

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 36  
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BETWEEN

JOSIE RAIHANA MAY  
GARDNER  
ANNELIES BUNNIK-  
ANDERSON  
DONNA BATES  
ERIN COOPER  
CAROLINE THOMPSON  
JASMIN SCHNURIGER  
Applicants

AND

PLATIMUM HEALTH  
LIMITED (IN LIQ)  
First Respondent

CONFIGURE EXPRESS  
LIMITED  
Second Respondent

MICHAEL JOHN COOPER  
Third Respondent

GREGORY CHARLES  
PETERS  
Fourth Respondent

Member of Authority: Vicki Campbell

Representatives: Margaret Penny for Applicants  
Gretchen Stone for Second and Fourth Respondents

Investigation Meeting: On the Papers

Determination: 4 February 2015

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. Ms Gardner, Ms Bunnik-Anderson, Ms Bates, Ms Cooper, Ms Thompson, and Ms Schnuriger, together, are ordered to pay Configure Express Limited the total sum of \$2,000 within 28 days of this determination.**

### **Employment relationship problem**

[1] In a determination dated 3 September 2014<sup>1</sup> I held that from 1 July 2013 the applicants were employed by Configure Trading Limited. The issue was determined as a preliminary matter on the papers by the consent of the parties.

[2] The question of costs was reserved and the parties have been unable to reach any agreement on this. The second and fourth respondents (Configure Express Limited and Mr Gregory Peters respectively) incurred legal costs and now seek reimbursement of those costs against each of the six applicants.

[3] Counsel has submitted that Configure Express Limited and Mr Peters jointly incurred costs of \$14,089.63. Counsel submits that costs were not invoiced separately to the two respondents, and seeks the total costs incurred be attributed 50/50 between them, being \$7,044.81 each. Configure Express Limited is seeking a contribution of 2/3rds its costs equating to \$4,720.02. Mr Peters seeks indemnity costs of \$7,044.81.

[4] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event.

### **Determination of costs**

[5] Under normal circumstances the Authority would apply a starting point of a notional daily tariff for quantifying costs. As this matter did not involve an investigation meeting the appropriate starting point is an assessment of the actual costs incurred by the respondents and an assessment of whether those costs were reasonable.

[6] The Authority has been provided with evidence that Configure Express Limited incurred costs of \$14,089.63. There is no evidence to show that Mr Peters personally incurred any costs. Further the Authority has not been provided with a breakdown of how the invoiced costs were incurred. The Authority is therefore

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<sup>1</sup> [2014] NZERA Auckland 367.

unable to assess the reasonableness of the costs incurred and is satisfied that any costs award should be limited only to Configure Express Limited and not to Mr Peters personally.

[7] As held recently by the Employment Court, the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.<sup>2</sup> As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*,<sup>3</sup> awards in the Authority will be modest taking into account conduct which increases costs unnecessarily. Indemnity costs may be justified in relatively rare cases where a party's conduct is particularly egregious.<sup>4</sup>

[8] Configure Express Limited submits that its costs were increased because of the way in which the applicants ran their case. Particular reference is made to an email from the Authority dated 13 May 2014 in which the Authority commented on the many shortcomings of the Statement of Problem and First Amended Statements of Problem lodged on behalf of each applicant.

[9] Configure Express Limited's costs were not increased unnecessarily as a result of the need to respond to the amended Statements of Problem. A review of the file shows the respondents were not required to lodge a Statement in Reply until after the Authority had received the second Amended Statements of Problem. Following receipt of all statements the Authority determined the preliminary matter on the papers with the consent of the parties to assist them to contain the costs for their clients.

[10] The applicants submit that they have constrained financial circumstances and are unable to make a contribution to costs. The applicants seek to have costs lie where they fall.

[11] In *Merchant v Chief Executive of the Department of Corrections*<sup>5</sup> Employment Court stated:

The established principle is that ability to pay should be taken into account if payment of the sum which is otherwise appropriate would cause undue hardship to the plaintiff. Assessment

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<sup>2</sup> *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

<sup>3</sup> (2006) 7 NZELC 98,128; [\[2005\] ERNZ 808](#); (2005) 3 NZELR 1 (EMC).

<sup>4</sup> *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2 at [9].

<sup>5</sup> [2009] ERNZ 108 at [29].

requires consideration of the total financial position of the plaintiff including both assets and liabilities and income and necessary expenditure.

[12] Five of the applicants have provided information to the Authority to support their submission that costs lie where they fall. The Authority must be mindful not to allow impecunious litigants to embark on lengthy and doomed proceedings free from the spectre of a significant or any, costs liability.<sup>6</sup>

[13] The financial position of the applicants is relevant to an assessment of costs which must be considered in light of the interests of both parties. I consider it appropriate for the applicants together to make a contribution to the costs incurred by Configure Express Limited.

[14] The applicants will be jointly and severally liable for the payment of the costs. This means that the applicants can decide the proportion of costs to be paid by each of them but if one does not pay, the remaining applicants will remain liable. On that basis Ms Gardner, Ms Bunnik-Anderson, Ms Bates, Ms Cooper, Ms Thompson, and Ms Schnuriger, together, are ordered to pay Configure Express Limited the total sum of \$2,000 within 28 days of this determination.

Vicki Campbell  
Member of the Employment Relations Authority

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<sup>6</sup> Supr n 4 at [18].