority's jurisdiction to investigate Mr Segal's claims.

[22] In the circumstances, taking into account the respective successes and failures of both parties, I make an award of \$3,000 in favour of Infor NZ and Infor Australia.

Order

[23] Mr Segal is ordered to pay Infor NZ and Infor Australia \$3,000 towards their actual legal costs.

Anna Fitzgibbon
Member of the Employment Relations Authority