

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 82
5595807

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| BETWEEN | CHRISTOPHER BARTHOLOMEUSZ Applicant | DAVID |
| A N D | TRADEFOG GLOBAL CO LIMITED First Respondent | |
| A N D | TRADEFOG INTERNATIONAL LIMITED Second Respondent | |

Member of Authority: Helen Doyle

Representatives: Michael McDonald, Advocate for Applicant
David Beard, Counsel for Respondent

Submissions Received: 12 May 2017, from the Applicant
25 May 2017, from the Respondent

Date of Determination: 30 May 2017

COSTS DETERMINATION OF THE AUTHORITY

A I order Tradefog International Limited to pay to Christopher David Bartholomeusz costs in the sum of \$3791.67.

The Authority determinations

[1] In a determination dated 28 April 2017¹, the Authority found that the applicant was employed by the second respondent and that he was unjustifiably dismissed from his employment. Awards were made for reimbursement of lost wages, payment of a

¹ [2017] NZERA Christchurch 62

lost benefit of holiday pay on those wages and compensation. The issue of costs was reserved in the determination.

[2] After the investigation meeting had concluded but before the matter had been determined, an application for removal to the Employment Court was made by the first and second respondents. The application for removal was declined by the Authority.² Costs were reserved.

[3] The Authority has now received submissions on costs from Mr McDonald and Mr Beard.

The applicant's submissions

[4] In his submissions, Mr McDonald refers to the judgment of the full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*³ and the principles in *Da Cruz* held to be appropriate to the Authority and consistent with its functions and powers. Mr McDonald refers to the tariff based approach considered appropriate in *Da Cruz* for the Authority provided that it is not unduly rigid.

[5] Mr McDonald submits that there are factors that should result in uplift to the award of costs in this matter. He submits that there had been no objection raised by the first respondent including at the investigation meeting that it was not the correct employer. The matter was only raised by way of submissions lodged on behalf of the first respondent following the investigation meeting that the second respondent was the employer of the applicant.

[6] He submits that the Authority proposed joining the second respondent to the proceeding so it could determine who the employer was. The applicant agreed to that step and stated that no further evidence would need to be called but the first respondent objected to the joinder of the second respondent. The Authority determined that the second respondent be joined to the proceeding.⁴ That determination was challenged by the first and second respondents and subsequently it was agreed that the Authority would not determine the substantive matter until that challenge had been dealt with by the Employment Court.

² [2016] NZERA Christchurch 203

³ *PBO v Da Cruz* [2005] 1 ERNZ 808

⁴ [2016] NZERA Christchurch 120

[7] Following that, Mr McDonald submits that the first and second respondents made application to have the proceedings removed from the Authority to the Employment Court. Mr McDonald submits the applicant was put to the cost of filing a statement in reply to the application for removal and considering the submissions made by the first and second respondents.

[8] Mr McDonald submits that the applicant has been put to significant extra expense in representative costs as a result of the respondents' subsequent actions in what was otherwise a straightforward matter. The applicant seeks uplift on that basis. Mr McDonald submits that the applicant's actual costs for the investigation, excluding mediation, are \$5,500 plus GST and that a further account for \$2,390 plus GST for subsequent submissions and a telephone conference has been issued to the applicant.

[9] Mr McDonald seeks an award on the basis of a full day investigation at \$4,500 and a further day at the subsequent day rate of \$3,500.

The respondents' submissions

[10] Mr Beard on behalf of the first and second respondents, submits primarily that as the second respondent was not a party at the half day investigation meeting it cannot be ordered to pay the costs incurred by the applicant in proceedings that arose before the date it was expressly joined. Mr Beard submits that the second respondent is not liable to any costs incurred before it was joined to the proceedings on 21 July 2016.

[11] Mr Beard submits that the applicant's costs are excessive and that the first and second respondents are separate legal entities. He submits that the Authority has no jurisdiction to make orders against the first respondent and that costs should follow the event and the first respondent be awarded costs in the sum of \$4,774.80. In respect of the second respondent, Mr Beard submits it should only be responsible for any costs the applicant incurred when it lodged its statement in reply to the application for removal on 7 October 2017.

[12] Mr Beard also refers to *Da Cruz* and the principles to be considered. He refers to the High Court Rules and the daily recovery rates in those rules. Mr Beard submits that the first respondent is a separate legal entity to the second respondent and that it was successful in its defence, shifting the evidential onus.

[13] Mr Beard submits that the first respondent only began incurring legal costs from 30 June 2016 after the investigation meeting at which the director of the first and second respondents attended without representation. He sets out various invoices provided to the first and second respondents in this matter in the sum of \$4,774.80 and submits that the first respondent is entitled to costs in this matter and that a reasonable costs award would be in the sum of \$4,400 or \$6,690 assessed under the High Court rules.

[14] Mr Beard submits that in respect of the second respondent, it was not identified or joined as a party until after the investigation meeting and that it has not filed any document in the proceeding denying it was the employer. Mr Beard submits the only costs reasonably attributable to the second respondent are those costs that arose after 21 July 2016.

Determination

[15] There is discretion to be exercised by the Authority as to whether costs are awarded and in what sum. That discretion is to be exercised in accordance with principle and not arbitrarily. Costs are not to be used as a punishment or an expression of disapproval but conduct that increases costs can be taken into account in inflating or reducing an award.

[16] The Authority often assesses costs against a notional daily rate. There is a practice note of the Chief of the Authority James Crichton about costs in the Authority dated 30 June 2016. It provides that there would be an adjustment to the daily tariff for matters lodged in the Authority from 1 August 2016 to \$4,500 for the first day of any matter and \$3,500 for each subsequent day.

[17] At the time the statement of problem in the substantive matter was lodged, the daily tariff was still at the rate of \$3,500 per day. The application for removal to Court was lodged after 1 August 2016 but is inextricably linked to the substantive application and I find that the appropriate daily rate to assess costs is that applicable prior to 1 August 2016.

[18] The investigation meeting for the substantive matter commenced at 9.30am and concluded at 12.55pm. That is 3½ hours.

[19] There is a fundamental principle that costs follow the event. The applicant was successful in his personal grievance and in resisting the application for removal to Court.

[20] The only issue that makes this matter less routine is the issue about the identity of the correct employer and whether there should be any change to the usual principle that costs follow the event as a result.

[21] I am not persuaded that there should be an award of costs in favour of the first respondent notwithstanding that it was not found to be the employer of the applicant. Firstly the first respondent and the second respondent whilst separate legal entities have the same sole director. Secondly the first respondent did not before final submissions following the investigation meeting acknowledge that it was not the employer of the applicant. It attended mediation, lodged a statement in reply responding to and denying the claim against it and by its director attended at the investigation meeting and gave evidence. In short the first respondent was responsible for the costs it incurred because for whatever reason it did not advise the applicant it was not his employer.

[22] That then brings me to the second issue. In its substantive determination, the Authority found the employer of the applicant was the second respondent. Mr Beard in his submission states that any award made against the second respondent can only be made from the point of time it was joined to the proceedings.

[23] I am not persuaded by that argument either. A company who is an employer acts through a human agent. In this case that was the sole director of the first and second respondents, Mr Solomon Ye. I shall limit my analysis to the evidence given at the investigation meeting, although other earlier actions after the statement of problem was lodged were also taken by the first respondent. Mr Ye gave evidence at the Authority's investigation meeting about the employment of the applicant and the ending of the employment relationship. He could not have been giving that evidence on behalf of the first respondent because the subsequent submission on behalf of the first respondent was that it was not the employer of the applicant. I find Mr Ye was giving that evidence on behalf of the second respondent and the second respondent must therefore be taken to have authorised him to do so. After the joinder of the second respondent no further evidence was required. I find in those highly unusual

circumstances the liability of the second respondent is not limited to the time of its joinder to the proceedings.

[24] The applicant is therefore entitled to costs from the second respondent who was found to be his employer. The investigation meeting took three and a half hours. Based on a daily tariff at that time of \$3,500 and dividing that figure by six I arrive at an hourly rate of \$583.33. That rate then multiplied by 3.5 is the sum of \$2041.67 and that is the starting point for costs for the investigation meeting for the substantive matter.

[25] I have then considered whether there should be any increase or reduction to that amount. After the investigation meeting there was a submission provided on behalf of the first respondent. Mr Beard submits that Mr McDonald's submission in reply to this was not timetabled and a breach of natural justice. There was for the first time in the submission on behalf of the first respondent a statement that it was not the employer and if submissions had not been provided then the Authority would have needed some response to that new matter from the applicant.

[26] Joinder was strenuously opposed by the first respondent and proposed second respondent and further submissions were lodged. There was no further submission to that already provided on 13 July by the applicant. The second respondent was then joined to the proceedings.

[27] On 30 August 2016 there was a telephone conference with the Authority and representatives to discuss how to deal with the identity of the employer. By that time the joinder determination had been challenged. In anticipation of that telephone conference both representatives provided memorandum about the identity of the employer. The Authority ultimately accepted the second respondent was the employer.

[28] On 26 September 2016 the first and second respondents made application for removal of the matter to the Employment Court. The applicant lodged a statement in reply. The first and second respondents made further submissions in support of the application. The applicant was content to treat the statement in reply which was a full reply as his submission. Although the Authority asked if the representatives wanted to discuss the application for removal on a telephone conference they were content for the matter to be dealt with on the papers.

[29] I accept that the applicant incurred further costs in this matter after the investigation meeting because of the conduct of the first and second respondents. I take into account that the respondents incurred the cost of preparing a memorandum about the identity of the employer an issue in which they were successful.

[30] I find that there should be, taking all matters into account including consideration for the respondents' success about the identity of the employer, an uplift to costs assessed on the basis of a further half day at the daily tariff rate of \$3,500. That is an uplift of \$1750.

[31] I find a fair and reasonable award for costs \$3791.67 which is the combined sums of \$2041.67 and \$1750.

[32] I order Tradefog International Limited to pay costs to Christopher David Bartholomeusz in the sum of \$3791.67.

Helen Doyle
Member of the Employment Relations Authority