

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 320  
3055372

BETWEEN	DAVID ALLISON Applicant
AND	CERES NEW ZEALAND LLC Respondent
AND	HESTIA LIMITED Second Respondent (joined for purpose of costs)

Member of Authority: Helen Doyle

Representatives: Anna Oberndorfer, advocate for the Applicant  
Sarah Townsend, counsel for the Respondent

Submissions Received: 24 July 2020 from the Applicant  
16 July 2020 from the Respondent

Date of Determination: 14 August 2020

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A David Allison is ordered to pay to Hestia Limited the sum of \$1,500 being costs.**
- B David Allison is ordered to pay to Ceres New Zealand LLC the sum of \$5,000 being costs.**

### **Preliminary and Substantive Determinations**

[1] In its determination dated 16 September 2019 the Authority struck out the claim against the second respondent and joined Ceres New Zealand LLC to the proceeding.<sup>1</sup>

[2] Costs were reserved pending determination of the substantive matter.

[3] In its second determination dated 2 July 2020 the Authority dismissed the applicant's claims against the respondent and costs were reserved.<sup>2</sup>

[4] The Authority has now received submissions from Ms Oberndorfer and Ms Townsend as to costs.

### **The Respondent's Submission**

[5] Ms Townsend on behalf of the respondent seeks an award of \$3,000 towards its costs in the strike out application and \$6,250 in respect to the substantive hearing.

[6] She refers to the power to award that the Authority has to award costs in schedule 2, clause 15 of the Employment Relations Act 2000 (the Act) and also to the judgment in the full Court of the Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.<sup>3</sup> In *PBO* the Employment Court referred to some basic tenets that the Authority has held to when considering costs.<sup>4</sup>

[7] Ms Townsend submits that the applicant's pursuit of claims against the second respondent which was the subject of the preliminary strike out application was vexatious and misguided. Further that the applicant had signed an employment agreement with the respondent and raised personal grievances against the respondent but attempted to pursue claims in the Authority against another company.

[8] Ms Townsend attached a letter to her submissions dated 14 March 2019 to Ms Oberndorfer inviting the withdrawal of the claim against Hestia Limited to avoid an application to strike out on which basis Ceres New Zealand LLC would consent to be joined to the proceeding. That was not agreed to and Ms Townsend submits that substantial costs in

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<sup>1</sup> *David Allison v Hestia Limited and Ceres New Zealand LLC (proposed respondent)* [2019] NZERA 534.

<sup>2</sup> *David Allison v Ceres New Zealand LLC* [2020] NZERA 267.

<sup>3</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.

<sup>4</sup> At [44].

pursuing the strike out application were incurred involving the lodging of two affidavits, attendance at a case management conference, memoranda and submissions.

[9] She submits that the actual solicitor/client costs relating to the successful strike out application were approximately \$10,000 together with GST and submits a cost award of \$3,000 is appropriate.

[10] In relation to the substantive proceedings the Authority dismissed the applicant's five claims and Ms Townsend submits that costs should follow the event. She assesses an appropriate award of costs on the basis of 1.5 days. In doing so she takes into account the need to convene after the first day to hear evidence from an additional witness and lodge written submissions. Ms Townsend submits a cost award of \$6,250 based on the daily tariff for 1.5 days is appropriate and significantly less than actual costs.

### **The Applicant's Submission**

[11] Ms Oberndorfer on behalf of the applicant accepts that the principles to be applied are those in *PBO*.<sup>5</sup>

[12] She submits in relation to the strike out application that the claim was not vexatious or misguided and that the employment agreement and business cards showed a relationship between the applicant and the second respondent as well as duties performed for both companies. She submits had it been so obvious then the affidavits, submissions and a relatively lengthy determination would not have been necessary.

[13] Ms Oberndorfer submits the matter could have been dealt with on an interlocutory basis at the commencement of the substantive meeting or even at mediation because there had not at that time been attendance at mediation. She submits that both companies have the same director and the same representative so there was no requirement to double up on costs and that costs of no more than \$1,000 were appropriate for that application.

[14] In respect of the substantive matter Ms Oberndorfer submits that a starting point would be daily tariff and that there are no additional factors to justify uplift from a one-day tariff.

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<sup>5</sup> Above n 3.

[15] Ms Oberndorfer submits that submissions were prepared and expected to be provided on the day, and the delay in lodging these does not justify increasing costs beyond one day. Neither, she submits, did further evidence by phone from a witness justify an increase to costs.

### **Analysis and conclusions**

[16] The basic tenets that the Authority has held to since its inception are referred to in the judgment in *PBO*.<sup>6</sup> These include that the Authority is required to exercise its discretion as to costs in accordance with principle and not arbitrarily. Costs are not to be used as a punishment or an expression of disapproval but conduct that unnecessarily increases costs can be taken into account in inflating or reducing an award. Costs generally follow the event and awards will be modest and frequently costs are judged against a notional daily rate.

#### *Claim for costs by second respondent*

[17] The proceedings were initially lodged only against the second respondent. As indicated in Ms Townsend's letter when the claim against the second respondent was not withdrawn and substituted by a claim against the first respondent the application to strike out was lodged. Ms Townsend's suggested approach in her letter of 14 March 2019 was both sensible and ultimately found to be the correct approach. Had it been agreed to it would have saved both parties considerable cost.

[18] The claim against the second respondent was struck out under s 221 of the Act so the Authority could more effectually dispose of the claim between the applicant and first respondent. The second respondent was successful in its application and is entitled to costs.

[19] The Authority is an investigative rather than an adversarial body. Interlocutory applications such as strike out applications sit less comfortably with the role of the Authority as set out in s 157 of the Act. The Authority establishes facts and makes determination according to the substantial merits of the case without regard to technicalities. It does this in a cost effective manner by investigation.

[20] I weigh Ms Oberndorfer's submission in light of the above that there were different ways of dealing with the matter that may have been more cost effective than an interlocutory

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<sup>6</sup> Above n 3 at [44].

application to strike out. Costs would still have been incurred but in all probability to a lesser degree by the second respondent if the matter had proceeded to the Authority on the basis of joining the first respondent and carrying out an investigation into the identity of the employer.<sup>7</sup>

[21] I do weigh that it was found in the preliminary determination there was “no particular ambiguity” from the employment agreement provided at the outset of employment as to the intended employer.<sup>8</sup> Further that the companies operated as separate entities and carried on different businesses which supported an arm’s length relationship rather than joint employment. Grievances had also been raised against the first respondent only and it was only in the statement of problem that the second respondent was named as employer. I do not however find a basis for solicitor/client costs made out. Costs in the Authority are modest and should be proportionate in relation to the matter at issue.

[22] I conclude that it is appropriate weighing all these matters to award costs on the basis of the daily tariff to the second respondent for one third of a day at \$1,500.

[23] I order David Allison pay to Hestia Limited costs in the sum of \$1,500.

*The substantive investigation*

[24] The substantive investigation meeting took a full day commencing at 9.30am and finishing at 5.50pm. The evidence of one witness was heard by telephone on a subsequent day and that took about half an hour.

[25] The respondent successfully defended all claims it faced and is entitled to a contribution towards its costs.

[26] Ms Townsend seeks costs based on daily tariff of \$4,500 for a day and a half to take into account the additional witness and the need to file written submissions.

[27] The notice of direction following a case management conference in December 2019 provided that submissions would be heard following the conclusion of the evidence at the investigation meeting<sup>9</sup>. On that basis submissions would have been prepared for the

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<sup>7</sup> Ms Oberndorfer agreed that the respondent should be joined to the proceedings but the respondent wanted the claim against the second respondent struck out first.

<sup>8</sup> Above n 1.

<sup>9</sup> Notice of Direction dated 16 December 2019 at [9].

investigation meeting but would have required finalising after the evidence of the final witness. Any increase to tariff would be justified on that limited basis only.

[28] The starting point for an assessment of costs is the daily tariff of \$4,500. Weighing all matters I consider it fair and reasonable to increase that by \$500 for the time taken for the further attendance relating to one witness and for additions/changes to submissions as a result of that evidence.

[29] I order David Allison pay to Ceres New Zealand LLC costs in the sum of \$5,000.

**Helen Doyle**  
**Member of the Employment Relations Authority**