

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 107
ARC 120/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN RUSH SECURITY SERVICES
LIMITED TRADING AS DARIEN
RUSH SECURITY
Plaintiff

AND JAMES VAINUU SAMOA
Defendant

Hearing: By memoranda of submissions filed on 29 July and 12 August 2011

Appearances: Larissa Rush, agent for plaintiff
Kenyon Stirling, counsel for defendant

Judgment: 19 August 2011

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] In dismissing Rush Security Services Limited's challenge to the Employment Relations Authority's determination,¹ I allowed Mr Samoa costs on the challenge. Agreement has not been able to be reached between the parties themselves about the amount of the order and Mr Samoa has therefore applied for this to be fixed.

[2] Mr Samoa claims \$5,446.10, the majority of which (bar \$120) was the amount paid by the Legal Services Agency for his legal aid and, therefore, calculated at very modest charge-out rates. Mr Samoa will be required to pay to the Legal Services Agency any difference between the amount advanced to him for legal fees in the litigation and this Court's award of costs.

¹ *Rush Security Services Limited trading as Darien Rush v Samoa* [2011] NZEmpC 76.

[3] In these circumstances, the defendant says that \$5,446.10 is a reasonable fee for the proceedings and is also a reasonable contribution to that reasonable fee, albeit that it is a full indemnity of the costs.

[4] Rush Security opposes an award of this amount and suggests, in substitution, an award of 66 per cent of the costs which would amount to \$3,594.43. It submits, correctly, that the Court should take as a starting point 66 per cent of actual costs reasonably incurred² but that in all the circumstances there is no case to increase this amount. As the plaintiff says, the hearing occupied one sitting day and the issues dealt with were reasonably straightforward. I agree, also, that the challenge was both prosecuted and defended in good faith and the parties conducted their cases expediently and efficiently. I disagree, however, that it would be appropriate to limit the defendant's fee recovery to 66 per cent of the actual fee. That is because a reasonable fee for the defendant's representation would have been greater but for the statutory legal aid limitations upon that. That is not to say that the fee charged to Mr Samoa was unreasonable: rather, it would have been reasonable for him to have been charged a greater fee had he not been legally aided.

[5] In these circumstances, I conclude that a reasonable contribution to a reasonable fee amounts to the same as the fee actually charged.

[6] Looked at in another way, if the plaintiff's proposed award were to be adopted, Mr Samoa would have to contribute to his legal aid grant to the extent of the difference between those two figures. I conclude that this would not be just in the circumstances of his success in the Authority and the upholding of its determination on the challenge.

[7] The legal costs paid by the plaintiff to its solicitors (although they did not appear at the hearing) are largely irrelevant as to whether Rush Security should pay costs to Mr Samoa and, if so, how much these should be. However, the amount of the company's legal costs, which have been disclosed by it, illustrates the reasonableness of the defendant's solicitors' total fee. Even without the cost of legal representation at the hearing, Rush Security incurred legal costs of more than

² *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438.

\$17,000 for attendances including receiving instructions, providing an opinion, drafting the statement of claim, undertaking research, providing a further opinion, and incidental attendances.

[8] For reasons already outlined, I do no more than comment that this is a substantially greater amount, but for doing less, than the defendant's solicitors' billed on legal aid. That confirms the reasonableness of the defendant's costs.

[9] In these circumstances, I fix the defendant's costs, which are payable by the plaintiff, in the sum of \$5,446.10.

GL Colgan
Chief Judge

Judgment signed at 2 pm on Friday 19 August 2011