

**Attention is drawn to the non-publication order at paragraph 3.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 382/09  
5074991

BETWEEN                      B AND C  
                                         Applicants  
  
AND                                A  
                                         Respondent

Member of Authority:        Marija Urlich  
  
Representatives:             Danny Jacobson, Counsel for Applicants  
                                         Damien Chesterman, Counsel for Respondent  
  
Submissions received:        15 July 2009, from Applicant  
                                         4 November 2008 and 20 July 2009 from Respondent  
  
Determination:                30 October 2009

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In a determination dated 30 September 2008 (AA248A/08) an award of costs was made in related proceedings in favour of the respondent named in these proceedings. At paragraph [10] of that determination I noted:

*The award also does not include costs associated with the withdrawn application filed by B and C a separate matter not yet considered by the Authority.*

[2]     On 3 November 2008 Mr Chesterman wrote to the Authority seeking a determination as to the *separate matter*. Submissions have been filed.

**Non-publication orders**

[3]     It is appropriate for the non-publication orders applicable to AA248/08 to be extended to these proceedings. To this end the last three applicant parties will be referred to as D, E and F.

***“The separate matter”***

[4] As Mr Jacobson points out in his submissions there has been file number confusion. A’s personal grievance has assumed the file number of B and C’s application. This determination deals with B and C’s applications to the Authority and whether there is any outstanding costs liability.

[5] The parties first came before the Authority in late 2006 when an application was filed in the Authority in the name of B and C and an employee who shall be referred to as D. A was named as the respondent. The remedies sought included orders from the Authority requiring D to attend mediation on an urgent basis and what appears to be authorisation from the Authority for B and C to dismiss D.

[6] This application was given the file number 5074991. Following a teleconference on 21 December 2006 the application for a direction to mediation was declined for reasons set out in the relevant minute.

[7] On 3 January 2007 B and C filed an amended statement of problem with the Authority. The remedies sought were amended orders that *the parties to meet to resolve all things*.

[8] On 15 January A, through counsel, filed a strike out application to the amended statement of problem. Leave not to file a statement in reply was sought.

[9] In a minute dated 17 January the Authority directed A to file a statement in reply by 30 January. In that minute the Authority emphasised the importance of mediation and urged the parties to focus on the central issue – A’s personal grievance.

[10] On 30 January A filed a statement in reply to 5074991 and a statement of problem which was given the file number 5077321.

[11] B and C filed a statement in reply to 5077321 on 19 February. Also on 19 February B and C filed a further amended statement of problem adding E and F (also employees of B and C) as applicant parties along with a strike out application to 5077321.

[12] On 2 March a teleconference was convened. A minute followed dated 5 March 2007. Concerning 5074991 the minute includes:

- (i) It was unlikely the Authority did not have jurisdiction to consider claims by co-worker applicants;
- (ii) the co-worker applicants may be bound by any outcome including any award of costs;
- (iii) recording B's (the employer) advice that she represented the co-worker applicants and a direction that the co-worker parties provide written authorisation of such;
- (iv) a record of Mr Chesterman's advice of his intention to seek indemnity costs against the applicants.

[13] On 26 March the Authority received an unsigned email attachment from B and C's then representative advising:

*The Applicant gives notice that the application for mediation assistance presently before the Employment Relations Authority is withdrawn and no further assistance from the Authority is required in this matter.*

*Notice of withdrawal is also given for the Strike Out application against [A]'s personal grievance claim.*

[14] The covering email advises a signed copy would be forwarded to the Authority. The email and attachments were forwarded to Mr Chesterman's email address the same day.

[15] The signed letter of withdrawal was not filed with the Authority until 28 June 2007, although the document is dated 28 March 2007. In that letter B and C's then representative writes:

*I act for [B and C]. I have been instructed by [B and C] that they no longer wish to proceed with the claims against [A] presently filed before the Employment Relations Authority.*

*I therefore hereby give notice that all claims are withdrawn and no further assistance from the Authority is required in regard to applications made by [B and C] or [trading name].*

[16] The letter was forwarded to Mr Chesterman the same day.

### **Mr Chesterman**

[17] Submits:

- (i) B and C filed three statements of problem against the A;
- (ii) The morning of the hearing (3 July) it withdrew that application;
- (iii) Total costs incurred in relation to those applications are \$5554.00;
- (iv) A seeks indemnity costs; and
- (v) A contribution to total costs sought in previous memoranda filed and determined.

### **Mr Jacobson**

[18] Submits:

- (i) the Authority does not have jurisdiction to award costs in relation to the third statement of problem referencing the 5 March minute;
- (ii) in the alternative, Mr Chesterman was aware from 26 March B and C's applications were withdrawn;
- (iii) minimal costs must have been incurred because the applications were not set down for investigation; and
- (iv) A cannot claim costs in relation to private billing beyond the legal aid.

### **Determination**

[19] *PBO Ltd v Da Cruz*<sup>1</sup> sets out the appropriate principles to be applied by the Authority in exercising its costs discretion. This application for costs deals with withdrawn proceedings which were not set down for hearing. Steps taken by the parties in preparation for hearing are relevant factors for consideration in setting an award of costs<sup>2</sup>.

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<sup>1</sup> [2005] 1 ERNZ 808

<sup>2</sup> *Data Group Ltd v Gillespie* 22/3/04, Travis J, AC16/04

[20] I accept A received B and C's notice of withdrawal proximate to the investigation hearing. Notice of intention to withdraw is not the same as notice of withdrawal. The unusual circumstances of these applications – the intertwining of multiple related applications and the jurisdictional issues raised by way of strike out – have resulted in A incurring costs which she could reasonably have anticipated being dealt with by way of preliminary and/or priority hearing or may impose on the scheduled investigation meeting. Grounds for a costs award exist.

[21] Any jurisdictional barrier to an award of cost in relation to the third statement of problem would not apply to B and C (the employer applicants).

[22] Issues between A and the Legal Aid Board are not for the Authority to comment on or anticipate.

[23] The request to revisit earlier costs claims is declined; those issues have been considered and determined.

**[24] B and C are ordered to pay A \$2000 for costs plus \$70 to reimburse the filing fee incurred in relation to the strike out application: schedule 2, clause 15 Employment Relations Act 2000.**

Marija Urlich

Member of the Employment Relations Authority