

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 106
5633930

BETWEEN PHILIP MOORE
 Applicant

A N D LEISURETIME PORTABLE
 BUILDINGS LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Steve Richardson, Advocate for the Applicant
 Jannah Stringer, Counsel for Respondent

Submissions Received: 23 June 2017, from the Applicant
 29 May 2017, from the Respondent

Date of Determination: 29 June 2017

COSTS DETERMINATION OF THE AUTHORITY

A Philip Moore is ordered to pay to Leisuretime Portable Buildings Limited the sum of \$3,500 being costs.

The substantive determination

[1] The Authority in its determination dated 16 May 2017 found that the applicant was not in an employment relationship with the respondent. As a consequence of that finding it did not have jurisdiction to deal with the applicant's claim that he was unjustifiably dismissed and was entitled to statutory minimum entitlements.

[2] Costs were reserved in the determination and failing agreement a timetable was set for an exchange of submissions. Submissions were received from the respondent in accordance with that timetable. Mr Richardson on behalf of the applicant sought an extension because his client was overseas and this was granted. Submissions have now also been received from the applicant.

The respondent's submissions

[3] Ms Stringer in her submissions refers to the usual principle that costs follow the event. She refers to clause 15 of the second schedule of the Employment Relations Act 2000 (the Act) that provides to the Authority the discretionary power to award costs.

[4] Ms Stringer refers to the 'notional daily tariff' that has been applied in the Authority. The utility and value of a 'notional daily rate' for costs was confirmed by the full Court of the Employment Court in *Fagotti v Acme & Co. Limited*.¹

[5] Ms Stringer submits that costs should be awarded to the respondent in the sum of \$4,500. This was based in submissions on the daily tariff and the length of the hearing which was one full day, plus further costs taking into account that there was provision of some further information and further submissions after the investigation meeting.

The applicant's submissions

[6] Mr Richardson, on behalf of the applicant, submits that the respondent considered his relationship with the applicant had changed from being a contractor to that of an employee and wanted to challenge his dismissal on that basis.

[7] He submits that the respondent was not prepared to attend mediation and the matter went to an investigation meeting and the determination viewed overall found factors that pointed toward and away from an employment relationship.

[8] Mr Richardson submits that costs should be apportioned and should lie where they fall, but if costs are to be determined Mr Richardson submits that the applicant does not have his own bank account, has no savings, and no assets that he could easily liquidate. There was no information beyond that attached to Mr Richardson's submissions.

[9] Although not timetabled Ms Stringer provided an email to the Authority in response to the submissions. In circumstances where it was not timetabled the Authority has decided not to put any weight on its contents.

¹ [2015] NZEmpC 135 at [108]

Determination

[10] There is no good reason why the Authority should depart from the fundamental principle that costs follow the event. The respondent was the successful party and is entitled to consideration of a contribution towards its costs.

[11] I agree with Mr Richardson's submission that there were factors found in the determination that pointed toward and away from an employment relationship. That is almost always the case in determining the real nature of a relationship and whether a person is employed under a contract of service. I do not conclude that is a factor to take account of in exercising my discretion as to costs.

[12] I accept Mr Richardson's submission that failure to attend mediation may be reflected in an award of costs. It was the preliminary view of the Authority before it talked to the representatives in this matter that mediation could be of assistance. Ms Stringer however advanced at a later telephone conference with the Authority and Mr Richardson that mediation was unlikely to be constructive. This was on the basis that the essential facts were in dispute and the different views of the nature of the relationship.

[13] It was one of the rare occasions where the Authority was persuaded that mediation would not be constructive and proceeded to set the matter down to investigate and reach conclusions with its primary focus on the nature of the relationship. I am not persuaded that the failure to attend mediation in all the circumstances should be a factor considered in the exercise of my discretion as to costs.

[14] My minute book reflects that the investigation meeting commenced at 9.30am and concluded at 3.15pm so it was not a full day. The main submissions followed the evidence on the day of the investigation meeting. There was however additional information provided by both parties after the investigation and some limited submissions.

[15] The daily tariff for costs in the Authority increased in 2016 to \$4,500. As outlined in the Employment Relations Authority Practice Note 2 dated 30 June 2016 that was only for matters lodged from 1 August 2016. The statement of problem in this matter was lodged on 6 July 2016.

[16] The investigation meeting took less than a full day however I accept that there was further provision of information that was very helpful and provision of some limited submissions after the meeting. In all the circumstances I find that a fair and reasonable starting point for costs is the sum of \$3,500.

[17] I have then considered the submission made as to the financial situation regarding the applicant and his ability to pay. When a submission of this nature is advanced on behalf of a party the onus is on that party to establish their financial situation. Beyond a submission about the applicant's financial position the Authority has no other information and the bank account that the Authority was provided with for the purpose of its investigation which reflected payments made did not support impecuniosity on the part of the applicant.

[18] I do not find that there should be an increase or a decrease to the relevant daily tariff of \$3,500.

[19] I order Philip Moore to pay to Leisuretime Portable Buildings Limited the sum of \$3,500 being costs.

Helen Doyle
Member of the Employment Relations Authority