IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 58
5365644

	BETWEEN	JASON COLE Applicant
	A N D	DEVELOPMENT ENGINEERING LIMITED First Respondent
	A N D	NEW ZEALAND SCIENCE AND TECHNOLOGY CHARITABLE TRUST Second Respondent

Member of Authority:	David Appleton
Representatives:	Linda Ryder for Applicant Tim Holton, Counsel for First Respondent Lois Flanagan, Counsel for Second Respondent
Submissions received	20 December 2012 from the second respondent 18 March 2013 from the applicant
Date of Determination:	20 March 2013

COSTS DETERMINATION OF THE AUTHORITY

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[1] The second respondent (more commonly known as Science Alive) seeks a contribution towards its legal costs following the discontinuance of his application by Mr. Cole. An investigation meeting had been set down on 12 February 2013 to investigate the preliminary issues of whether Mr. Cole had been an employee or an independent contractor and, if an employee, by which employer he had been employed. The first respondent does not seek a contribution to its costs.

[2] Mr. Cole had lodged his statement of problem on 19 January 2012, and withdrew from the proceedings by way of an email dated 3 December 2012 from his counsel which stated the following:

I am writing to advise that due to a change in my client's financial circumstances he is no longer able to pursue his application and accordingly I am instructed to formally advise that the proceedings can be withdrawn and the hearing date on 12 February 2013 can be vacated.

[3] Counsel for the second respondent submits that the application against it was misconceived and should never have been pursued against it in the Authority. Its position was that it had an agreement with the first respondent to have its exhibits maintained, repaired and, where necessary fabricated. The second respondent says that the first respondent had, in turn, an agreement with a company called Cole Train Limited to carry out this work. Cole Train Limited was a limited liability company of which Mr. Cole was the sole director and majority shareholder. On this basis the second respondent contends that the likelihood of Mr. Cole proving that it had been his employer were, at best, extremely thin, if not nil.

[4] The second respondent also states that Mr. Cole required it to attend mediation when the prospects of settlement were low, and that he required the second respondent to undertake the discovery process when he himself did not comply with the process. The second respondent seeks a contribution of $6,000, being, it says, approximately 60% of costs actually incurred.

[5] Ms Ryder for Mr. Cole addresses the second respondent's submissions by stating that the application to the Authority was only lodged because the second respondent refused to attend mediation voluntarily, and that nothing happened other than some discussion about resolving issues until the Authority held a second directions conference on 20 September 2012. She says that there was no reason for either party to incur costs in the period leading to the directions conference. Therefore, she says, the second respondent's costs were unreasonably incurred. She also makes mention of Mr. Cole's impecuniosity, although produces no evidence of that.

[6] In the Costs Judgement in *Gini v Literacy Training Ltd* [2013] NZEmpC 25, Judge Ford states, at [13], that there are no special principles applicable to the assessment of costs on a discontinuance. The general rule that a discontinuing party is liable for costs on discontinuance may be displaced if there are just and equitable circumstances not to apply it. While the Court will not speculate on the merits of a

case that has not been heard, the reasonableness of the stance of both parties needs to be considered.

[7] In addition, in the Authority, the principles of *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 need to be considered.

[8] Whilst the daily tariff approach is the most common approach adopted by the Authority in determining costs liabilities, I am not convinced that that is the correct approach where no investigation meeting actually took place because of a discontinuance.

[9] I believe that the Authority can be guided by the main principles that have been applied in the High Court when considering an application for costs after a plaintiff has discontinued proceedings, whilst being mindful that there is no equivalent of High Court Rule 15.23 in the Authority's jurisdiction *(Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance)*. These principles have been summarised as follows in Thompson Reuters Brookers Online, at HC23.15.01, as follows:

a. It is appropriate to determine whether the plaintiff acted reasonably in commencing the proceeding and whether a particular defendant acted reasonably in defending it: *Oggi Advertising Ltd v McKenzie* (1998) 12 PRNZ 535 (HC) at 536.

b. As to acting reasonably in discontinuing the proceeding the question is; was the proceeding discontinued as promptly as it should have been: *Anglesea Medical Properties Ltd v Braemar Hospital Ltd* HC Hamilton CIV-2006-419-1492, 9 October 2007; *Prudential Mortgage Nominees Ltd v Faith Family Fellowship Trust (Bishopdale)* HC Christchurch CIV-2008-409-906, 19 August 2008.

c. However, the presumption is not displaced merely because the plaintiff acted reasonably in bringing and discontinuing the proceeding. These are relevant factors, but more is needed to show that a costs award in a defendant's favour would not be just or equitable: *Vector Gas Ltd v Todd Petroleum Mining Company Ltd* HC Wellington CIV-2004-485-1753, 7 December 2010 at [18].

[10] Whilst I accept that, on the face of it, Mr. Cole would have had an up hill struggle to show that the second respondent was his employer, I cannot reach any definitive views on this without having heard the evidence of the parties. I therefore decline to take the strength or weakness of Mr. Cole's claim against the second respondent into account in determining the position on costs. I am satisfied that his claim against the second respondent was not frivolous or vexatious, and that an arguable case existed that needed to be explored.

[11] However, the reason for Mr. Cole's discontinuance and how promptly after his circumstances changed he instructed his counsel to withdraw his claims are relevant to the situation. Unfortunately, no evidence whatsoever has been adduced to enable the Authority to judge these two factors, other than statements by his counsel that he is impecunious and that he has suffered a change in his financial circumstances. In the absence of such evidence, I cannot see any reason to overturn the presumption that Mr. Cole should contribute to the second respondent's costs.

[12] Turning to the issue of whether costs were reasonably incurred by the second respondent in defending the claim against it, I cannot come to any firm conclusion that the second respondent's refusal to voluntarily attend mediation caused the costs to be incurred as, again, I have no knowledge of the circumstances, other than that the second respondent was denying that the Authority had the jurisdiction to consider the claims against it. In such circumstances it is not unusual, nor necessarily unreasonable, for a party to decline to attend mediation.

[13] I am satisfied that the second respondent's counsel had to take a number of steps to defend the claim, take part in the proceedings and to advise their client up to the date when the notice of discontinuance was lodged. The narratives supplied by the second respondent's counsel do not break down the costs of each step, although most of the steps taken appear to be reasonable.

[14] However, the sum of $6,000 sought appears to be 60% of the GST inclusive amount, which the second respondent can set off against its own GST liabilities. Therefore, it is not appropriate to pass that element onto Mr. Cole. As office costs shown on the invoices are GST inclusive figures, and they re relatively modest sums, I shall also leave these out of the calculation.

[15] The total GST exclusive fees charged by Parry Field Lawyers to the second respondent amounts to a total of $8,677. Counsel for the second respondent does not

explain why they seek 60% of their costs, but this seems a not unreasonable percentage to apply. Applying 60% to the GST exclusive fee total produces $5,206. I consider $5,000 is a reasonable sum for Mr. Cole to pay as a contribution to the second respondent's costs.

David Appleton
Member of the Employment Relations Authority