

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 34  
3043555

BETWEEN DANIEL SAUNDERS  
Applicant

AND RUSSELL LILLEY  
CONSTRUCTION LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: David Beck, counsel for the Applicant  
Paul Brown, advocate for the Respondent

Submissions Received: 21 November 2019 from the Applicant  
3 December 2019 from the Respondent

Date of Determination: 28 January 2020

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**COST DETERMINATION OF THE AUTHORITY**

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**A I order Daniel Saunders to pay to Russell Lilley Construction Limited the sum of \$4,500 being costs.**

**Substantive Determination**

[1] In a substantive determination dated 24 September 2019 the Authority found in favour of the respondent and reserved the issue of costs.<sup>1</sup> The Authority has received submissions from both parties.

**The respondent's submissions**

[2] Both parties referred in submissions to the leading judgment of the Employment Court on costs in the Authority, *PBO Limited (formerly Rush Security Limited) v De Cruz*.<sup>2</sup>

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<sup>1</sup> *Saunders v Russell Lilley Construction Limited* [2019] NZERA 548

<sup>2</sup> *PBO Limited v De Cruz* [2005] 1 ERNZ 808.

Mr Brown submits costs should follow the event and be awarded to the respondent based on the daily tariff of \$4,500.

[3] He submits that it was not until the commencement of the investigation meeting that the applicant provided a very basic document about his entitlement to holiday pay. He contrasts that with the defence of the respondent which he submits was well established and presented prior to the investigation meeting to counsel for the applicant.

[4] Mr Brown submits the only possible argument against costs following the event is that the counterclaim of the respondent was unsuccessful, but that only took a small amount of time and was effectively disposed of by pursuing costs in the Authority.

[5] Actual costs incurred by the respondent and supported by invoices were \$9,205.75.

### **The applicant's submissions**

[6] The applicant submits that costs should lie where they fall and that this would be a reasonable outcome in light of all the circumstances, including that the counterclaim failed and that there was a failure to provide relevant information in a timely manner.

### **Determination**

[7] The respondent faced a significant claim quantified on the morning of the investigation meeting to be approximately \$34,000 for holiday pay for the period of employment between 2005 and 2013.

[8] The respondent was successful in its defence of the claim against it.

[9] The counterclaim was based on an agreement between the parties for the sale of shares. The agreement provided an indemnity to the respondent, in respect of any liability arising after the date of settlement, of 49%. The time that occupied at the investigation meeting was very limited and ultimately the Authority concluded that it did not have jurisdiction about that matter. Costs were then applied for under clause 15 of the second schedule of the Employment Relations Act 2000 (the Act).

[10] Mr Beck submits that the respondent did not provide information in a timely manner. The respondent, however, provided at a comparatively early stage its written view about what leave it concluded had been taken by the applicant over the period of employment from 2007,

including details of the final payment for holiday pay. Two different methods of calculation were provided. I accept that detailed leave records were not provided however the Authority found that records were required to be kept from October 2012, being six years from the date on which the information was entered into the record.

[11] I accept Mr Brown's submission that the fundamental principle that costs follow the event should not be departed from without good reason. I do not find that it would be fair and reasonable in all the circumstances for costs to lie where they fall. The respondent is entitled to consideration of a contribution towards costs of \$9,205.75.

[12] The investigation meeting concluded after three quarters of a day. The Authority had insufficient information for the purposes of its investigation so it adjourned the meeting and asked for further information. That was subsequently provided together with submissions. I accept that this put the respondent to further cost.

[13] It is fair and reasonable that costs be considered on the basis of the daily tariff of \$4,500. I do not consider the amount of time spent on the counterclaim was such to justify any deduction to the daily tariff.

[14] I order Daniel Saunders to pay to Russell Lilley Construction Limited the sum of \$4,500 being costs.

**Helen Doyle**  
**Member of the Employment Relations Authority**