

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 481
3080774

BETWEEN

CREST COMMERCIAL
CLEANING LIMITED
Applicant

A N D

TOTAL PROPERTY SERVICES
(CANTERBURY) LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Charles McGuinness, counsel for the Applicant
Paul McBride, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 27 September 2021 from the Applicant
4 October 2021 from the Respondent

Date of Determination: 1 November 2021

COST DETERMINATION OF THE AUTHORITY

The Determinations

[1] By way of a first determination of 22 June 2020 the Authority dealt with an application by Crest Commercial Cleaning Limited (Crest) to have this matter removed to the Employment Court. The application was unsuccessful.¹

¹ *Crest Commercial Cleaning Limited v Total Property Services (Canterbury) Limited* [2020] NZERA 241.

[2] A second preliminary determination of 22 October 2020 affirmed that Crest had standing to pursue a penalty action if a breach of s 69OEA of the Employment Relations Act 2000 (the Act) was established and that the Authority had jurisdiction to determine this matter. Costs were reserved in both determinations pending resolution of the substantive matter.²

[3] On 13 September 2021 the Authority issued a substantive determination finding that Total Property Services (Canterbury) Limited (Total Property) had to pay into the Crown bank account a penalty in the sum of \$1,000 pursuant to s 135 of the Act for failing to follow the prescriptive obligations set out in s 69OB of the Act in a situation where their former employees were transferred to Crest.³

[4] The parties were asked to explore resolving costs by agreement but failed to do so. The investigation meeting took place over one day and written submissions were received thereafter.

Crest's submission

[5] Mr McGuinness first, briefly set out his client's understanding of the Authority's daily tariff based approach to costs in both preliminary and substantive matters. He then went on to suggest that for the first determination that was heard 'on the papers' it was a neutral outcome for both parties (removal to the court denied) and costs should lie where they fall.

[6] On the second determination Mr McGuinness asserted that as Total Property had failed to establish a contention that the Authority lacked jurisdiction then costs should be found in Crest's favour at the rate of a half day tariff (\$2,250).

[7] On the substantive matter Mr McGuinness alluded to Crest's success in establishing that Total Property had breached a provision of the Act and a penalty had been levied. As the hearing took one day followed by comprehensive timetabled submissions, Crest seek a costs award in their favour of the full daily tariff (\$4,500).

² *Crest Commercial Cleaning Limited v Total Property Services (Canterbury) Limited* [2020] NZERA 439.

³ *Crest Commercial Cleaning Limited v Total Property Services (Canterbury) Limited* [2021] NZERA 402.

Total Property's submission

[8] Mr McBride responded with a similarly concise submission pointing out that Crest had not been successful in either of the two preliminary matters and in the substantive proceedings their success was very limited in comparison with the various claims advanced.

Costs principles

[9] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*,⁴ including: that costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.⁵

Assessment

[10] A general principle for a successful party is that costs should 'follow the event' and here Crest was moderately successful in establishing a breach that led to an imposition of what can best be described as a 'token amount' penalty that drew to Total Property's attention the need to be more timely in complying with statutory obligations.

[11] This was also a very unique matter to be before the Authority as it involved two commercial entities on an issue that peripherally impacted upon vulnerable employees and has potential wider application. In this sense, it was somewhat of a test case and as such had little case precedent to fall back upon. In *New Zealand Labourers etc IUOW & Ors v Fletcher Challenge Ltd and Firth Industries Ltd & Ors* the Labour Court broadly defined the elements of a test case as being:

In a sense every case which is novel ... can be described as a test case. In another sense of the term, a test case is a case of a kind which frequently comes before this Court and which, although decided as between two parties and perhaps in respect of a cause of action which is only a sample, is agreed or intended to affect not only those parties in respect of the sample cause of action but also those parties in respect of other similar occurrences and, in comparable circumstances, other parties bound by the same instruments. Another example of a test case is a case concerning the practice or procedure of this Court or some generalised ruling on a subject matter involving or

⁴ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁵ Section 160(2) Employment Relations Act 2000.

affecting many parties.⁶

[12] The categorisation of the uniqueness of the case is however, an element I need to consider without it being solely determinative.

[13] Looking at the totality of the three proceedings and applying discretion, I consider that in the first proceedings costs should lie where they fall given that both parties were comfortable with the whole matter being removed to the court.

[14] In the second proceedings that followed to determine whether the Authority had statutory jurisdiction, I consider that Crest did respond to and was successful in contesting Total Property's submission that the Authority lacked jurisdiction to deal with the claims Crest had advanced. However, this was a unique issue and I find it would be equitable to again, let costs lie where they fall.

[15] On the substantive proceedings however, I consider the unique jurisdictional nature of the matter had been resolved and Crest had a level of success that warrants a contribution to costs being awarded. In all of the circumstances I consider that a reduced standard daily tariff should apply.

Award

[16] I order Total Property Services (Canterbury) Limited to pay Crest Commercial Cleaning Limited the sum of \$3,000.00 as a contribution to legal costs incurred and a filing fee of \$71.56.

David G Beck
Member of the Employment Relations Authority

⁶ *New Zealand Labourers etc IUOW & Ors v Fletcher Challenge Ltd and Firth Industries Ltd & Ors* 1 [1990] 1 NZILR 557 (LC) at 570.