IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 458
5427224

	BETWEEN	DEBASISH SAHA Applicant
	A N D	PACIFIC FLIGHT CATERING LIMITED First Respondent
	A N D	PRI FLIGHT CATERING LIMITED Second Respondent
	A N D	LSG SKY CHEFS NEW ZEALAND LIMITED Third Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Marija Urlich, Counsel for the Applicant Anthony Drake and Ben Nicholson, Counsel for the First and Second Respondents	
Submissions Received:	21 October 2014 from the Applicant 25 September 2014 from the Respondent	
Date of Determination:	10 November 2014	

COSTS DETERMINATION OF THE AUTHORITY

Chronology of events

[1] On 23 February 2011 the Applicant transferred his employment to the Third Respondent which accepted the transfer. The Applicant remains employed by the Third Respondent.

[2] On 10 June 2013, the Applicant wrote the Second Respondent claiming a personal grievance arising from the fact of his employment transfer.

[3] On 17 June 2013 the Second Respondent replied setting out its position that the Applicant's claim was misconceived.

[4] On 20 February 2014, the Applicant, Mr Debasish Saha, filed a Statement of Problem with the Authority. In the Statement of Problem Mr Saha claimed that he was employed

under a collective employment agreement and the claim was filed against the First Respondent only.

[5] On 28 February 2014, the First Respondent filed a Statement in Reply setting out that it had never employed the Applicant, the Applicant was never employed under a collective agreement as claimed, and the pleadings were defective in all respects.

[6] On 4 April 2014, Counsel for the First Respondent attended a telephone conference with the Authority and requested that the claim against it be struck out.

[7] By letter dated 8 April 2014, the First Respondent sent a *Calderbank* letter to Mr Saha's union, the Service and Food Workers Union Nga Ringa Tota, (SFWU) setting out the reasons why Mr Saha's claim must fail and stating that it would pursue him for costs associated with the Authority-directed mediation, as well as the pre-litigation costs involved in responding to the dispute if he did not discontinue the alleged flawed cause of action.

[8] On 6 June 2014, the Applicant filed an amended Statement of Problem adding the Second Respondent as a party without removing the First Respondent. The Authority made a direction that the parties attend mediation within four weeks.

[9] On 18 June 2014, the First and Second Respondents filed an amended Statement in Reply requesting removal of the First Respondent and that the claim be struck-out as being entirely misconceived.

[10] On 1 July 2014, the First and Second Respondents filed a memorandum with the Authority setting out the grounds of the strike-out application and that the Third Respondent should be added as the correct employer party.

[11] At a telephone conference with the parties on 2 July 2014, the Authority directed the Third Respondent to be added as a party and file a Statement in Reply. On 17 July 2014, the Third Respondent filed its Statement in Reply.

[12] On 18 July 2014, the Authority issued a Notice of Direction to attend mediation, which the parties attended on 8 August 2014.

[13] On 21 August 2014, the First and Second Respondents filed a further memorandum with the Authority requesting the strike-out application be continued as no settlement had been reached at mediation.

[14] On 1 September 2014, the Authority requested a telephone conference to progress the strike-out application.

[15] On 4 September 2014, the Third Respondent advised the Authority that it understood the matter was to be withdrawn due to it having reached a settlement with the Applicant.

[16] On 5 September 2014, the Applicant confirmed that his claim was withdrawn in the Authority.

Submissions of the First and Second Respondents

[17] The First and Second Respondents submit that *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*[1] sets out a number of considerations to which the Authority must have regard in determining costs of which the most important is that the Authority must take a principled approach to costs.

[18] It is also a principle that costs are modest and: "*it is open to the Authority to consider whether all or any of the parties costs were necessary or unreasonable".*

[19] The First and Second Respondents submit that *RHB Chartered Accountants v. Rawcliffe*[2] is authority for the principle that costs should follow the event where an applicant withdraws a claim against a respondent that was required to incur costs in opposing the proceeding (absent agreement between the parties). They further submit that it was also clear from that judgment that increased or indemnity costs may be appropriate depending on the circumstances; however proceeding against the wrong party is just cause for uplift in costs.

[20] The First and Second Respondents cite the following statements contained in the judgment as authority for this submission:

> *[19] ... I do not consider that the policy concerns relating to allowing mediation costs have any real application in respect of attendances such as the preparation of a statement in reply prior to mediation taking place, and I can discern no reason in principle why such costs ought to be automatically excluded from consideration where a grievance is subsequently withdrawn (absent agreement between the parties).*
>
> *[44] The general principle is that a plaintiff who discontinues a proceeding against a defendant is liable for costs of and incidental to and including the discontinuance.*
>
> *[45] In the circumstances of this case I can see no reason why a contribution to costs in relation to the preparation of a statement in reply ought not to be ordered. Mr Rawcliffe proceeded against the wrong party. An award of costs in such circumstances is consistent with the general approach that, where technical or futile points are advanced by an unsuccessful party, it can be expected that a larger contribution*

[1] [2005] 1 ERNZ 808
[2] *Rawcliffe* [2012] NZEmpC 31

> *to the successful party's costs will be required and is also consistent with "the basic tenets" relating to costs awards in the Authority articulated by the Full Court in* Da Cruz.

[21] The First and Second Respondents accordingly also submit that they should be awarded costs associated with the preparation for and attendance at mediation, quoting from *Jenkinson v. Oceania Gold (NZ) Ltd*[3] in which it was stated at para.[24]:

> *… mediation directed by a Judge pursuant to a statutory requirement should be regarded as costs necessarily incurred in the proceedings before the Court and subject to the same consideration for recovery as other costs.*

[22] Counsel for the First and Second Respondents submits that there are two considerations for the Authority in determining costs associated with this matter. First, that the Authority should determine costs associated with the conduct of the proceedings in the Authority and whether these costs should be awarded on an indemnity basis. Second, that the Authority should determine whether the Applicant is required to make a contribution to the costs of the First and Second Respondents in attending mediation.

[23] Counsel submits that the Authority is able to award full indemnity costs in relation to the substantive proceedings, while making a modest award in relation to attendance at mediation.

[24] Counsel submits that the Applicant acted vexatiously, frivolously, improperly and unnecessarily in pursuing a claim against the First and Second Respondents which was clearly flawed from the outset, and that he should always have pursued his claim against the Third Respondent. Counsel submits that the Applicant's claim was flawed from the outset and could not succeed on the basis that:

(a) The Applicant was never employed by the First Respondent;

(b) The Applicant's personal grievance was filed out of time and that the Applicant pursued his claims regardless of obvious difficulties.

[25] Counsel submits that the Applicant's claim can only be seen as improperly brought. Further, counsel submits that the First and Second Respondents have been put to significant costs in defending the proceedings to date including the preparation of two statements in reply, attending two telephone conferences and preparation of a memorandum requesting strike-out.

[3] [2011] NZEmpC 2

[26] The First and Second Respondents submit that their actual costs were $18,381.60 plus GST of which costs totalling $15,680.60 plus GST were incurred after the Statement of Problem was filed. Counsel submits that the Authority should award the full amount.

[27] In regard to the mediation proceedings and citing the Court's decision in *RHB*, the First and Second Respondents submit that when the Authority directs parties to attend mediation, the mediation is not voluntary and cannot be anything other than a necessary step in the proceedings.

[28] The First and Second Respondents are not seeking indemnity costs in respect of mediation costs, however, they are seeking a modest award of the costs actually incurred, noting that the First Respondent put the Applicant on notice that if a direction to mediation was sought, it would be seeking costs against him associated with that direction.

[29] Counsel submits that an award between $2,207.75 plus GST and $3,345.00 plus GST should be awarded. Further, that as the Applicant was put on notice that the First Respondent would seek costs, the Authority should award the higher figure quoted.

Submissions for the Applicant

[30] Counsel for the Applicant submits in respect of the First and Second Respondents' claim that the Applicant's claim was misconceived in the following respects:

(a) The identity of the employing entity was mistaken; and

(b) The Applicant was entitled to transfer under Part 6A.

That Counsel in effect invites the Authority to determine the substantive issues, however, the Authority has made no such substantive determination and is unable to do in a costs setting given:

(a) All the evidence is not before it;

(b) It is not had an opportunity to test that evidence; and

(c) The parties have not been heard on the substantive issues.

[31] Counsel for the Applicant submits that whilst the First and Second Respondents seek to rely on the First Respondent's *Calderbank* offer dated 8 April 2014 in respect of their claim for costs, it is not relevant to the Authority's consideration on the basis that:

(a) At para.12 of the memorandum of costs, the First and Second Respondents mistakenly state that the *Calderbank* offer was made by them both.

However, the *Calderbank* offer was made on behalf of the Second Respondent only;

(b) The Second Respondent was not a party to the proceedings at the time the *Calderbank* offer was made;

(c) There is no evidence before the Authority that the Second Respondent had incurred any costs in relation to this matter as the invoices submitted by counsel for the First and Second Respondents referred to costs invoiced only to the First Respondent.

[32] Counsel for the Applicant submits that the First and Second Respondents who seek to rely on *RHB* as authority for costs award following an Authority-directed mediation is limited to circumstances where the wrong party was pursued to mediation in the face of information otherwise and subsequent to mediation proceedings which were amended consistent with the earlier information.

[33] Further, counsel submits that *RHB* is distinguishable from the matter before the Authority on the basis that:

(a) All identified parties were directed to mediation. The First and Second Respondents (along with the Third Respondent) were directed to mediation with the applicant;

(b) Settlement was reached at mediation and the proceedings subsequently withdrawn;

(c) The Authority has not determined the identity of the applicant's employer or any other substantive issue between the parties;

(d) There is no evidence before the Authority that the Second Respondent has incurred any costs in relation to this matter;

(e) If the First and Second Respondents are related companies then it is not clear what prejudice resulted to them from either being named as respondent parties;

(f) There is no evidence before the Authority which supports a finding and would form the basis for a reasonably drawn inference that the Applicant has conceded the legal basis of any aspect of his claim consequent to any action of or information provided by the first and second respondents.

[34] Further, the First and Second Respondents have made serious and unsubstantiated allegations against the Applicant and his union. Given that these allegations are not factors which can reasonably be considered by the Authority is irrelevant to the matter for determination.

[35] Counsel for the Applicant submits that whilst it is accepted that the level of costs incurred by the First respondent in relation to the matter are significant, the reasonableness of the costs given the modest nature of the Applicant's claim and in light of his repeated and sustained request to meet to discuss that claim in a statutory mandated setting of mediation must be questionable. On that basis, the Applicant submits that no order for costs should be made.

Determination

[36] I accept that throughout the initial stages of the claim coming before the Authority, the position of the First and Second Respondents was that the Applicant's claim against them must fail, and that they incurred significant costs of preparation in relation to the Applicant's claims against them and further incurred costs associated with attendance at the directed mediation.

[37] Since this matter coming before the Authority and being subsequently settled and withdrawn by the Applicant with no claims against the First and Second Respondents subsisting, the Supreme Court has issued its judgment: *LSG Sky Chefs Ltd v Pacific Flight Catering Ltd & PRI Flight Catering Limited*[4] which held that LSG, the Third Respondent in this matter, bore responsibility for statutory entitlements of the transferring employees from the First and Second Respondents under a restructuring.

[38] I note that the issues between the parties LSG Sky Chefs Ltd v Pacific Flight Catering Ltd & PRI Flight Catering Limited have involved consideration of a complex area of law at a high judicial level.

[39] Prior to the date of this Supreme Court judgment, and in an attempt to resolve the issues between the parties without the necessity of an investigation meeting, I duly considered and directed mediation, in accordance with s 159 of the Employment Relations Act 2000 (the Act) in order that the parties could attempt in good faith to reach an agreed settlement pursuant to s 159(2) of the Act.

[4] SC 103/2013 [2014] NZSC 158

[40] Directed mediation resulted in the successful resolution of the matter without the intervention of the Authority. It is not usual in such cases that costs be awarded as a result of the resolution of the matter through the appropriate statutory mechanism prior to any investigation meeting.

[41] There has been no substantive hearing of the matter, and the Authority has not had the benefit of hearing witness evidence in relation to the substantive claim, nor has the Authority determined the identity of the Applicant's employer and the correct Respondent(s) in the matter.

[42] Having given careful consideration to the submissions of the First and Second Respondent, and whilst I acknowledge the significant liability that the First and Second Respondents have incurred in respect of costs, I nonetheless think it appropriate in the circumstances that I exercise my discretion by letting costs lie where they fall.

Eleanor Robinson
Member of the Employment Relations Authority