

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 236
3000931
3000895

BETWEEN MIKE MOSKAL
 Applicant

A N D NANCY McGUIRE
 Applicant

A N D MANOR HOUSE CUISINE
 (2015) LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: G Bennett, Advocate for Applicants
 M Dimond, Advocate for Respondent

Investigation Meeting: 10 August 2017 by telephone

Submissions Received: 10 August 2017 from Applicants
 10 August 2017 from Respondent

Date of Determination: 11 August 2017

ORAL DETERMINATION OF THE AUTHORITY

A. Manor House Cuisine (2015) Limited's application to strike out these proceedings is dismissed. Costs reserved.

B. I order Gregory Bennett to pay \$500 to Manor House Cuisine (2015) Limited as a contribution towards its costs within 7 days of the written determination.

Employment relationship problem

[1] An oral determination was issued at a telephone conference on 10 August 2017 with reasons in brief for the above orders. The detailed reasons and the narrative leading to the making of orders are set out herein.

Relevant Facts

[2] A telephone conference was set down for this matter at 9.30 am 9 June 2017. The applicant's representative, Gregory Bennett, had confirmed his availability by email dated 16 May 2017 and provided his office's landline number in Auckland.

[3] The Authority attempted to call Mr Bennett on the landline number several times without success on 9 June for the telephone conference. The respondent's representative Mike Dimond was in attendance. He sought an order striking out these applications on the basis they were frivolous and vexatious. He stated this was the fifth application that has been made by Mr Bennett about this matter. He complains this behaviour has been endemic throughout their dealings.

[4] I issued a Minute directing the applicant to file a memorandum by 16 June 2017 addressing Mr Bennett's absence and setting out reasons why I should not award costs for his non-appearance and/or strike out this application.¹

[5] Following receipt of my Minute Mr Bennett emailed the Authority Officer stating:

Hi Deb,
I didn't receive any phone call or email until the [Minute dated 9 June 2017] as I was travelling to Whangarei and not in the office so not certain why I didn't receive a call. My phone number [is mobile number] Do you want me to put this into a memorandum?
Regards,
Greg

[6] The Authority officer advised a memorandum was expected. She also forwarded a copy of his earlier email dated 16 May 2017 confirming his attendance and giving his landline contact number for his Auckland office. Mr Bennett's 16 May email had also been forwarded by Mr Dimond to the Authority. The Authority did not have a mobile number for Mr Bennett for this file.

[7] Nothing further was filed by 16 June 2017. Mr Dimond emailed complaining about the applicants' non-compliance with my direction. He sought progression of his application to strike out. He copied his email to Mr Bennett.

[8] A memorandum from the applicants was then filed on 19 June attaching an indecipherable medical certificate. It was accepted Mr Bennett did not provide the

¹ Minute dated 9 June 2017.

correct phone number for the telephone conference. However he now raised health issues as the basis for his non-attendance.

[9] I issued a further Minute.² Issues of ill health had been raised previously by Mr Bennett before another Member resulting in a penalty issuing. I also referred to his agreement with the Chief of the Authority to provide the contact details of his clients so they may also be served and kept aware of the progress of their matters through the Authority.³ Given what appeared to be similar circumstances, I directed Mr Bennett provide the contact details for the applicants within 7 days.

[10] By 3 July 2017 no applicant contact details were received. Instead Mr Bennett filed a memorandum effectively declining to comply with my direction.

[11] On 7 July 2017 I issued a further Minute. I directed that all copies of my Minutes and the Authority correspondence were to be served upon both applicants and Mr Bennett was to provide their contact details and a telephone number both could be contacted upon for attendance at a telephone conference on 2 August 2017.

[12] On 24 July 2017 the Authority Officer emailed Mr Bennett about my directions seeking the applicants' contact telephone numbers. Mr Bennett emailed the same day stating:

Hi Deb
I spoke to Mike and he will be attending the TC but not his wife. I will forward his email later this afternoon when back in the office
Regards
Greg Bennett

[13] By 1 August 2017 no contact details for the applicants had been provided. As a consequence of their non-compliance I cancelled the conference. I also issued a further Minute⁴ indicating the applicants were now at risk of both costs and penalties for their non-compliance. Given I had not heard directly from the applicants or their representative about who had occasioned the non-compliance, I directed they be present with their representative at the next telephone conference where I intended determining the respondent's applications for strike out and costs.

² Minute dated 26 June 2017.

³ *Davidson v Great Barrier Airlines Ltd* [2016] NZERA Auckland 403.

⁴ Minute dated 3 August 2017.

Application to strike out

[14] Mr Diamond brought this application on behalf of the respondent upon two grounds:

- a) The behaviour of the applicants and their advocate in not attending the telephone conference and non-compliance with directions;
- b) The Authority's lack of jurisdiction over both applicants' matters.

[15] Mr Bennett now accepts he was at fault for not attending the first teleconference and not complying with my directions. He then submitted the Authority should have known to contact him upon other numbers he had supplied to it for other unrelated files. I disagree. It is not the Authority's responsibility to track down a party's representative for its conferences. Once parties have confirmed their availability and contact number it is assumed they shall attend upon that number.

[16] Mr Bennett then submitted there was jurisdiction for the applications because it's accepted Mr Moskal was employed. Ms McGuire's application will require a pre-hearing ruling about whether she was also employed.

[17] I agree with Mr Bennett that there is now no basis for granting an application to strike out these applications at this time. The applicants are now engaging with the Authority to progress the applications. Any issues of costs incurred as a result of the above actions can be dealt with by way of an interim costs order.

[18] Manor House Cuisine (2015) Limited's application to strike out these proceedings is dismissed. Costs reserved.

Interim costs

[19] Mr Dimond submits he is the respondent's advocate and therefore entitled to recover his costs in appearing today. He has taken legal advice on this matter incurring costs of \$500 to \$1,000 from a local law firm. He submitted he had also lost income due to the need to attend today and previous cancelled conferences including preparation time.

[20] Although Mr Bennett admitted fault for non-attendance and non-compliance, he sought for costs to lie where they fall. He denied any "legal" costs had in fact been

incurred by the respondent. He also denied any award should be made against the applicants due to it being his fault they found themselves in this position. I pointed out to Mr Bennett that Mr Dimond was an advocate representing a separate corporate body. He had similar standing to Mr Bennett under s236 of the Employment Relations Act 2000 to appear before the Authority. Therefore he could seek to recover his costs or, at the very least, a contribution to the costs he had incurred from the legal advice sought to date.

[21] Mr Bennett objected to the respondent's legal costs being recovered because no invoice had been produced, the costs were unreasonable and there was a conflict of interest arising with the law firm he had been advised by.

[22] Costs are discretionary. The Authority uses a notional daily tariff for determining costs which in this case is \$4,500. This matter took approximately 1 hours' hearing time which over a 6 hour hearing day would equate to \$750. I intend awarding slightly less against Mr Bennett given his admittance of fault.

[23] If there is an issue of conflict of interest in the firm advising the respondent, Mr Bennett may take that up with the firm and its insurer. It is not a matter that shall impact costs here.

[24] Therefore I order Gregory Bennett to pay \$500 to Manor House Cuisine (2015) Limited as a contribution towards its costs within 7 days of the written determination.

[25] A further Minute shall be issued dealing with the timetabling of Ms McGuire's pre-hearing issue of whether she was employed by the respondent at all.

T G Tetitaha
Member of the Employment Relations Authority