IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2019] NZERA Wellington 167
3021991

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	ADVOCATES FOR EMPLOYERS NZ LIMITED First Respondent
	AND	FSB NAPIER LIMITED Second Respondent
Member of Authority:	M B Loftus	
Representatives:	Claire English, counsel for Applicant Gary Tayler, advocate for First Respondent Nil for Second Respondent	
Submissions Received:	27 February 2019 from First Respondent 20 March 2019 from Applicant	
Determination:	21 March 2019	

COSTS DETERMINATION OF THE AUTHORITY

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[1] On 3 December 2018 I issued a determination in respect to the Inspector's claim the second respondent was guilty of various breaches of its statutory duty in respect to the provision of employment records and the first respondent (AENZ) was a party to, indeed primarily responsible for, the alleged breaches .[1]

[2] The action against FSB was abandoned as a result of its liquidation the day before the investigation but that against AENZ continued.[2] I concluded that while

[1] [2018] NZERA Wellington 108
[2] Section 248 of the Companies Act 1993

AENZ's actions were unacceptable and warranted censure that could not occur as the Authority lacked the required jurisdiction.[3]

[3] I went to say:

> Costs are reserved though I express a preliminary view they should lie where they fall. Mr McAleer's conduct warranted censure and he should consider himself lucky he avoided penalty by virtue of a technicality.[4] [5]

[4] Notwithstanding what I thought a fairly unsubtle hint AENZ has now sought a contribution toward the costs it incurred in defending the Inspector's claims.

[5] In doing so it refers to well established principles that apply to a costs award in the Authority.[6] Applying the above principles and a view there was nothing untoward about this matter that would warrant a departure from the normal daily tariff AENZ asserts an award of $2,250 is appropriate given its actual costs, that it was wholly successful and the investigation took half a day.

[6] With respect to my preliminary view it is argued that is inappropriate with reliance being placed on the Court of Appeal's comments at [51] of *White v ADBH*.[7] There the Court said:

> In summary, the Judge was in error in failing to deal separately with the discrete issues of remedies and costs. Having taken into account the appellant's contributory behaviour in denying him a remedy in compensation, he was not entitled to take into account that same behaviour in declining to award the appellant costs.

[7] The Inspector is of the view costs should lie where they fall on the grounds this was in the nature of a test case involving the enforcement of employment standards as opposed to a conflict between two private parties as is more prevalent in the Authority. Comment is made that should I disagree then an award of approximately half that sought would be appropriate given the investigation meeting

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[3] n 1 at [29]
[4] n 1 at [30]
[5] Mr McAleer is AENZ's sole Director
[6] *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135
[7] *Harvey Douglas White v Auckland District Health Board* [2008] ERNZ 635

was considerably shorter than AENZ asserts. A quick observation that regarding time taken I consider the Inspector's estimate to be the closer.

[8] Comment is also made about the relationship between AENZ and its representative but I will simply say I have strong reason to believe the Inspector is mistaken. FSB is not the company that purchased Mr Tayler's previous business as the Inspector appears to believe and that negates the submission in this respect.

[9] Turning to the matter in hand. I consider *Harvey v ADHB* to be distinguishable. It involves a situation where the Court of Appeal appears to be saying earlier decisions have resulted in the same behaviour being used to penalise Mr Harvey twice and that is inappropriate.

[10] That is not the situation here as AENZ suffered no punishment as a result of the original determination. The submission does, however, raise the fact one of the principles in *PBO* is costs should not be used to punish. While that is obviously true I consider the opposite also applies – they should not be used to reward inappropriate behaviour and here I note the Inspector's arguments. This was about enabling the inspector to perform his duty. It is a duty the New Zealand public is placing ever greater importance on and AENZ went out of its way to impede the Inspector.

[11] What occurred here should not have occurred. Had it not occurred this claim would not have been taken. Responsibility for what occurred falls solely upon AENZ and it should not be rewarded for what I can only conclude was wrongdoing.

[12] An award of costs is discretionary.[8] I find nothing in the Respondent's submission which would, given the present factual situation, persuade me to alter the preliminary view expressed in the substantive determination.

[13] Costs shall lie where they fall.

M B Loftus
Member of the Employment Relations Authority

[8] Provision 15(2) of Schedule 2 to the Employment Relations Act 2000