IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 251
5379132

	BETWEEN	PATRICK MAURICE O'SULLIVAN Applicant
	A N D	LITERACY TRAINING LIMITED (IN LIQUIDATION) Respondent

Member of Authority:	M B Loftus
Representatives:	Patrick O'Sullivan on his own behalf Tim Cleary, Counsel for Respondent
Submissions Received:	15 November 2013 from Respondent 15 November and 29 November 2013 from Applicant
Date of Determination:	4 December 2013

COSTS DETERMINATION OF THE AUTHORITY

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[1] On 7 November 2013 I issued a determination rejecting Mr O'Sullivan's claim he had been unjustifiably dismissed. Costs were reserved and Literacy Training Limited (LTL) now seeks a contribution toward those it incurred defending the claim.

[2] While LTL is now in liquidation I have evidence the liquidator has given Mr Cleary instructions to proceed with the costs application (section 248(1)(a) of the Companies Act 1993).

[3] The liquidation, which occurred within a fortnight of my having completed the investigation meeting, does raise a further complication. The Authority was not advised of the liquidation and issued its determination but a question remains. Should the process have been stayed and the substantive decision never issued?

[4] In this regard I note the decision of Faire J in *Pacific Holding Ltd v Hudson NZ Ltd & Ors*, HC Auckland, CIV 2005-404-531 which noted s.248 of the Companies

Act 1993 did not preclude the Court from entering judgement (paragraph 73). In that case, however, only one of a multiplicity of respondents was affected. Judge Faire's approach was adopted by the Authority in *Park v K & C Howick Ltd t/a Howick Kim's Club (in liquidation)* unreported, D King, 14 August 2007, AA247/07.

[5] There are, however, the comments of Judge Inglis in *Newick v Working in Ltd (in liquidation)* [2013] NZEmpC 132 which suggest there is scope for debate about the effect of s.248 in such circumstances and I can source no further decisions about the issue. Given this, the fact the substantive decision was issued and the liquidator's instructions regarding costs I will continue.

[6] Normally the Authority will use a daily tariff approach when addressing a costs claim (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.

[7] Notwithstanding significantly greater costs, LTL's claim is for $4,000. Its supporting argument relies on *PBO Ltd v Da Cruz* ($3,500 for the day Counsel was engaged plus preparation) along with a small increase due to two factors – the need to prepare questions for one of Mr O'Sullivan's witnesses who failed to attend and the levelling of serious but ill-fated allegations which had to be defended.

[8] Mr O'Sullivan advises he has challenged the original determination in the Employment Court and also asked the Court to determine costs in the Authority. He contends a costs determination is pointless given the matter is now before the Court and I should not determine the issue as, having found against him on the substantive claim, I now lack sufficient impartiality. He also expresses disdain at the liquidator for refusing to indemnify him should his challenge succeed and comments on the general unfairness of the situation. Mr O'Sullivan closes by asking for the contradictory remedies of *A Declaration that costs will be determined by the Court* and an award of costs in his favour.

[9] For four reasons Mr O'Sullivan's argument I not determine costs but transfer the issue to the Court fails to persuade me.

[10] Normal practice in the employment jurisdiction is to conclude all outstanding questions including costs in advance of an appeal or challenge (*Swales v AFFCO New Zealand Ltd* NZEmpC Auckland AC19/01, 23 March 2001) and this approach is

normally adopted in the Authority (*Sandilands v Chief Executive of the Department of Corrections* ERA Wellington WA67A/09, 10 September 2009). The parties can then be sure the Authority's processes are complete and, if the challenge proceeds, the Court will then be acquainted with, and seized of, all issues.

[11] In any event, and given his advice he has obtained legal assistance regarding the challenge, Mr O'Sullivan should be aware s.248 of the Companies Act raises doubt about whether the Court will ever consider the issues he seeks to put before it. The liquidator has not, and clearly will not, give authorisation in respect of the challenge and the High Court has not been asked to consider an application pursuant to s.248(1)(c) of the Companies Act.

[12] Costs are a routine matter applying well established law and normal practice is the same Authority member considers both a substantive claim and any resulting issue as to costs.

[13] The bulk of the costs claim, namely application of the daily tariff must be considered reasonable, especially given the lack of a contrary argument concerning quantum.

[14] I cannot say the same of the increase. The serious accusations had to be addressed in any event. It is hard to see how they increased costs and similarly the preparation for the absent witness would have occurred anyway. Even if she had appeared it would not have lengthened the investigation to any great extent.

[15] Opposing the claim is Mr O'Sullivan's fairness argument. He says it is unfair he be liable for a prejudicial financial burden which, given their present state, is not balanced by a reciprocal liability against LTL should his challenge succeed (or, I add, had he been successful in the substantive decision).

[16] In my view, the argument has merit. This is an equitable jurisdiction whose underlying legislation promotes good faith and fairness. There is something inherently unfair about allowing one party to pursue costs when the other was, in all probability, precluded for doing so had the substantive decision been different.

[17] There also remains some uncertainty about whether the substantive decision should ever have been issued (refer paragraphs 4 and 5 above). If it hadn't there would be no successful party and no event for costs to follow. In such circumstances

I consider it unfair to add a costs imposition when Mr O'Sullivan is likely deprived of the normal right of challenge or the ability to argue this uncertain point due to s.248 of the Companies Act.

[18] Finally I note Mr O'Sullivan's request he be the beneficiary of a costs award. The answer is no. Costs follow the event and even if the determination was wrongly issued it was LTL, not he, which was successful.

[19] For the above reasons I consider costs should lie where they fall.

M B Loftus
Member of the Employment Relations Authority