

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 652
3301380

BETWEEN MICHAEL ANDREW PORTER
Applicant

AND EVERSLOT SUPERMARKET
LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Applicant, for himself
Dean Kilpatrick, for Respondent

Submissions received: 11 and 18 October 2024 from Respondent
31 October 2024 from the Applicant

Determination: 1 November 2024

COSTS DETERMINATION OF THE AUTHORITY

Background to this costs application

[1] On 3 June 2024 the applicant, Mr Porter (formerly Mr McFadden), who remains unrepresented, lodged a claim disputing the granting of some paid ‘long service’ leave to him that he says he did not ask to be granted or paid to him. Initially he named as the single respondent a co-director of the current respondent, Evershot Supermarket Limited (Evershot) saying this was his former employer. The co-director objected to this saying they were not the employer. I asked Mr Porter (with time for a response in writing from the co-director) to explain why he claimed the co-director was his employer when in a prior claim¹ that he had

¹ Not related to the leave entitlement issue but during the same period of employment.

lodged in the Authority, and subsequently withdrew, had been lodged against Evershot as his employer for the period of time that this leave entitlement claim relates to.

[2] Having heard from both parties in writing I gave a preliminary view that it was Evershot that was the employer. I did not issue a determination because Mr Porter then accepted this and amended his application to Evershot as the sole respondent.

[3] Evershot being the respondent, I then proposed a stay on these proceedings for the same reason that this was proposed earlier for the above mentioned previously lodged claim that Mr Porter lodged in the Authority and then withdrew before I finalised a direction for a stay.

[4] I invited² and received comment from the parties on the proposed stay in these proceedings. I directed a stay on 15 October 2024.

[5] The stay in these proceedings relates to matters to be first concluded in another jurisdiction, the Human Rights Review Tribunal (HRRT) where Mr Porter has sought to have set aside a settlement with Evershot resolving his employment matters with it.

Costs application

[6] There is an application for costs at the initiation of Evershot and the co-director³ who say:

- a. The Authority should award a contribution to costs because Mr Porter unnecessarily lodged and sought to advance claims against the co-director when he knew he had been employed by Evershot;
- b. that Mr Porter's claim against Evershot could not proceed due to proceedings still live in the HRRT; and

² Directions of the Authority, 25 September 2024.

³ As confirmed in the 11 October 2024 'Memorandum of Counsel for the Respondent: Response to Minute of the Authority'.

- c. that the Authority need not wait until the conclusion of these proceedings to make an award of costs now providing two invoices recording combined costs of \$3,590.01 (ex GST).

[7] Mr Porter has responded to the application saying:

- a. that the Authority should disregard the application for costs because the invoices show they are not made out to Evershot or the co-director, noting the trading name that appears on the invoices;
- b. that it is dishonest not to have mentioned the name on the invoices before and questions who the respondent is; and
- c. that he ‘may be seeking costs’ ‘for the time, effort and the mental toll spent seeking [what] I was cheated of.’

Costs principles in the Authority

[8] The Authority has the discretionary power to award costs.⁴ A party should receive a reasonable contribution to costs incurred in achieving a successful result. Costs are discretionary, modest, and not a mechanism to punish the other party.

[9] The Authority uses a notional daily tariff adjusting the tariff up or down as appropriate depending on the case. Such an adjustment may take into consideration a liable party’s means to pay costs, settlement offers made by either party, additional preparation required if a case is complex, and any conduct of a party that has unnecessarily increased costs.⁵

[10] The current tariff applied for a one-day Authority links to the framework of an investigation meeting being \$4,500.00 for the first day, and \$3,500.00 for subsequent days. This amount is considered a starting point for assessing a reasonable contribution to the legal costs incurred by a party preparing for and taking part in an investigation meeting but not including the preparation for and attendance at mediation.

⁴ Employment Relations Act 2000, Schedule 2, cl 15.

⁵ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

Should the application for costs be considered now before the substantive matter is heard and determined by an investigation meeting process?

[11] Generally, the answer to the above is that the Authority deals with costs after the event at the conclusion of the substantive matter before it. There has been no determination of the substantive claim that Mr Porter has brought or any decision as to jurisdiction.

[12] I note the respondent's reference to an Employment Court⁶ case where it was found that there was no reason why the Authority could not have ordered costs in the matter concluded before it when subsequently the Employment Court found there was a lack of jurisdiction. I find the situation in that matter different to the present. However, the co-director is no longer a respondent having the claim against them withdrawn by amendment by Mr Porter. As such if I am satisfied they have personally incurred costs in successfully defending that they should not have been named as respondent it would seem appropriate to consider a costs application. Costs have been awarded in the Authority⁷ against a party who has withdrawn a claim where two phone conferences had occurred, but no further steps had been taken in the investigation process including evidence preparation and preparation for and attendance at an investigation meeting). The award was a modest \$750.00 based on the Authority tariff approach.

Has the co-director shown they have personally incurred costs in relation to having to defend that they were not the employer?

[13] I have nothing before me to show that the co-director has personally incurred costs, rather it is put forward that Evershot was invoiced on their behalf. To that extent I find I cannot be satisfied that a costs award is appropriate and defer to the end of the substantive matter at which point, depending on its outcome and an appropriate application, costs can be revisited.

[14] For the sake of completion, I accept that while not ideal to invoice to a trading name and rather than an individual or corporate entity, I do not accept this raises an issue about who the respondent should be as submitted by Mr Porter. I accept the explanation from counsel

⁶ *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2018] NZEmpC 45.

⁷ *MacDonald Industries Limited v Simon Beswick* [2023] NZERA 176.

for the respondent that the invoices were to Evershot. I am satisfied that Mr Porter understands who employed him. That has been dealt with by me already. That is the party he seeks redress from in these proceedings. It is irrelevant whether that entity still owns and operates the workplace that Mr Porter worked in. Evershot remains a company registered.

[15] Based on the above I decline to make an order for costs but upon any appropriate application by the eventual successful party, the Authority may revisit the issue of costs *when* the substantive matter in the Authority is concluded.

Antoinette Baker
Member of the Employment Relations Authority