

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 153  
5518302

BETWEEN            ROBBIE McINTYRE  
                                 Applicant  
  
AND                    CORE TECHNOLOGY  
                                 LIMITED  
                                 First Respondent  
  
AND                    SHANE MERCER  
                                 Second Respondent

Member of Authority:    Michele Ryan  
  
Representatives:        Bede Laracy, Advocate for the Applicant  
                                 Shane Mercer for the first and second Respondents  
  
Submissions received:    30 May 2016 from the Applicant  
                                 25 June 2016 from the Respondents  
                                 12 October 2016 'In reply' from the Applicant  
  
Determination:         14 December 2016

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     A dispute between the parties was decided in favour of the applicant, Mr Robbie McIntyre, in a determination issued on 7 April 2015.<sup>1</sup> He now seeks an order against the respondents for costs of \$1,750.

[2]     The first respondent no longer exists as a legal entity. The second respondent, Mr Shane Mercer, resists the application and submits costs should lie where they fall.

**The law**

[3]     The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act which states:

**15 Power to award costs**

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<sup>1</sup> *McIntyre v Core Technology Ltd* [2015] NZERA Wellington 34

- (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.

[4] The relevant principles when assessing costs are set out in *PBO Ltd v Da Cruz*.<sup>2</sup> It is not necessary to restate all of these in full. Material to this determination the following principles are relevant;

- the Authority's discretion to award costs, including whether costs would be awarded and what amount, should be exercised in a principled manner and not arbitrarily;
- the statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority, equity and good conscience is to be considered on a case by case basis;
- costs generally follow the event;

### **Background information**

[5] During a case management call to decide, amongst other things, how best to progress Mr McIntyre's claim, the Authority was informed that no additional evidence was required beyond what had been already been furnished to the Authority. The parties agreed that the Authority would be able to determine the matter on the papers following the provision of submissions.

### **Determination**

[6] It is submitted on Mr McIntyre's behalf that actual costs were in excess of \$3,400 although no invoices were produced to verify that assertion. In any event Mr McIntyre seeks to recover \$1,750 (half of the Authority's notional daily tariff as it was set at the time) on the basis that he was successful party and costs should follow the event. He estimates that had the parties an investigation meeting that inquiry would likely have occupied half a day.

[7] Mr Mercer submits this is a matter where costs should lie where they fall. He says the dispute between the parties was based on a mutual misunderstanding as to

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<sup>2</sup> [2005] ERNZ 808

what was agreed between them in a mediated settlement agreement, and required a determination from the Authority to resolve.

[8] I am prevented from making an assessment as to what was agreed during a confidential mediation, or whether the agreement correctly reflected what one or other party thought had been agreed. Whilst I have no doubt that the dispute was genuine I am not satisfied that is a sufficient ground on its own to depart from the principle that costs should follow the event. The Court has recently held that while the nature of a dispute (genuine or otherwise) may be a factor in assessing costs, it is no necessarily so.<sup>3</sup>

[9] A fundamental purpose of a costs award is to recompense a successful party for the cost of being represented in that litigation. Mr McIntyre was successful with his substantive claim and is entitled to a contribution to reflect that outcome.

[10] I agree an award of costs should be made but not at the quantum Mr McIntyre suggests. Whilst the parties' submissions in respect of the substantive claim were helpful, the sole issue for determination involved a simple application of the law as it relates to contract interpretation and was not legally complex. Had the parties attended the Authority and where no additional evidence was required I assess the investigation would likely to have lasted a little over an hour at most.

[11] Having considered the circumstances of this matter I consider a contribution of \$750 to Mr McIntyre's costs is appropriate in the circumstances.

### **Order**

[12] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act I order the second respondent, Mr Shane Mercer, to pay the applicant, Mr Robbie McIntyre the sum of \$750 as contribution towards costs.

Michele Ryan  
Member of the Employment Relations Authority

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<sup>3</sup> *Tertiary Education Union v Vice-Chancellor, University of Auckland* [2016] NZEmpC 654