

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 38  
5324337

BETWEEN	DAWN CHALMERS Applicant
AND	PHYSICAL THERAPY NELSON LIMITED Respondent
AND	NIGEL MCFADDEN, DAVID PHILLIPS, JOHN SANDSTON, GRAEME DOWNING and VICTORIA CHISNALL trading as MCFADDEN MCMEEKEN PHILLIPS First Party sought to be joined
AND	ACTIVE BODY CENTRE LIMITED Second Party sought to be joined

Member of Authority:	Philip Cheyne
Representatives:	Graeme Downing, Counsel for Applicant and for First Party sought to be joined John Levenbach, Counsel for Respondent Gerard Praat, Counsel for party sought to be joined
Submissions Received:	24 January 2012 from First Party sought to be joined 13 February 2012 from Second Party sought to be joined 2 February & 24 February 2012 from Respondent
Determination:	1 March 2012

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**SECOND DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] In a determination dated 9 January 2012 I declined the respondent's application to join two parties to the applicant's personal grievance claim. Costs for the intended parties were reserved to be dealt with by an exchange of memoranda which have now been received. This determination resolves that issue of costs.

[2] The first intended party is the applicant's firm of solicitors acting for her in her personal grievance claim. I am told (and accept) that the firm has written off \$1,206.00 in fees from the applicant's file as time spent dealing with the respondent's application to join the firm as a party to the proceedings. Counsel makes the point that he referred to the fundamental jurisdictional hurdle faced by the respondent's application at the outset and several times subsequently. I am asked to award \$1,206.00 (plus GST) in costs to reflect the abusive and meritless application.

[3] Counsel for the respondent says that the time written off by the first intended party must include time spent considering material only relevant to issues between the respondent and the second intended party. While that is obviously correct, the issue is whether the time incurred was reasonably necessary for the purposes of the Authority's investigation into the joinder application. That would have required the first intended party to review the submissions made by the second intended party to ensure that there was nothing to affect its interests. In a similar fashion, counsel had to participate in a phone conference involving all the parties because the respondent made one application to join two additional parties. Accordingly I see no reason to discount the claim for this reason.

[4] To some extent the respondent has repeated arguments dealt with in the earlier determination. To recap, there was no contractual relationship between the respondent and the first intended party and no employment relationship. Any claim by the respondent had to be outside the Authority's jurisdiction. I think that the application can properly be said to have been without merit from the outset..

[5] Counsel for the respondent submits that the matter should be dealt with on a daily tariff basis with an award of \$600.00 (including GST) to reflect the fact that it was investigated without the need for an investigation meeting.

[6] The relevant principles are referred to in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808. There, the Full Court specifically stated that the nature of a case can influence costs, that conduct which unnecessarily increases costs can be taken into account in inflating or reducing an award of costs and that the statutory jurisdiction is consistent with the equity and good conscience jurisdiction.

[7] I think the GST point is straight forward. There is no GST content on the first intended party's claim because no GST invoice has or will be issued to anyone.

[8] In the present case there is no reason to depart from the usual principle that costs should follow the event. I accept that the costs reasonably incurred reflect the sum written off the applicant's bill by the first intended party. It would be unfair not to fully compensate the first intended party for the time wasted by the respondent's hopeless application. Accordingly I order that the respondent must pay the first intended party costs of \$1,206.00.

[9] The second part of this determination relates to the claim for costs by the second intended party (Active Body Centre Limited). The applicant is a director and shareholder along with others in this company. The respondent sought to join the company so as to claim damages against it arising from the applicant's alleged breach of a restraint of trade provision in her employment agreement with the respondent. The law on this has been well settled since *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205. Accordingly the application was without merit from the outset.

[10] Counsel for the respondent makes the point that the costs application was out of time. It is correct that it was lodged late but there was no prejudice to the respondent from that. I also permitted the respondent the opportunity to lodge a reply specifically to this part of the claim. I enlarge time so as to validate the late filing.

[11] Counsel in his submissions refers to some of the points made in the original joinder application but I do not intend to canvass them in detail because they have already been dealt with.

[12] Counsel submits that the second intended party's costs of \$3,960.00 are unusually high. I have been given copies of the invoices which include a narrative about the work performed but not any time records. Having regard to the narrative the work appears to have been reasonably necessary for the purposes of the Authority's investigation. However, the claim by the intended party is limited to \$1,500.00 so it is not necessary to take the point any further. I am satisfied that the

intended party incurred reasonable legal costs of at least \$1,500.00 and that the Authority should order that sum to be paid.

[13] While an award of \$1,500.00 will result in the second intended party receiving a greater award than the first intended party I note that the second intended party did lodge and serve an affidavit as part of its defence.

**Orders**

[14] Physical Therapy Nelson Limited is to pay McFadden McMeeken Phillips the sum of \$1,206.00 in costs.

[15] Physical Therapy Nelson Limited is to pay Active Body Centre Limited the sum of \$1,500.00 in costs.

Philip Cheyne  
Member of the Employment Relations Authority