

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 49
3008232

BETWEEN ROBERT NOBLE
 Applicant

A N D BALLOONING
 CANTERBURY.COM LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Jeff Goldstein and Linda Ryder, Co-Counsel for
 Applicant
 Anne Toohey, Counsel for Respondent

Investigation Meeting: Determined on the papers

Submissions Received: 23 March 2018 on behalf of Respondent
 6 April 2018 on behalf of Applicant

Date of Determination: 18 April 2018

**DETERMINATION OF THE
AUTHORITY**

[1] By way of a determination dated 26 February 2018¹ the Authority found that it did not have jurisdiction to determine Mr Noble’s application for unjustifiable dismissal, and arrears of wages, nor the respondent’s counterclaim, on the basis that Mr Noble was not an employee of the respondent. The Member reserved costs and invited the parties to agree how they were to be dealt with. The parties have evidently been unable to agree.

[2] The respondent seeks from Mr Noble on an indemnity basis recovery of the legal costs and disbursements which it has incurred, attributing responsibility for the

¹ [2018] NZERA Christchurch 25

costs incurred to the applicant's conduct "in refusing to deal with the jurisdictional issue as a preliminary matter".

[3] In his submissions in reply, Mr Goldstein rejects that argument on behalf of Mr Noble and blames the level of costs incurred on the way that the Authority conducted its investigation.

[4] This submission creates a conflict of interest for the Authority, so that it cannot in good conscience determine how costs should ultimately be borne by the parties. This is the case even though I did not determine the original matter as each Member represents the Authority in the discharge of his or her functions.

[5] In such a situation, the only appropriate step is to remove the determination of costs to the Employment Court as a forum independent of the Authority. Section 178 of the Employment Relations Act 2000 (the Act) empowers the Authority to order the removal of a matter to the Court on its own motion without the Authority investigating it.

[6] Subsection 178(2) sets out the reasons why the Authority may order removal. These are:

- a. an important question of law is likely to arise in the matter other than incidentally; or
- b. the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or
- c. the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
- d. the Authority is of the opinion that in all the circumstances the court should determine the matter.

[7] I understand that Mr Noble has already filed a challenge in the Court in relation to the substantive determination of the matter, so that sub-section 178(2)(c) is potentially engaged. However, that is not usually sufficient reason to remove a costs matter to the Court, as the Authority is in the best position to determine costs itself. However, I am satisfied that in this particular matter, all of the circumstances warrant the Court determining costs, for the reasons referred to in paragraphs [3] and [4] above.

[8] Accordingly, I order the removal of the determination of costs to the Employment Court pursuant to s 178 of the Act. The Authority shall send to the Court copies of the parties' submissions on costs. As the substantive matter has been challenged the Court will already have a copy of the substantive determination.

David Appleton
Member of the Employment Relations Authority