

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 21

5280234, 5280277, 5280279,
5280284, 5280285 and 5293977

BETWEEN AYLA HUTTON AND 113
OTHERS
Applicants

AND PROVENCOCADMUS
LIMITED (In Receivership) and
PROVENCO PAYMENTS
LIMITED (In Receivership) and
PROVENCO RETAIL
AUTOMATION LIMITED (In
Receivership) and CADMUS
PAYMENTS SOLUTIONS
LIMITED (In Receivership) and
PROVENCO TECHNOLOGY
LIMITED (In Receivership)
Respondents

Member of Authority: Alastair Dumbleton

Submissions Received 28 November and 20 December 2011

Determination: 18 January 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] In its determination of 8 November 2011 – [2011] NZERA Auckland 482 – the Authority reserved costs and sought written application if agreement could not be reached. Costs have not been agreed and an application has been made and responded to.

[2] For the investigation meeting, which took place over three days, on behalf of the respondents counsel Mr Clarke seeks an order for increased costs of \$18,000 as a contribution to actual legal fees exceeding the far greater amount of \$100,000. Mr Clarke submits that although the Authority's usual daily tariff ranges up around \$3,000 per day, making \$9,000 a suitable starting point for an award, there are a

number of reasons why the Authority should exercise its discretion to award at least double this amount.

[3] Counsel for the 114 applicants, Mr Skelton, submits that there is no justification in this case for an award of increased costs above the usual tariff of \$2,500 to \$3,000 per day. He submits that a contribution of \$7,500 is justifiable on “public policy/access to justice” grounds. This is so that large costs awards made by the Authority will not create disincentives for general disputes to be resolved through access to the Authority in matters exclusively within its jurisdiction. Mr Skelton submits this is not a claim where an award of increased costs is justified as a result of the claim being frivolous or vexatious.

[4] In accordance with the relevant principles as set out by the Employment Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 referred to by counsel, the Authority has a discretion as to whether costs should be awarded and, if so, in what amount. Usually the successful party will be entitled to a reasonable contribution to its actual costs from the unsuccessful party. In determining costs each case should be considered in the light of its own circumstances. The Authority from time to time has found that the circumstances justify an award of costs increased above the so-called tariff of about \$3,000 per day. Mr Clarke has referred to several cases where between \$5,000 and \$7,000 per day has been awarded on this basis.

[5] It is not necessary for the Authority to determine whether the respondent’s actual legal fees of over \$100,000 were reasonable in this case, as the total amount sought, \$18,000, is only a one-fifth of those or less. I do however regard those actual costs as some indication of the lack of focus and direction in the way claims were initially formulated and put before the Authority for determination.

[6] Eventually the parties were able to agree that the sole issue for determination by the Authority was the identity of the applicants’ former employer or employers.

[7] I am satisfied that the respondents were unnecessarily put to extra costs because of the direction the Authority and the respondents were initially asked to go in, before Mr Skelton became involved as counsel and a more effectual and rationalised approach was taken to sorting out the liability of employer and receivers insofar as the Authority had jurisdiction.

[8] While finally there was only a single issue to be determined, it was one of part law and part fact, the latter circumstance requiring detailed information in relation to each applicant of which there were 114.

[9] I accept that the applicants were not entirely without success, as the investigation resulted in information coming to light that led to settlement in respect of the claims of two, Mr Kennelly and Mr Jury. I take no account of a complaint of conflict of interest made by the respondents against counsel who acted for the applicants before Mr Skelton. The complaint was not ultimately upheld and the applicants should not have to bear any increased costs in respect of it.

[10] In my view it is a circumstance of some relevance that there were multiple applicants in this case against whom costs are sought. Spread evenly among them an award of \$18,000 would require each applicant to contribute only \$158, hardly an amount which could be regarded as a disincentive to resolving disputes by access to the Authority.

[11] I consider in the circumstances that the Authority's discretion should be exercised to award costs at a level of \$5,000 per day, making a total award of \$15,000 as a reasonable contribution to the respondents' significantly higher costs.

[12] The applicants are ordered to pay that amount to the respondents pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Alastair Dumbleton
Member of the Employment Relations Authority