



New Zealand Employment Relations Authority Decisions

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Smith v Air2There.com (2008) Limited (Wellington) [2011] NZERA 385; [2011] NZERA Wellington 98 (9 June 2011)

Last Updated: 24 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 98 5320148

BETWEEN DAVID SMITH

Applicant

AND [AIR2THERE.COM](#) (2008)

LIMITED

Respondent

Member of Authority: Eleanor Robinson

Costs Submissions 20 May and 3 June 2011

Determination: 9 June 2011

COSTS DETERMINATION OF THE AUTHORITY

[5] Ms Buckett, citing the case of *McKendry v Jansen and Prouting*¹, submits that costs awards fall within s 123(1)(c) of the Act on the basis that losses under s123(1)(c) can include non contractual losses as special damages.

[6] Ms Buckett submits that the conduct of the Respondent supports a costs award at the level claimed in that:

- (i) The matter was conducted in an extraordinarily adversarial and aggressive fashion;
- (ii) The Respondent obstructed and frustrated the process;
- (iii) The Respondent and his counsel engaged in exceptionally bad behaviour;
- (iv) There were late starts and adjournments;
- (v) The content and nature of the allegations prolonged matters.

[7] Mr Gowland, on behalf of the Respondent, submits that the basis for indemnity costs as advanced by Ms Buckett is contrary to the principles of reasonableness and proportionality. Mr Gowland also submits that a reduction in the level of costs claimed is merited on the basis of the conduct of the Applicant, making particular reference to:

- (i) Breach of the Authority's direction to serve the agreed bundle of documents causing delay;
- (ii) Gratuitous and lengthy cross-examination of the Respondent's CEO;
- (iii) Arduous and constant interruptions and interjections;
- (iv) Calling witnesses for no real probative value.

1 [\[2010\] NZEMPC 128](#)

[8] Mr Gowland further submits that s 123(1)(b) and s 123(1)(c)(ii) provisions are not applicable to costs awards on the basis that:

- s123(1)(b), which makes provision for the reimbursement to an employee of

"a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance", applies to losses in the employment of a party. Mr Gowland submits, applying a *ejusdem generis* or *noscitur socias* interpretation, that what is meant by "other money lost" refers to losses similar in nature to lost wages.

- s 123(1)(c)(ii), which makes provision for "the loss of a benefit, whether or not of a monetary kind", refers to a loss of an employment benefit such as a commission payment.

Discussion

[9] The Applicant was successful in his unjustifiable dismissal claim and was accordingly awarded lost wages and compensation pursuant to s 123 of the Act. However the Applicant was not successful in his claim for reinstatement and his remedies were reduced for contributory conduct pursuant to s 124. Whilst costs normally follow the event and do so in this case, the overall outcome must be taken into consideration when determining the level of costs which it is appropriate to award.

Conduct of the parties

[10] Both parties have referred in submissions to the conduct of the other party as being such as should incur an increase or a decrease in the level of costs to be awarded.

[11] The role of the Authority in conducting a case before it is investigatory; however in this particular case counsel conducted themselves in a confrontational and adversarial manner requiring the intervention of the Authority, which conduct was neither helpful nor efficient in the conduct of the case. I also observe that there was, on the part of both parties, some element of avoidable delay which had the effect of prolonging the investigation process.

[12] In these circumstances I find no justification for raising or lowering the costs award based on the conduct of either party.

Principles

[13] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the [Employment Relations Act 2000](#) which states: **15 Power to award costs**

(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.

[14] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*^[1].

[15] Both parties refer in their submissions to *PBO Limited (formerly Rush Security Ltd) v Da Cruz*^[2] and submit that the principles and the approach adopted by the Authority on which an award of costs is made are well settled.

[16] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*^[3] that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*^[4] at para [48] "As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred."

[17] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a 2 day Investigation Meeting this would normally equate to an award of \$6,000.00.

Special Damages

[18] The Applicant is seeking special damages.

[19] Firstly, whilst the Authority has the jurisdiction to award special damages in certain circumstances, the damages now claimed were not averred in the Statement of Problem, only falling to be claimed after the matter had been determined by the Authority and the question of costs alone remained to be determined. I am of the view that it would be contrary to the principles of the Act to allow such an application to proceed at this stage.

[20] Secondly, I have considered Ms Barrett's submissions on the applicability of the s123(l)(b) and [s123\(i\)\(c\)](#) provisions, but I do not agree that these provisions of the Act are to be applied as argued and in this respect find Mr Gowland's arguments to be the more persuasive.

[21] These arguments gain support from the judgment of the Employment Court referred to by Ms Buckett. In *McKendry v Jansen and Fronting*^[5] the Employment Court held that compensation under [s 123\(1\)](#) encompassed both contractual and statutory benefits; in that particular case the loss of a statutory parental leave payment was held to be not only "other money

lost by the employee as a result of the grievance" under [s 123\(1\)\(b\)](#), but also to be a "loss of any benefitwhich the employee might reasonably have expected to obtain if the personal grievance had not arisen" under [s 123\(1\)\(c\)\(ii\)](#).

[22] However I do not find this case to be authority for Ms Buckettt's contention that costs fall within [s 123\(1\)\(c\)\(ii\)](#), as costs are neither a contractual nor a statutory benefit.

[23] Examining the case law on the subject, I find examples of heads of compensatable loss arising under [s 123\(1\)\(c\)\(ii\)](#) recognised by the Court to include future loss of remuneration[6], employee share ownership plans[7], concessionary travel arrangements[8], and a petrol allowance[9]. There have been many others as noted extensively in *Mazengarb's Employment Law*".

[24] However the cost of legal action, even that in pursuit of a personal grievance, is not included in the list. I consider that to be because costs do not arise as either a contractual or statutory benefit in the context of [s 123\(1\)](#) of the Act.

Determination

11 Chapter 11 at 11.35

[25] The principles governing award of costs in the Authority have, as discussed, been clearly set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[10]. Recompense under [s 123](#) of the Act has been addressed by the Authority in the substantive determination. I see no reason in the current case for departing from the normal level of awards made by the Authority in similar circumstances.

[26] The normal rule is that costs follow the event and Mr Smith is entitled to a contribution to his costs.

[27] For a case of this kind \$3,000.00 is accepted as the notional daily rate. Accordingly, Air2there is ordered to pay Mr Smith \$6,000.00 costs, pursuant to clause 15 of Schedule 2 of the [Employment Relations Act 2000](#).

[28] Mr Smith wishes to recover the \$70.00 filing fee paid on his application. Air2there is ordered to pay that amount of \$70.00 in addition to the costs award.

Eleanor Robinson

Member of the Employment Relations Authority

[1] [\[1996\] 2 ERNZ 622](#)

[2] [\[2005\] NZEmpC 144](#); [\[2005\] 1 ERNZ 808](#)

[3] [\[2005\] NZEmpC 144](#); [\[2005\] 1 ERNZ 808](#)

[4] [\[2001\] NZCA 313](#); [\[2001\] ERNZ 305](#)

[5] [\[2010\] NZEMPC 128](#)

[6] *NZ Insurance Guild IUW v Guadian Royal Exchange Assurance Co Ltd* [\[1978\] ACJ 151](#)

[7] *Trotter v Telecom Corporation of NZ Ltd* [\[1993\] NZEmpC 152](#); [\[1993\] 2 ERNZ 659](#)

[8] *Unkovich v Air New Zealand Ltd* [\[1993\] NZEmpC 63](#); [\[1993\] 1 ERNZ 526](#)

[9] *Madsen v Aotearoa International Ltd* [\[1995\] 1 ERNZ 325](#)

[10] [\[2005\] NZEmpC 144](#); [\[2005\] 1 ERNZ 808](#)