

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 183  
5448996

BETWEEN            MOHAMMED IRFAN ALI  
Applicant

A N D                ABHISEK QUALITY FOODS  
LIMITED trading as BOMBAY  
PALACE INDIAN RESTAURANT  
WANAKA  
First Respondent

                          RAMESH ANAND RAJAGOPAL  
Second Respondent

                          MASANIAMMAN LIMITED  
Third Respondent

Member of Authority:     David Appleton

Representatives:         Robert M Thompson, Advocate for Applicant  
Paul McBride, Counsel for the Second and Third  
Respondents

Submissions Received:    15 September 2016 from second and third respondents.  
29 September 2016 from Applicant

Date of Determination:    7 October 2016

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**COSTS DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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[1] By way of a determination dated 31 August 2016<sup>1</sup>, the Authority declined to join the second and third respondents to the proceedings for the purposes of causing the first respondent to comply with the orders of the Authority contained in an earlier substantive determination<sup>2</sup>. The Authority also declined to make compliance orders against the first respondent.

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<sup>1</sup> [2016] NZERA Christchurch 147

<sup>2</sup> [2015] NZERA Christchurch 80.

[2] Costs were reserved and the parties invited to agree how they should be dealt with. No agreement has been reached and the second and third respondents now seek a contribution towards their costs from the applicant.

### **Submissions**

[3] Mr McBride states that a total of \$9,245 plus GST has been incurred in defending the application by Mr Ali, made up of 27.2 hours. That fee is equally assigned between each of the second and third respondent. The second and third respondents seek an order for a costs award in the total of \$6,000 on a joint and several basis.

[4] Mr McBride suggests that the proceedings, although determined on the papers, was in the realms of the equivalent to a one-day investigation meeting, but with complications, as it was not a run-of-the-mill matter. He submits that a flawed approach was adopted in bringing the claims to the Authority.

[5] Mr Thompson refers to the well know *Da Cruz* principles<sup>3</sup> and says that it is not automatic that costs follow the event. He essentially asserts that a protracted process had to be adopted in order to obtain necessary financial information, and that the respondents' behaviour prolonged the case. For that reason, costs should not be awarded in their favour he submits.

[6] Mr Thompson also asserts that Mr Ali is not in a financial position to pay costs, as he is on low wages, and struggles to support his young family and parents. He has also not received the financial remedies awarded to him by the Authority against the first respondent. However, no evidence was provided to substantiate this assertion about Mr Ali's financial position.

### **Discussion**

[7] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

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<sup>3</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808.

### ***15 Power to award costs***

*(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*

*(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[8] I believe that the following *Da Cruz* principles are particularly relevant in this case:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That awards will be modest.
- i. That frequently costs are judged against a notional daily rate.
- j. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[9] Whilst Mr McBride seeks that a global sum be awarded on a joint and several basis, or alternatively, that each be awarded \$3,000, I believe that it is appropriate to differentiate between the second and third respondent.

[10] The claim against the third respondent, the company that took over the business of the first respondent, was of limited merit, and was pursued as if Mr Ali was seeking to lift the corporate veil, even though Mr Thompson said that that was not the case. I do not believe that there is any question that a costs award should be made in favour of that company. I shall turn to the quantum below.

[11] In respect of the second respondent, I concluded in my determination dated 31 August as follows<sup>4</sup>:

If it were not for the fact that the first respondent is clearly in no position to pay the sums ordered by the Authority, I would have joined Mr Rajagopal and issued the compliance order requested. It was only when Mr Krishnadass' answers to questions in his second affirmation was lodged that it became clear that the first respondent was not in a position to pay those sums.

[12] Therefore, it was not unreasonable to have sought to join Mr Rajagopal to order him to make the first respondent comply with the orders of the Authority. It was due to Mr Krishnadass<sup>5</sup> failing to annex supporting documentation to his first affirmation, and not making clear what had happened to certain assets, that it was necessary to seek financial records and further information. This prolonged matters and added to the parties' costs. Of course, Mr Krishnadass was instructed by or on behalf of the second and third respondents so they must bear responsibility for these failings.

[13] The application against Mr Rajagopal was therefore not misconceived. Indeed, it was a reasonable step to take in order to get to the bottom of the first respondent's ability to comply with the Authority's orders.

[14] Taking into account the equity and good conscience jurisdiction of the Authority, I believe it would not be just to award costs in favour of the second respondent.

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<sup>4</sup> At [70]

<sup>5</sup> The first respondent's one time accountant who lodged affirmations in support of the second and third respondents' defence of the applications to join them.

### **Costs for the third respondent**

[15] I believe adopting a notional daily tariff approach is a reasonable way of assessing what would be a reasonable contribution to the third respondent's costs. Assuming that the entire matter would have taken a full day to investigate, and that roughly equal time would have been devoted to the respective claims against the second and third respondents, I assess the starting point at half the daily tariff applicable at the time; namely \$1,750, being half of \$3,500.

[16] Should this be increased? I am convinced on balance that extra time was needed by Mr McBride to address the many assertions made on behalf of Mr Ali which would have been more relevant to a claim for lifting the corporate veil. However, I do not believe that that extra time would have been substantial, as the arguments were fairly easy to combat.

[17] I assess that a modest uplift is warranted, in the sum of \$500. I therefore set the award of costs in favour of the third respondent at \$2,250. As no evidence was produced about Mr Ali's financial situation, I take no account of it.

### **Order**

[18] Mr Ali is to pay to the third respondent the sum of \$2,250. There is no order as to costs in respect of the first respondent (which was unrepresented, and took no part in the proceedings) or the second respondent.

**David Appleton**  
**Member of the Employment Relations Authority**