

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 447
3175725

BETWEEN	JORDAN JAMES Applicant
AND	PHLEX CONSTRUCTION LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	No appearance for the Applicant Patrick Anderson, counsel for the Respondent
Investigation Meeting:	15 August 2023 at Tauranga
Submissions received:	None 15 August 2023 from Respondent (by audio-visual link)
Determination:	16 August 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jordan James filed an application raising personal grievance claims of unjustified disadvantage, unjustified dismissal, and breaches of the Wages Protection Act 1983 and the statutory duty of good faith under the Employment Relations Act 2000 (the Act) against the respondent.

[2] Phlex Construction Limited (PCL) denied these claims.

[3] A case management conference call was held with the parties. Both parties were represented by a representative and counsel respectively. At this call, the issues for

investigation by the Authority were identified as set out above. An investigation meeting was set down for 15 and 16 August 2023 in Tauranga, with the agreement of both parties. Timetabling orders for the provision of witness statements and other documents by both parties were also made.

[4] A copy of these timetabling directions, as well as a notice of hearing, was sent to both parties. The representative acting for Mr James at that time confirmed to the Authority that Mr James had been provided with both these documents.

[5] Mr James did not file any evidence, or any of the other documents provided for in the timetabling directions. The file shows that the Authority Officer responsible for the file contacted Mr James' representative to remind him of the timetabling directions. Mr James' (now former) representative advised that they were no longer instructed to act for Mr James and had no instructions from him to file any documents with the Authority, and provided contact details for him. They also advised that Mr James was aware of the timetabling dates for the filing of evidence and the scheduled investigation meeting.

[6] The Authority Officer has emailed Mr James at the personal email address provided, both to remind him of the timetabling dates for the filing of evidence, and to advise him that if he did not attend the scheduled investigation meeting, it was possible that the matter would be dismissed. The Authority Officer also called Mr James on the personal mobile phone number provided but the call was disconnected without being answered. No response has been received of any kind from Mr James.

[7] Counsel for PCL has also advised that they have received no contact from Mr James.

[8] Both parties were sent a Notice of Hearing, setting out (among other things) the date, time, and venue for the investigation meeting. Despite this, Mr James failed to attend the investigation meeting on 15 August 2023, even though ample time was allowed in case of lateness. An Authority Officer called Mr James three times on the personal mobile phone number provided, with all three calls being disconnected without being answered.

[9] Counsel for PCL did attend by audio-visual link, and in Mr James' absence, submitted that the matter should be dismissed. Counsel for PCL orally submitted that a nominal contribution to costs of \$500 be awarded, noting that PCL had complied with

all timetabling instructions, had attended mediation with Mr James and his then representative, and had made a number of “drop hands” offers to Mr James prior to mediation.

The Authority’s investigation

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[11] I am satisfied that Mr James was aware of the scheduled investigation meeting, as he was represented at the case management conference where the date and venue for the investigation meeting were set, and his representative actively participated in setting that date. I am also satisfied that he received the notice of hearing confirming this, which was sent both to his then-representative, and was confirmed to him later via emails as noted above.

[12] Contained in the notice of investigation meeting, which I am satisfied Mr James has received, is advice that if the applicant does not attend the investigation meeting the matter may be dismissed.¹

[13] Given that, the absence of either notification or explanation of Mr James’ absence, along with his failure to respond to multiple approaches from the Authority, I conclude it appropriate I apply the regulations and dismiss the application for lack of prosecution.

Orders

[14] For the above reasons, I dismiss Mr James’ application.

Costs

[15] I am satisfied that Mr James was put on notice that, in the event that he did not attend the investigation meeting, costs might be awarded against him.²

¹ Note 1 to Form 8 of the Employment Relations Authority Regulations 2000.

² See also Note 1 to Form 8 of the Employment Relations Authority Regulations 2000, as well as the advice contained in the Authority’s timetabling directions.

[16] Having been assured by PCL's counsel that it incurred costs in excess of the nominal \$500 sought in defending to Mr James' claims I am satisfied PCL has incurred reasonable costs to which Mr James should contribute.

[17] In assessing the quantum of an order for costs, the Authority generally applies a tariff, currently set at \$4,500 for a full first day of an investigation, unless particular circumstances or factors require an upward or downward adjustment of that tariff.³

[18] In this case, the Authority's meeting was brief given Mr James' absence, and therefore his inability to establish his claim. However, I recognise that PCL, through its counsel, has been put to unnecessary expense including the preparation of a statement in reply and attendance at a telephone conference with the Authority. PCL was required to prepare for the investigation meeting, although I approved its counsel attending by audio-visual link given Mr James' lack of engagement with the Authority, and PCL was not required to file witness statements. I am satisfied PCL has incurred unnecessary and additional costs, although these would have been minimal. I also recognise that PCL made a number of "drop hands" offers to Mr James, which would have enabled him to withdraw his claims without facing any liability to contribute to PCL's costs.

[19] For the above reasons I consider it is appropriate that Mr James contribute \$500 towards the costs of Phlex Construction Limited. This is a reasonable contribution to costs in the circumstances of this matter.

Shane Kinley
Member of the Employment Relations Authority

³ Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>