

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 254  
5370320

BETWEEN	REUBEN MILLER Applicant
A N D	SPRINGFREE NEW ZEALAND LIMITED First Respondent
A N D	DONGGUAN SHENG HUI FITNESS EQUIPMENT CO LIMITED Second Respondent

Member of Authority: Helen Doyle

Representatives: Glenn Cooper, Counsel for Applicant  
Christy Corlett, Counsel for Respondents

Submissions Received: 15 October and 5 November 2012 from Second  
Respondent  
2 November 2012 from Applicant

Date of Determination: 22 November 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] The Authority in its determination dated 21 September 2012 determined two preliminary matters between the parties. The first matter was whether the applicant was employed jointly by the respondents. The second matter was whether the Authority had jurisdiction to hear the claim against the second respondent. The second respondent lodged a protest to the jurisdiction of the Authority.

[2] In its determination the Authority found that the first and second respondents were joint employers of the applicant but that the Authority had no jurisdiction to hear the claim against the second respondent.

[3] The Authority reserved the issue of costs and indicated in its determination that both parties had a measure of success but given the proceedings against the second respondent were at an end then costs with respect to the second respondent could be determined at this stage. Submissions have now been received.

[4] The second respondent submits that it has incurred actual legal fees of \$2,788.63 inclusive of GST and disbursements. It seeks a full award of costs because it says it was always clear the proper law of contract between the applicant and the second respondent was that of the Peoples' Republic of China and that the parties had expressly selected this.

[5] Further it says that although the protest to jurisdiction was to be determined on the papers, there were no submissions from the applicant.

[6] The second respondent submits that the fees were reasonably light in terms of taking instructions, drafting the protest to jurisdiction, research, drafting submissions and appearing at the investigation meeting.

[7] Ms Corlett also submits that any costs by the applicant against the first respondent should be reserved pending final determination of the matter.

[8] The applicant submits that the cost issue should not be determined at this stage of the proceedings as the applicant was substantially successful with respect to the preliminary issues and that an order as to costs would penalise the applicant and would not be just and equitable. The applicant accepts that his claim against the second respondent may have come to an end but it was necessary to bring proceedings against both respondents in order for the Authority to determine the true nature of the employment relationship between the applicant and the respondents.

[9] The applicant says that his approach was consistent with the High Court Rules where, if in doubt as to from whom the plaintiff is entitled to relief, two or more persons as defendants may be joined. The applicant refers to the leading Employment Court judgment with respect to costs in the Authority in *PBO (formerly Rush Security) Ltd v. Da Cruz* [2005] 1 ERNZ 808 and the principles therein including that costs are discretionary and that awards will generally be modest.

[10] There was some criticism by the applicant that the second respondent failed to provide an accurate breakdown of costs and that it appeared, on the face of the

submissions, that the second respondent was claiming solicitor/client costs and on that basis alone that claim should fail. The applicant says that solicitor/client costs would not be reasonable and that only limited work was necessary with respect to the protest to jurisdiction. Further, the applicant submits that he was justified in ensuring the second respondent was a party to the proceedings and that he had significant success on the preliminary issues.

[11] The applicant submits that costs should be reserved and determined at the end of the proceedings, particularly given the close relationship between the respondents meaning there has been negligible costs incurred by the second respondent and that an award of costs would penalise the applicant for what is essentially a successful outcome.

[12] Following those submissions, the second respondent's counsel provided a breakdown of costs that confirmed that solicitor/client costs were being sought in this matter.

### **Determination**

[13] The usual principle is that costs follow the event. I accept the applicant's submission that it would have been necessary for the Authority to have had regard to the applicant's relationship with the second respondent. The issue before the Authority though was a protest to its jurisdiction. It is sensible to join parties where there is an element of doubt as to the correct respondent but there are difficulties with that if the Authority would ultimately have no jurisdiction to determine any claim against that party.

[14] I find that there is no reason in this case given that the proceeding against the second respondent is now effectively at an end to depart from the usual principle that costs follow the event. If costs were left until after the substantive proceeding between the applicant and the first respondent the situation would still be as it is at this present time.

[15] I intend to apply the principles in *PBO* in exercising my discretion as to costs. The unique nature of the Authority was recognised by the Court in *PBO* and it was recognised that costs principles are not necessarily as comprehensive or as prescriptive as those that may have applied in Employment Court judgments. Ms Corlett referred to *Graham v Airways Corp of New Zealand* [2004] 1 ERNZ 564

as a case regularly referred to by the Authority when determining costs. *Graham* refers to a three stage process when determining costs in considering the actual costs, whether they were reasonable and what proportion ought to be met by the unsuccessful party. The leading Employment Court judgment on costs in the Authority is *PBO* and I intend to apply the principles in that case in exercising my discretion as to costs. The Authority usually applies a daily tariff approach and in *PBO* it was accepted that there was nothing wrong with that approach as long as it was not applied rigidly with respect to the particular circumstances of the case. For completeness the second respondent's costs appeared reasonable but this not a case that calls for full solicitor/client costs. That would be very unusual in the Authority where a contribution to costs is the general approach.

[16] The daily tariff now recognised by the Authority is \$3,500 as the appropriate starting point. That is for a full day.

[17] If the protest to jurisdiction was the only issue then I would have anticipated that the matter could have been dealt with within an hour, or two at the outside. I do not accept that the applicant waived his defence in terms of the jurisdictional point but the focus was certainly more on the issue of whether both respondents jointly employed the applicant.

[18] I find the starting point should be less than the full day tariff. This was a truly preliminary matter and by agreement dealt with on the papers. The evidence given related to the issue of joint employment.

[19] If I start then at a half day rate of \$1750 there should then be a further reduction to reflect that had the matter simply been confined to the protest to jurisdiction then it would not have occupied a half day. I will reduce on that basis the tariff by \$400.

[20] In all the circumstances I am of the view that a fair and reasonable contribution to costs would be the sum of \$1,350.

[21] I order Reuben Miller to pay to Dongguan Sheng Hui Fitness Equipment Co Limited the sum of \$1,350 being costs.

[22] Costs in relation to the preliminary determination between the applicant and the first respondent are reserved until after there has been determination of the substantive proceedings.

Helen Doyle  
Member of the Employment Relations Authority