

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 139
5339589

BETWEEN NZ AMALGAMATED
 ENGINEERING, PRINTING &
 MANUFACTURING UNION INC
 Applicant

A N D PIKE RIVER COAL LIMITED (IN
 RECEIVERSHIP)
 Respondent

Member of Authority: Helen Doyle

Representatives: Greg Lloyd, Counsel for Applicant
 Tim Clarke, Counsel for Respondent

Submissions Received: 24 August 2011 from Applicant
 2 August 2011 from Respondent
 Affidavit of Alan Harold James Clarence in support of
 applicant- Affirmed 17 August 2011

Date of Determination: 19 September 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 20 July 2011, I found in favour of the respondent where there was a dispute as to whether a payment in lieu of notice formed part of redundancy compensation. It was an important issue for both parties because any compensation for redundancy owed to an employee is given preferential status in a receivership under the Companies Act 1983.

[2] I reserved the issue of costs and have now received submissions from both counsel.

[3] On behalf of the applicant, I was also provided with an affidavit of Alan Harold James Clarence, Union organiser of Nelson, affirmed on 17 August 2011. Mr Lloyd had, I accept, alerted the Authority and Mr Clarke earlier to that possibility because there was a difference in views about the nature and extent of any discussions

between the Union and Receivers about the dispute before proceedings were lodged. In the circumstances, although unusual, I am prepared to read the affidavit. I have decided that it is not necessary to return to Mr Clarke for his comment on the affidavit content in the exercise of my discretion as to costs.

[4] I shall set out the three matters in Mr Clarke's submissions that Mr Clarence intended his affidavit to respond to.

[5] The first matter is that the issue of payment in lieu of notice forming part of redundancy compensation was raised only briefly with the Receivers at a meeting. Mr Clarence's affidavit and the documents annexed thereto, support some discussion about whether payment in lieu of notice was part of redundancy compensation at meetings with the Receivers on 15, 16 and 21 December 2010. The Union's position was also put in some detail in Mr Lloyd's letter to the Receivers dated 14 December 2010. What I conclude in that regard is that both parties had a different legal view about the issues and they made that view quite clear to each other.

[6] The second matter Mr Clarke refers to in his submissions is that the respondent did not understand and was not told by the applicant that the Union would issue formal proceedings in the Authority against the company. Notes of the meeting that took place on 16 December 2010 are annexed to Mr Clarence's affidavit and marked "D". They refer amongst other matters to the Assistant National Secretary of the Union, Ged O'Connell, stating *Union has a different position on payment of notice and we are challenging receivers position.*

[7] The third matter overlapping with the second Mr Clarke submits, is that there was no formal letter from the Union before the proceedings were lodged. Mr Lloyd accepts that was the position but does not he submits accept that the Receivers were not previously aware of the Union's intention to issue formal proceedings. I do not find for present purposes in exercising my discretion as to costs I am required to resolve whether or not the Receivers knew of the Union's intention to lodge formal proceedings. That is because even after the proceedings were lodged there was the opportunity for exactly the same sort of discussion and resolution as there had been in the more informal setting.

[8] I shall now set out the balance of submissions.

The respondent's submissions

[9] Mr Clarke refers to the leading Full Court judgment in *PBO (formerly Rush Security Ltd) Ltd v. Da Cruz* [2005] 1 ERNZ 808 that set out the relevant principles that the Authority should follow.

[10] Mr Clarke recognises that the Authority's standard approach in disputes regarding the interpretation of collective agreements is to let costs lie where they fall but submits that this was not a typical dispute because there was no ongoing relationship and the claim was essentially a money claim.

[11] Mr Clarke submits a suitable starting point for an award of costs in this matter is \$3,000 for the following reasons:

- It was not a situation where the parties' relative positions were finely balanced and the applicant's claim was without merit and the applicant had acted unreasonably by bringing proceedings;
- The applicant brought the claim without prior notice.

[12] Mr Clarke finally submits that the Receivers have been put to considerable trouble and expense in defending the application. He submits that the funds spent on defending the claim would otherwise have been available for the costs of receivership and the company's creditors. He acknowledges in his submissions that the matter was dealt with on the papers.

[13] Mr Clarke refers to the significant sum the Union stood to gain and submits that it should not be immune from the usual costs consequences of being unsuccessful in bringing proceedings. He seeks an award of \$5,000 in costs in all these circumstances.

The applicant's submission

[14] Mr Lloyd submits that this was a typical dispute arising over the interpretation of a collective agreement and there is no reason why the Authority should depart from its usual practice of ordering that costs lie where they fall in a dispute.

[15] Mr Lloyd further submits that any criticism of the Union is unfair and unwarranted and that there is no basis on which the respondent can be critical of the

Union for bringing a case on behalf of its members who believed they had not received their full entitlements following the closure of the mine.

[16] Mr Lloyd submits that counsel for the respondent acknowledged, given the nature of the dispute and the respondent's obligations to its creditors, that the matter could not be resolved informally in mediation and the dispute was dealt with on the papers and there is no reason to depart from the usual approach that costs should lie where they fall.

Determination

[17] The Authority finds that this matter was a dispute about the interpretation, application or operation of the provisions of the employment agreement and whether the provision for four weeks' payment in lieu of notice formed part of the redundancy compensation.

[18] It seemed unlikely, objectively assessed, that the dispute could have been informally resolved even if a letter had been forwarded to the Receivers before formal proceedings were lodged. There was a large amount of money at stake and the Union had a very clear view about the matter, as did the Receivers.

[19] The matter was determined by the Authority on the papers by way of timetabled submissions. The parties were not put to the expense of attending at an investigation meeting. In all the circumstances, the Authority is not persuaded that this is a matter where costs should be awarded.

[20] I order that costs lie where they fall.

Helen Doyle
Member of the Employment Relations Authority