

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 205
5409631

BETWEEN	DARRON HADLEY Applicant
A N D	EMPLOYMENT SERVICES LIMITED t/a CANSTAFF Respondent

Member of Authority: M B Loftus

Representatives: Gregory Bennett, Advocate for Applicant
Paul Brown, Counsel for Respondent

Submissions Received: 1 October 2013 from Applicant
16 September 2013 from Respondent

Date of Determination: 2 October 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] On 5 February 2013 Mr Hadley (though his advocate) lodged a statement of problem claiming he had been constructively dismissed. Canstaff denied the claim (statement in reply dated 19 February 2013).

[2] Attempts to progress the claim were unsuccessful as Mr Hadley had already left the country by the time the statement in reply was received and I initially declined a request I receive his evidence via electronic media. I did so given the magnitude of disagreement and the fact he carried the onus of establishing a prima facie case for Canstaff to answer. As it turned out, this discussion became academic as Mr Bennett then found himself unable to contact Mr Hadley and obtain instructions.

[3] On 27 July 2013 Mr Bennett e-mailed the Authority. He stated *I have not been able to get hold of Mr Hadley and therefore ask that you formally close the file.*

[4] Canstaff's response was to seek recompense for the costs it had incurred and ask Mr Bennett be accountable for any resulting award.

[5] The claim Mr Bennett be joined relies on an assertion he was negligent in lodging the claim without first ascertaining whether his client would be available to pursue it, especially as, in Canstaff's view, the claim was no more than an ill-conceived attempt to extort a settlement in order that Canstaff might avoid the cost of litigation. The claim Mr Bennett be liable is supported with references to *New Zealand Medical Laboratory Workers Union Inc v Capital Coast Health Ltd* [1998] 2 ERNZ 107 and *McKean v The Board of Trustees of Wakaaranga School* Chief Judge Colgan, AC38/08, 24 September 2008.

[6] Canstaff seeks \$1,552.50. This is calculated on the basis of the time taken to prepare the statement in reply at Mr Brown's hourly rate, though an actual account cannot be furnished as he was performing various tasks for Canstaff at the time and did not itemise these on the invoices.

[7] Mr Bennett's response was, in total, *I will seek leave to withdraw. The respondent will need to serve the applicant directly.* There was no indication as to where Mr Hadley might be. Mr Bennett was told he would not be given leave to withdraw on the basis of the information provided. He was instructed to detail his attempts to contact Mr Hadley and obtain instruction.

[8] The response came via submission. Mr Bennett contends it is inappropriate to make an award of costs as there was no investigation and a determination was never issued. There was therefore no event for a costs award to follow. The claim for joinder is countered with an assertion it has not been made via a formal application and cannot therefore be considered.

[9] It is accepted costs normally follow the event and an unsuccessful party will be required to contribute toward the costs the other incurred. Normally the Authority will determine the amount by using a daily tariff approach (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[10] I do not accept the argument there was no event. There was an application and it goes without saying Mr Hadley must be considered unsuccessful by virtue of the decision to discontinue. By that time Canstaff had incurred some costs.

[11] Against that I must balance three points. First I cannot accept the assertion the claim was an ill-conceived extortion without evidence of the claims merits. Second Canstaff seeks recompense of all costs. An award is normally a contribution as opposed to recompense in totality and a total award, such as is being sought here, would be exceptional. Third there is the fact Mr Brown cannot provide any evidence of costs actually incurred (though I must say the time said to have been required to prepare the response does not appear inordinate).

[12] Having considered the information before me I consider a contribution of \$750 to be appropriate.

[13] That conclusion raises the question of who should pay – Mr Hadley or Mr Bennett.

[14] To make an award against Mr Bennett I need evidence of an act of his which put Canstaff to avoidable cost. In this case there is only one thing which might constitute such an act and that would be Mr Bennett filing the claim knowing Mr Hadley would immediately leave the country and not be available to pursue it. There is, however, no evidence Mr Bennett knew of his clients imminent departure and therefore nothing on which to base a conclusion he acted inappropriately.

[15] While probably pyrrhic, the award should be against Mr Hadley.

[16] For the above reasons I order the applicant, Mr Darron Hadley, pay the respondent, Employment Services Limited, \$750.00 (seven hundred and fifty dollars) as a contribution toward the costs incurred in responding to Mr Hadley's claim.

M B Loftus
Member of the Employment Relations Authority