

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 271
3141421

BETWEEN CHRIS DAVIS
 Applicant

AND MDL CIVIL AND
 ENGINEERING LIMITED
 Respondent

Member of Authority: Peter Fuiava

Representatives: David Prisk, advocate for the Applicant
 Matthew McGoldrick, counsel for the Respondent

Submissions received: 20 May 2022 from Respondent

Determination: 27 June 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] This is a costs determination for a matter that was withdrawn after a case management conference but before an investigation meeting into a preliminary issue namely whether Chris Davis was an employee of MDL Civil and Engineering Limited (MDL).

[2] Mr Davis alleged in his statement of problem that, as an employee of MDL, he was unjustifiably dismissed and unjustifiably disadvantaged by the company. In its statement in reply, MDL stated that Mr Davis was not an employee but a contractor and that therefore the Authority had no jurisdiction to determine the claim.

[3] On 3 March 2022, the Authority held a case management conference with the representatives and made timetabling directions by agreement for the filing of witness statements and supporting documents concerning the preliminary issue. If Mr Davis was found not to be an employee, the Authority's inquiry would end there but if an

employment relationship was found to exist, his claims of unjustified disadvantage and unjustified dismissal would be progressed to a substantive investigation meeting.

[4] To assist with the Authority's investigation, pursuant to s 160 of the Employment Relations Act 2000 (the Act), various documents were requested from the parties, including end-of-year reports for a company for whom Mr Davis had worked, relevant GST returns for that company and for Mr Davis, bank statements, and copies of invoices and remittances between MDL and Mr Davis. A firm fixture was set down for an investigation meeting on 24 May 2022 to determine the preliminary matter.

[5] Written statements and supporting information and documents were provided by the parties which included a common bundle of documents from MDL comprising 267 pages and written statements from three witnesses.

[6] On 19 May 2022, Mr Davis withdrew his application. There was no agreement between the parties as to costs.

[7] On 20 May 2022, Mr McGoldrick, filed a memorandum seeking a contribution towards MDL's costs. The amount of \$2,250 was sought based on a half day investigation meeting in the Authority. The ordinary daily tariff for the first day of hearing is \$4,500.

[8] By email of 23 May 2022, the Authority invited Mr Prisk to provide a response to MDL's costs submission by 8 June 2022. The due date was further extended to 10 June 2022 as Mr Prisk was unable to obtain any instructions from Mr Davis who was made aware of the claim but was not responding to Mr Prisk's emails or texts.

Discussion

[9] The Authority has the power under clause 15 of Schedule two of the Act to award costs. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.¹ It is observed that, in relation to costs and the withdrawal of proceedings, former Chief Judge Colgan stated in *Eden v Rutherford & Bond Toyota Ltd* (not disturbed on appeal):

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

There is no time limit for withdrawing proceedings that will affect precisely the question of costs. As a matter of commonsense, however, the closer in time that proceedings are withdrawn before a hearing, the greater will probably have been the time put into their preparation by the other party and, therefore, the costs which the other party will have incurred reasonably and which may be the subject of an order.²

[10] In addition to the principle that: costs generally follow the event, the discretion to award costs should be exercised in accordance with principle rather than arbitrarily, and that costs be modest, the Authority takes into consideration that Mr Davis' withdrawal occurred three working days prior to the scheduled investigation meeting by which time MDL's preparation for the investigation meeting as noted above was essentially complete.

[11] The Authority accepts that MDL's actual costs will have exceeded the costs amount it seeks against Mr Davis of \$2,250. Those costs include counsel's attendance at the case management conference and his preparations for an investigation meeting that were well advanced. The late withdrawal by Mr Davis of his claim is a relevant consideration in MDL's favour and it is noted that there has been no response from Mr Davis concerning the company's cost claim notwithstanding his been given a reasonable opportunity to respond. It is appropriate that costs be awarded in the sum sought.

Conclusion and orders

[12] For the above reasons, I conclude and order Chris Davis to pay MDL Civil and Engineering Limited \$2,250 as a contribution to it legal costs. This amount is to be paid in full no later than 5 pm Tuesday 26 July 2022.

Peter Fuiava
Member of the Employment Relations Authority

² *Eden v Rutherford & Bond Toyota Ltd* [2010] NZEmpC 43 at [8].