IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 279/10
5161816

	BETWEEN	FLIGHT ATTENDANTS & RELATED SERVICES (NZ) ASSOCIATION Applicant
	AND	AIR NEW ZEALAND LTD Respondent

Member of Authority:	James Wilson
Representatives:	Stewart King for the applicant Graeme Norton for the respondent
Costs submissions received:	26 March 2010 from the applicant 22 March 2010 from the respondent
Determination:	11 June 2010

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 4 March 2010 (AA 99/10) I disposed of an application from FARSA by saying:

> ***Discussion and disposal***
>
> *[6] The statement of problem filed by FARSA, while dealing with a slightly different factual situation, is very similar to another statement of problem filed by them, citing Pacific Blue Employment and Crewing Ltd. as respondent. In my determination of that matter issued on the same day as this determination, I said:*

- ***Meetings convened by an employer as part of a disciplinary investigation regarding the alleged conduct of an employee are not convened pursuant to a statutory right to "do anything or take any action" and do not fall within the ambit of section 236 of the Act.***
- ***Whether or not an employer has conducted their investigation meeting in a fair and reasonable manner, including whether or not an employee was allowed proper and appropriate representation, will be judged against the employer's statutory duty to act in good faith, any relevant provisions of the employee's employment agreement and by considering "whether the employer's actions, and how the employer acted, was what a fair and reasonable employer would have done in all the circumstances at the time…."***
- ***Every case will be considered on its merits and according to its particular circumstances and it is impossible to make any statement regarding what is fair and reasonable which would have universal application.***

[7] While I accept Mr Norton's point, that FARSA's application seeks a determination of what is an hypothetical and speculative question, my determination in the Pacific Blue case, set out above, addresses the same fundamental question as that posed by FARSA in this application. The determination in the Pacific Blue case will, I hope, clarify the issue at the core of the dispute between FARSA and Air New Zealand. I see no merit in issuing any further determination in the current case which is, with this determination, closed

[2] In that determination I reserved the question of costs in the hope that the parties would be able to reach agreement between themselves. Unfortunately they have been unable to do so and Mr Norton, for Air New Zealand, has filed a submission seeking an award of costs of $500.00. Mr King, for FARSA, has opposed that submission and suggested that costs should lie where they fall.

The submissions

[3] In his submission Mr Norton has argued that, in accordance with the principles set out by the Employment Court in *PBO (formally Rush Security Ltd.) v Da Cruz* [2005]1 ERNZ 808, Air New Zealand, as the successful party is entitled to a contribution towards its costs. He says that in order to properly defend FARSA's claims it was necessary for in-house counsel to spend in the region of five hours to prepare. This time included attendance at meetings, correspondence with FARSA, researching the relevant case law, preparing two statements in reply and participating in a telephone conference with the Authority. Mr Norton has correctly identified that it has been clearly established by the Employment Court, that representation by in house counsel does not preclude an award of costs being made. (see *Murphy & Routhan t/a Enzo's Pizza v Van Beek* [1998] 2 ERNZ 607). He suggests a nominal charge out rate for senior in-house counsel of $200. Mr Norton also argues that FARSA's case had little merit and little chance of success but that Air New Zealand proceeded in an efficient manner and did not seek to unduly prolong or complicate the proceedings.

[4] Mr King argues that the Authority's determination will be useful to the Union as an employee Association that facilitates collective bargaining and works to address the inherent inequalities of power in the employment relationship. He says that the decision will benefit both FARSA and Air New Zealand and that it will provide parameters to employers and employees. He submits that the Union should not be dissuaded from seeking such outcomes through applications to the Authority (by the possibility that costs will be awarded against them) and costs should, in this case, lie where they fall.

Discussion and determination

[5] By agreement this matter was determined on the papers. However Air New Zealand was required to spend time and effort in responding to the statement of problem filed by FARSA and it is appropriate that they receive some contribution towards this expense. Mr Norton's suggestion of a contribution of $500.00 towards a nominal expense of $1000.00 seems reasonable.

[6] **FARSA is ordered to pay Air New Zealand Ltd $500.00 as a contribution towards their costs.**

James Wilson
Member of the Employment Relations Authority