

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 163  
5165084

BETWEEN GREGORY MARTIN FULTON  
Applicant

A N D CANSTAFF LIMITED  
First Respondent

CANSTAFF ASHBURTON  
LIMITED  
Second Respondent

Member of Authority: Helen Doyle

Representatives: Leandra Lambie-Shaw, Counsel for Applicant  
Paul Brown, Counsel for Respondent

Submissions Received: 16 September 2011 from Applicants  
26 September 2011 from Respondent

Date of Determination: 25 October 2011

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] The applicant applied to the Employment Relations Authority for the reopening of an investigation relating to the Authority's determination (or order file 5165084).

[2] The application was primarily made on the grounds that the substantive determination and the costs determination be reopened and that the first respondent be named as Matthew Jones, a director of the respondents', on the basis that at the time of the employment of Mr Fulton he was representing his business to him by referring to a company, Canstaff Limited, that was at all times unincorporated.

[3] The application also referred to the status of the second respondent, Canstaff Ashburton Limited, and that advice had been received on behalf of that company that it had ceased trading several months prior to the Authority's investigation meeting. The application maintained that such a reopening would not prejudice Mr Jones because he essentially represented himself during the terms of the employment

relationship and in the proceeding before the Authority. The application also stated that the amounts awarded to Mr Fulton in the Authority's determination of \$3,000 compensation and \$2,700 towards the applicant's costs remained unpaid.

[4] By way of statement in reply, the respondents' views were that there were no grounds for reopening the investigation. Further, the respondents' said that Canstaff Limited was incorporated in 2002 under the original name of The Callminders Limited, and then the name was changed back to Canstaff Limited in September 2004. The company then ceased trading in March 2009 and its name was briefly changed back to The Callminders Limited. The company was then struck off the Companies Register in June 2010. Company searches were attached to the statement in reply.

[5] There was a delay in progressing this matter because the file was unable to be obtained from the Authority's offices after the earthquake on 22 February 2011. In fact in this particular matter the statement in reply was lodged on 22 February, although the Authority was unaware of that until the files were able to be retrieved in late July 2011.

[6] The Authority then held a telephone conference on 23 August 2011 with Ms Lambie-Shaw and Mr Brown. Ms Lambie-Shaw had not at the time of that telephone conference received a copy of the statement in reply and that was sent to her immediately after the telephone conference.

[7] Ms Lambie-Shaw was asked to consider, and advise the Authority, whether in her view the Authority could deal with the matter on the papers or whether an investigation meeting was required.

[8] On 7 October 2011 the Authority received a letter from Ms Lambie-Shaw withdrawing the application to reopen. Ms Lambie-Shaw advised in her letter that given the background to the file, it was the applicant's view that costs should lie as they fall. A copy of that letter was provided to Mr Brown who strenuously opposed that course of action and said there were strong grounds for costs to be awarded.

[9] Mr Brown said in his letter that there was no merit to the application before the Authority and the identity of the employer was explicitly considered by the Authority and that the application was made because the award could not be recovered from the first and second respondents. Mr Brown said in his letter that it was the respondents' view that costs should be awarded against the applicant and also

his firm of advisers on a joint and several basis and that his client had incurred significant costs defending the matter which to date amounted to \$1,000 plus GST and an award is sought of \$750 towards the costs.

### **Determination**

[10] Costs are discretionary, but the discretion must be exercised in a principled fashion. There have been previous cases where costs have been awarded when claims before the Authority have been withdrawn, but steps have been taken by the other party.

[11] I accept Mr Brown's submission to the extent that costs generally follow the event and that there were steps taken by the respondents by which they would have incurred costs. There was a statement in reply lodged, attendance by Mr Brown on a telephone conference with the Authority and Ms Lambie-Shaw, and correspondence including that with respect to the issue of costs.

[12] There are other matters, however, for me to consider in the exercise of my discretion.

[13] A company is a separate legal entity to its directors. Given that the first respondent company has been struck off the Companies Register, it is most likely the second respondent company that incurred any costs in opposing the application for the reopening of the investigation to substitute the first respondent with a director of the second respondent, who was not a party to the application.

[14] This opposition was at a time when the second respondent had ceased trading and was described in the statement in reply as essentially dormant since August 2009, although obviously on the Companies Register. It was also after the second respondent had advised it was not in a position to pay any award made against it.

[15] The second respondent says it is unable to pay Mr Fulton the sum of \$5,300 and yet spent a sum in excess of \$750 opposing an application for someone else to assume that liability. Whilst it was open to the company to do that, it was somewhat unusual in my view for it to then seek costs against an applicant. There are no grounds to award costs against the applicant's legal advisors.

[16] I have also taken into account that any amount the Authority awards in this case would simply be set off against the much larger amount owing to the applicant. Given that the second respondent says there is little prospect of the applicant ever receiving payment, in all the circumstances I think it fair and reasonable that costs lie where they fall and I so order.

**Helen Doyle**  
**Member of the Employment Relations Authority**