IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

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[2019] NZERA 363
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BETWEEN	PATRICK AND NICOLA MARTIN Applicants
AND	SOLAR BRIGHT LIMITED (In Liquidation) Respondent
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AND	PATRICK AND NICOLA MARTIN Respondents

Member of Authority:	Christine Hickey
Representatives:	Applicants in person John Shingleton, counsel for Murray Spackman and John Walley, directors of Solar Bright Limited
Investigation Meeting:	On the papers
Costs submissions received:	1 February and 14 February 2019 from John Shingleton for Mr Spackman and Mr Walley personally 22 February 2019 from Patrick and Nicola Martin
Date of Determination:	19 June 2019

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Murray Spackman and John Walley are directors of Solar Bright Limited (SBL). They apply for costs personally incurred because of Patrick and Nicola Martin's attempt to join them to proceedings Mr and Mrs Martin have brought against SBL in the Employment Relations Authority. SBL also has proceedings against the Martins in the Authority and in the High Court.

[2] This determination has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. The Chief of the Authority has decided that exceptional circumstances exist for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

The substantive proceedings

[3] On 29 November 2018, I issued a Notice of Direction that directed Mr and Mrs Martin to provide additional information for their claims and to clarify the grounds on which claims were being made. In response they lodged a memorandum on 6 December 2018. The memo provided clarity about the claim for future income. However, in addition, it appeared to raise new claims against Mr Spackman and Mr Walley, personally, in their capacity as directors of SBL. Those claims referred to s 64 and Part 9A of the Employment Relations Act 2000.

[4] In response, Mr Shingleton lodged a memorandum on 18 December 2018 asking that I strike out the claims on the grounds that they were frivolous and vexatious. Mr Shingleton pointed out that neither Mr Spackman nor Mr Walley had ever personally been the Martins' employer and that neither of them were directors of SBL at the time of the Martins' resignation, which they allege was a constructive dismissal.

[5] In the subsequent case management conference, on 24 January 2019, I told Mr Martin that Mr Shingleton's view reflected how I understood the position, and Mr Martin conceded that was the case. Therefore, I indicated that it was unlikely that the Authority could ever find any personal liability against Mr Walley or Mr Spackman.

[6] I advised the Martins to seek legal advice. Mr Shingleton advised Mr Martin and the Authority that if the Authority struck out the claims against Mr Spackman and Mr Walley

after an investigation meeting they would seek indemnity costs, being their full legal costs for resisting what the Martins claimed about them.

[7] I gave the Martins the opportunity to withdraw their claims. On 30 January 2019, the Martins withdrew their claims against Mr Spackman and Mr Walley personally.

[8] On 1 February 2019, Mr Shingleton asked the Authority to make an order for costs against the Martins for their claims against Mr Spackman and Mr Walley.

The claim for costs

[9] The claim for costs is for the total costs of $2,093, including GST, of Mr Shingleton's time in dealing with the Martins' attempt to bring proceedings against Mr Spackman and Mr Walley personally.

[10] Mr Shingleton submits that the Martins' claims against his clients were:

> … hopeless from the start, confused and unmeritorious. I further submit that prima facie there was a very strong case for these to be struck out should the preliminary hearing have proceeded.
> The Applicants submissions lack any merit or logic. I am seeking they pay my clients costs because they caused my clients to incur these costs due to their actions in purporting to join my clients to the proceedings against their former employer.

The Martins' response

[11] Mr and Mrs Martin say that they should not be liable for the costs. They submit that Mr Spackman and Mr Walley chose to engage Mr Shingleton in relation to the matter and so should be liable for his costs. They further submit that they did not make a separate application against Mr Spackman and Mr Walley but merely clarified what their substantive claims were about. After the discussion in the case management conference they formed the view that the Authority was not the right arena and withdrew the allegations against Mr Walley and Mr Spackman.

Discussion

[12] I understand Mr Spackman and Mr Walley's desire to get legal advice in response to the fact the Martins appeared to be attempting to either join them to current proceedings or make new claims against them.

[13] I agree with Mr Shingleton's submission that the attempt to claim against Mr Spackman and Mr Walley was unmeritorious. It was misguided.

[14] However, the Martins were not legally advised at that point and once they had been advised that the claims were highly unlikely to be successful they very properly withdrew their claims.

Conclusion

[15] Clause 15 of Schedule 2 of the Employment Relations Act 200 gives the Authority the discretionary power whether to award costs, and, if so, how much:

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

[16] Mr Spackman and Mr Walley never became parties to these proceedings. They were not joined. Once the futility of the Martins' approach was explained to them they properly withdrew their claims. Therefore, there is no order for costs in these circumstances.

Christine Hickey
Member of the Employment Relations Authority