

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 62
5588801

BETWEEN

TRACEY WARD
Applicant

AND

MARK STEVENSON FIRST
NATIONAL REAL ESTATE
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Kevin Murray and Shayne Boyce, Advocates for the applicant
Peter Churchman QC, Counsel for the respondent

Costs submissions received: From the applicant on 21 April 2016
From the respondent on 7 and 21 April 2016

Determination: 16 May 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] This is a claim for costs for an application that did not proceed to an investigation meeting. Tracey Ward lodged a statement of problem on 20 October 2015 claiming unjustified dismissal and a number of unjustified disadvantage personal grievances. She claimed the respondent unjustifiably dismissed her in 2013.

[2] The respondent lodged a statement in reply on 6 November 2015 claiming that Ms Ward was at all material times an independent contractor and not an employee. The respondent attached Ms Ward's "Agreement for services ... engaged as an independent contractor" dated 31 January 2012. It sought an order striking out the proceedings on the basis that s 51(2) of the Real Estate Agents Act 2008 provides that:

Any written agreement between an agent and a salesperson is conclusive so far as it expressly states that the relationship between the agent and the salesperson is that of employer and independent contractor.

[3] I held a case management conference on 16 December 2015 during which the parties agreed I could determine the application to strike out proceedings on the papers.

[4] I directed Ms Ward to file her GST and tax returns for the relevant years by 3 February 2016. Ms Ward provided some of the requested documents by then.

[5] I also directed the respondent to lodge its submissions on its strike out application by 24 February 2016. It did so.

[6] I directed Ms Ward to lodge and serve submissions in reply by 16 March 2016.

[7] On 17 March 2016, the Authority officer reminded Ms Ward's advocates that their submissions had been due the previous day. On 21 March 2016, Ms Boyce notified the Authority and Mr Churchman's office that she needed to take further instructions from Ms Ward about filing submissions. She anticipated being able to update the Authority the following day.

[8] On 29 March 2016, Mr Churchman filed a memorandum noting that the submissions were two weeks overdue and asking the Authority to issue a direction that submissions be filed by 31 March 2016 or that the matter be withdrawn by then.

[9] On 30 March, Ms Boyce notified the Authority and Mr Churchman that Ms Ward would give further instructions the following day. On 1 April 2016, Ms Boyce informed the Authority and Mr Churchman that Ms Ward withdrew her application. Mr Churchman then applied for costs to be awarded.

Application for costs

[10] The respondent applies for \$3,500 in costs for the following reasons:

- It complied with my directions timetable.
- It was put to further expense when counsel had to follow up with the applicant's advocate multiple times after the submissions were not filed as timetabled.

- The applicant withdrew her application three weeks after her submissions were to be filed.
- The respondent has maintained the same position (that the applicant was an independent contractor and not an employee) since July 2013 and the applicant's advocate was aware of that.

Ms Ward's response

[11] In response, Mr Murray submits that costs should lie where they fall. In the alternative, if I decide costs are appropriate he submits any award should be modest.

[12] Mr Murray says that new evidence, being the 2010 Agreement for Services between the parties, was presented by the respondent in its 24 February 2016 submissions. That document stated that Ms Ward was an independent contractor. Mr Murray submits that Ms Ward needed time to consider that new evidence. Mr Murray submits that the respondent should have provided the 2010 agreement immediately after Ms Ward raised a grievance in July 2013 and requested her employment file.

[13] Mr Murray also submits that the decision to deal with the strike out application on the papers limited costs for the parties.

Determination

[14] The Authority's jurisdiction to make costs orders comes from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Costs are at the discretion of the Authority.

[15] Each case is to be treated in light of its own circumstances. The primary purpose of costs is to compensate the successful party.

[16] In exercising its discretion the Authority usually awards costs against a notional daily hearing rate. That notional rate is currently \$3,500 per day. The Authority may adjust costs up or down depending on a number of factors.

[17] Costs must be reasonable and costs awards are generally modest.

[18] The respondent's aim was for the application to be struck out on the basis the Authority had no jurisdiction to deal with the matter because Ms Ward was an independent contractor when the respondent chose to terminate its contract with her. Ms Ward withdrew her claim and the respondent no longer faces a claim it must defend. In that way, its aim was achieved. Therefore, it has had a measure of success.

[19] Ms Ward was entitled to withdraw her claim at any time. The amount of necessary work undertaken by the respondent's counsel was preparing a statement in reply, attending a telephone conference and lodging submissions on its strike out application. Those steps were the only steps required by the Authority.

[20] Mr Churchman submits that he also had to follow up with Ms Ward's advocate multiple times because her submissions were late.

[21] I take into account the principle that the Authority should not use costs as a punishment or an expression of disapproval of the unsuccessful party's conduct. Although in setting the amount of costs payable, I may take into account conduct that increased costs unnecessarily.

[22] Follow-up on the overdue submissions was something the respondent chose to do. The Authority did not require it to do so. The file shows the Authority officer was diligent about following up on the overdue submissions and kept Mr Churchman's office informed of its correspondence with Ms Boyce. I do not consider the fact that Ms Ward's submissions were overdue unnecessarily increased the respondent's costs.

[23] It is correct that Ms Ward withdrew her application three weeks after her submissions were due. However, I do not consider that to have unnecessarily increased the respondent's costs.

[24] Mr Murray submits the respondent was somehow responsible for Ms Ward's application, and by implication its own costs, because it had not earlier provided a copy of her 2010 agreement. I do not agree with Mr Murray. The 2010 agreement was no longer relevant at the time the respondent dispensed with Ms Ward's services. It was the January 2012 agreement the respondent relied on and had done so

consistently from July 2013 when Ms Ward first raised her claimed personal grievance.

[25] Mr Murray's submissions imply Ms Ward had forgotten about the 2010 agreement until the respondent attached it to its 24 February 2016 submissions. However, the respondent referred to the 2010 agreement in the first paragraph of its statement in reply. Therefore, Ms Ward was aware of its existence at least by 6 November 2015.

[26] Ms Ward withdrew her application at a relatively early stage and before the respondent was put to significant expense. The amount claimed is what is usually awarded after a day-long investigation meeting for which written witness statements and submissions would have been prepared.

[27] In all the circumstances, I consider it reasonable that the parties bear their own costs.

Christine Hickey
Member of the Employment Relations Authority