

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 44/09  
5124947

BETWEEN THE NEW ZEALAND  
PROFESSIONAL FIRE  
FIGHTERS UNION, BRUCE  
IRVINE and GARY LUFF  
Applicants

AND THE NEW ZEALAND FIRE  
SERVICE COMMISSION  
Respondent

Member of Authority: G J Wood

Representatives: Peter Cranney for the Applicants  
Paul Mc Bride for the Respondent

Submissions Received: By 11 February 2009

Determination: 7 April 2009

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] On behalf of the Fire Service Commission, Mr McBride seeks costs against the Professional Fire Fighters Union for three separate aspects to this employment relationship problem. The union was unsuccessful in its urgent application for interim injunction, successful in its urgent application for interim injunction pending a challenge and withdrew its substantive application just before the investigation meeting.

[2] These matters have involved another party, for whom it has been previously agreed would share the payment of costs with the union. The Fire Service's application here has continued on that understanding, except for costs incurred after

the other party withdrew its substantive application, which was earlier than the union did.

[3] This matter involves the applicants' objection to the appointment of people to reasonably senior positions in the Fire Service. The applicants filed an interim injunction to restrain the Commission from taking any further steps to employ them because their appointments were allegedly in breach of the collective agreement. In a situation of extreme urgency the matter was heard within a number of days of filing. It resulted in a determination declining the interim injunction being delivered at 7.30pm on Friday, 23 May 2008. Reasons for this determination were provided on 26 May, which at that point had also been brought against the Chief Executive of the New Zealand Fire Service, who was not the employer. In particular, I noted the impact on the appointees if they were not entitled to start work and that the applicants' rights would not be rendered nugatory even though the interim injunction had been declined. That determination was challenged to the Employment Court, but the result was the same.

[4] At the conclusion of the meeting on 23 May the applicants made application for a short term interim injunction to permit them to urgently file a challenge. That investigation meeting was held on Saturday, 24 May. I granted that interim injunction on conditions and relied in particular on the payment into Court that the union undertook to make.

[5] After the Employment Court had dismissed the challenge, the applicants continued with their claim against the Commission on a substantive basis. A different Authority member took over the file and set a timetable for the substantive investigation meeting. The union changed the focus of its claims by way of amended statement of problem. It then withdrew all claims three days before the substantive investigation.

[6] In respect of the interim injunction application, Mr McBride (on behalf of the Fire Service Commission) seeks \$9,000 plus GST, towards total costs of \$13,100 plus \$36.30 in disbursements. In support of this, Mr McBride noted the serious allegations made by the applicants, the decision to delay making the claim to the "last minute", its lack of merit and the naming of the Commission's Chief Executive as a party.

[7] On the stay application Mr McBride seeks full solicitor/client costs of \$925 plus GST, relying on the lack of success of the challenge and the fact that the union had sought an indulgence.

[8] In relation to the substantive hearing, Mr McBride seeks \$10,000 plus GST and full disbursements of solicitor/client costs of just under \$12,000. He noted in particular that the union continued with its claim and amended it twice even though the other original applicant had withdrawn, that there was no tenable evidence to support the new claim, that the union had failed to comply with the timetable and its late withdrawal.

[9] On behalf of the union, Mr Cranney submitted that \$3,000 would be a generous award for the interim injunction, which took 3½ hours to hear, remembering that the Fire Service Commission would also be entitled to recover \$3,000 from the other applicants. In relation to the stay, Mr Cranney noted that the matter only took so long because of the unsuccessful opposition by the Fire Service and thus it was a matter where an award of \$400 would suffice. In relation to the substantive investigation meeting, Mr Cranney submitted, on the basis that there was no additional evidence provided of any substance; that the new statement of problem only sought a remedy that the union would be entitled to be involved in the process of reviewing future appointments; that the Commission agreed with this and hence the statement of problem was withdrawn; then costs should lie where they fell.

[10] In response, Mr McBride claimed that it was appropriate in the case of the interim injunction for two counsel to be involved in the substantial preparation work required. In relation to the stay, Mr McBride submitted that it was proper for the Commission to contest the application and noted again that the applicants had failed in the Employment Court. In relation to the substantive hearing, Mr McBride accepted that the applicants had provided the same evidence as they had previously to the Authority in the Court, but that the Commission had provided additional material, as well as a substantially rewritten statement in reply, which involved the instruction of senior counsel.

[11] In final submissions in reply, Mr Cranney noted that in the 50 hours between filing and determination by the Authority, the Commission was claiming \$260 per hour for each of these 50 hours. He also noted that the appropriateness of the interim stay was not argued or adjudicated upon by the Employment Court.

[12] The appropriate principles for the Authority when determining costs is set out in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 at para.[44]. These principles include:

- *There is a discretion as to whether costs would be awarded and what amount;*
- *The discretion is to be exercised in accordance with principle and not arbitrarily;*
- *The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;*
- *Equity and good conscience is to be considered on a case by case basis;*
- *Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct, although conduct which increase costs unnecessarily can be taken into account in inflating or reducing an award;*
- *It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;*
- *That costs generally follow the event;*
- *Without prejudice offers can be taken into account;*
- *That awards will be modest.*

[13] It was also noted that there was an overall need to ensure that costs being incurred were reasonable in the light of the amount that is likely to be recovered as remedies in costs from the Authority.

[14] I conclude that an unusual contribution to costs should be made for the interim application because of the delays in bringing it and the extreme urgency in which it was disposed. Given that there were two applicants and therefore the union should only contribute to half of the normal costs, a fair share of their contribution would be \$4,500. No allowance is made for disbursements on the same grounds as those made by the Employment Court and in the absence of full details.

[15] I also accept that the application for stay was an indulgence for which the union should pay full solicitor/client costs. The claim for \$975 is therefore appropriate. The Commission was entitled to oppose the application for stay because of the great impact on it and the people it had appointed to the positions, particularly as it was subsequently held not to have acted outside its authority.

[16] I have consulted with my colleague (as agreed) who dealt with the substantive investigation. I conclude that the substantive matter could have been withdrawn earlier, without the need for the Commission to have prepared evidence and to have started preparing for a full investigation meeting, set down for up to three days – a

greatly extended period compared to most Authority investigation meetings. Given the need for preparation, I consider that \$3,000 is an appropriate contribution to costs. In this regard, the Commission was entitled to engage a QC if it wished or to engage the services of McBride Davenport James. For the Authority investigation meeting, however, it was not necessary to instruct both, and my conclusion of \$3,000 costs is calculated on this basis. For the same reasons as above, no disbursements are appropriate.

[17] There has been no suggestion that the two union member applicants, Messrs Irvine and Luff, should be required to contribute to the Commission's costs. I therefore order the first applicant, the New Zealand Professional Fire Fighters Union to pay to the respondent, the New Zealand Fire Service Commission, \$8,425 in costs.

**G J Wood**  
**Member of the Employment Relations Authority**