

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 56
5461073

BETWEEN JUSTIN WILSON
 Applicant

A N D GEOVERT LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Michael Smyth, Counsel for Applicant
 Anthony Parish, Advocate for Respondent

Investigation Meeting: On the papers

Submissions Received: 20 November 2015 from Applicant
 22 January 2016 from Respondent

Date of Determination: 26 February 2016

DETERMINATION OF THE AUTHORITY

Introduction

[1] This is an application by Mr Wilson to reopen an investigation of the Authority which resulted in a determination in this matter dated 29 January 2015 (the first determination), a minute of the Authority dated 20 April 2015 (the minute), and a second determination also dated 29 January 2015 (the second determination).

[2] The application to reopen is opposed by Geovert Limited (Geovert).

History

[3] It is common ground that in the first determination the Authority issued, there were a number of factual errors on the face of the determination. Those factual errors

are comprehensively traversed in Mr Wilson's application to reopen and I do not propose to set them out in full here.

[4] When the first determination issued, counsel for Mr Wilson contacted the Authority's Auckland office by telephone and spoke to an Authority Officer. I am satisfied that the Authority Officer subsequently indicated to counsel that the decision would be recalled and corrected and that meantime, the first determination would not be published. As a matter of fact, the first determination has never been published but has only been provided to the parties.

[5] Those same issues of concern to Mr Wilson were raised formally with the Authority by way of a letter of complaint to the Chief of the Authority. The Authority's formal response indicated that the determination would be recalled and corrected but that the decision would stand. The Authority noted the ability Mr Wilson had to apply either for a reopening in the Authority or indeed a challenge in the Court.

[6] A proposed draft of the recalled determination issued on 22 March 2015 and the second determination followed on 20 April 2015 accompanied by the minute. Critically for our purposes, the minute declined to alter the date of the determination or the timetable set for the exchange of costs memoranda which was consistent with the original date of the determination.

[7] Put simply, Mr Wilson says that the effect of this decision of the Authority was to deny him the right to claim costs in a matter in which he was wholly successful. Conversely, Geovert, maintains that Mr Wilson ought to have filed his application for costs in accordance with the timetable set out in the first determination and that had he done so, notwithstanding what happened to the first determination subsequently, he would have been within time and the matter could have been dealt with by the Authority in the usual way.

Determination

[8] I see the matter very simply. Mr Wilson was the successful party in the Authority's substantive investigation. He complained about errors on the face of the Authority's first determination which as a matter of fact was recalled. Given that fact, it cannot be right for Mr Wilson to be required to rely on the Authority's first determination in order to make an application for costs. This is for the self-evident

reason that the first determination was withdrawn and some months later was replaced by the second determination. In the period between the first determination being withdrawn and the second determination issuing, as a matter of law, there was no determination of the matter, at least to the extent that anybody could rely upon. The only aspect that was certain during that interregnum was that the outcome of the Authority's investigation would not change.

[9] From the point at which the decision was made to withdraw the first determination, aside only from the result itself, it must have been possible for the parties, or one of them, to contemplate a variety of changes to the first determination given the intimation from the Authority that the first determination would be replaced by another determination.

[10] In the result, the changes made in the second determination were modest and given the Authority's conviction that the substantive decision itself should not change, the modest number of changes would seem to be entirely appropriate.

[11] That said, the fact that the Authority did not adjust the timetable for the filing of costs submissions effectively deprived the successful party of access to a contribution to his costs unless Geovert was prepared to agree to such a contribution, which it was under no legal obligation to accede to.

[12] The interests of justice require that the matter before me be reopened so as to allow Mr Wilson to make an application to the Authority to have costs fixed and Geovert to respond. In making that decision, I need only emphasise again that I do not accept Geovert's fundamental submission that Mr Wilson ought to have made his costs submission in reliance on the first determination. This is because the first determination was withdrawn by the Authority and therefore it cannot be said to have any force or effect and certainly ought not to have been relied upon particularly as, within the timetable originally set in the first determination, the Authority had made it abundantly clear to Mr Wilson that the first determination had been recalled and that a fresh determination would issue in due course.

[13] I now direct that Mr Wilson file his application for costs in the Authority within 28 days of the date of this determination, serve that application on Geovert and that Geovert have 28 days from its receipt of the application for costs to file its response.

[14] I will then endeavour to deal with the costs award promptly.

James Crichton
Chief of the Employment Relations Authority