

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 329  
5442667

BETWEEN ANNA ALE  
Applicant

A N D KIDS AT HOME LIMITED  
Respondent

A N D PAULA MARIE LOVEGROVE  
Proposed Second Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Alex Hope, Counsel for Applicant  
Erin Burke, Counsel for Respondent and Proposed  
Second Respondent

Submissions Received: 19 September 2016 from Applicant  
5 September 2016 from Proposed Second Respondent

Date of Determination: 27 September 2016

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A. There is no order as to costs. Costs are to lie where they fall.**

**The determination on a preliminary issue (No 2)**

[1] In a determination of the Authority dated 9 August 2016<sup>1</sup>, the Authority declined the application to join Ms Lovegrove as a second respondent party to proceedings between the applicant, Ms Anna Ale, and the respondent, Kids at Home Limited, (Kids at Home). Costs were reserved.

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<sup>1</sup> [2016] NZERA Auckland 267

## **The applications for costs**

[2] A memorandum of costs was filed on behalf of Ms Lovegrove, the proposed second respondent, seeking full reimbursement of costs in respect of the application to join her. Costs sought by Ms Lovegrove total \$1,345.50 including GST. An invoice was attached to the submissions as to costs, detailing time and attendances by Ms Lovegrove's lawyer.

[3] Counsel for Ms Ale filed a memorandum opposing the application for costs and cross-applied for costs in her favour in the sum of \$2,000. No invoices were attached to the submission as to costs in respect of the joinder application. Details of costs incurred globally by Ms Ale in respect of all matters with Kids at Home were provided, but no invoices were attached.

## **Application by Ms Ale for costs against Ms Lovegrove, a non-party**

[4] The Authority's power to award costs arises from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). This confers a wide discretion on the Authority to award costs, on a principled basis. The Court has a similar power in clause 19 of Schedule 3 of the Act. The wording in the two clauses are almost identical.

[5] Counsel for Ms Ale seeks \$2,000 in costs against Ms Lovegrove, a non-party. In support of his submission that the Authority can award costs against a non-party, Counsel has referred the Authority to the Privy Council case of *Dymocks Franchise Systems (NSW) Pty Ltd v Todd & Ors*<sup>2</sup>.

[6] The ability of the Court to award costs against a non-party has been considered by the Employment Court on a number of occasions. *Gini v Literacy Training Limited*<sup>3</sup> is one such case. In that case, the Court referred to its ability to award costs pursuant to clause 19 of Schedule 3 of the Act and went on to state that the Court had no jurisdiction to make costs orders against non-parties<sup>4</sup>. However, referring to the Court of Appeal decision in *Kidd v Equity Realty (1995) Ltd*<sup>5</sup>, the Court confirmed its jurisdiction under s.221 of the Act to join a party to proceedings in an appropriate case for the purpose of making an award of costs.

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<sup>2</sup> [2004] UKPC 39

<sup>3</sup> [2012] NZEmpC 94 WRC 37/11

<sup>4</sup> *Gini* para.[18]

<sup>5</sup> [2010] NZCA 452 at [12]

[7] The Court in *Gini* stated:

[29] I consider that the present case falls within the general category of cases recognised in *Kidd* and in the extracts quoted from *Dymocks* and *Knight*. In such situations insolvency, receivership or inability of the litigant company to meet a costs award together with evidence that the non-party played an active part in the conduct of the litigation are essential prerequisites to the making of a joinder order against a non-party director. Once those “core features” are established then the other elements referred to by the Court of Appeal in *Kidd* such as impropriety on the part of the non-party or evidence that the non-party was acting in his or her own interests rather than the interests of the litigant company can appropriately be taken into consideration in the exercise of the Court’s overall discretion in determining the justice of the case.

[8] The Court concluded that a case had not been made out which would warrant the making of a costs order against the non-party director and accordingly the application for joinder was declined.

[9] In this case, the application to join Ms Lovegrove to the proceedings was declined by the Authority<sup>6</sup>. In any event, I am not satisfied that there are grounds to make an award of costs against Ms Lovegrove and to join her to the proceedings in order to do so.

[10] Kids at Home was removed from the Companies office register. The removal was not as a result of insolvency. There is nothing to suggest that Ms Lovegrove was not acting other than in her capacity as a director of Kids at Home and not in a personal capacity. Similarly there is no evidence of impropriety by Ms Lovegrove or that she was acting in her own interests rather than Kids at Home. I do not consider a costs order against Ms Lovegrove is warranted and I decline to make such an order.

#### **Application by Ms Lovegrove for costs against Ms Ale**

[11] Counsel for Ms Lovegrove seeks costs against Ms Ale in respect of the joinder application.

[12] The principles guiding the Authority’s approach to costs are set out by the full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>7</sup>. Counsel for Ms Lovegrove has referred to that decision in support of her claim for costs.

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<sup>6</sup> Fn 1 at [25]

<sup>7</sup> [2005] 1 ERNZ 808

[13] The Employment Court in *Carter Holt Harvey v Eastern Bays Independent Industrial Workers Union & Ors*<sup>8</sup> observed that a notional daily tariff approach, which was to be adjusted in a principled way, was best suited to the Authority's unique jurisdiction. I adopt that approach. The normal starting point for costs in the Authority is \$3,500 per day, *Fifita (aka Bloomfield) v Dunedin Casinos Ltd*<sup>9</sup>.

[14] This matter was dealt with on the papers and involved considering an application from Ms Ale that Ms Lovegrove be joined as a second respondent to the proceedings together with an affidavit in support. Ms Lovegrove opposed the application to join her as a second respondent and filed an affidavit in support. The former accountant for Kids at Home, also filed an affidavit in support. The parties agreed to have the matter dealt with on the papers and filed submissions which were considered by me.

[15] As mentioned, Ms Lovegrove seeks costs of \$1,345.50 including GST being her entire legal costs to defend Ms Ale's application.

### **Determination**

[16] From the evidence filed, Kids at Home ceased trading and a year later was removed from the Companies Office register. Counsel for Ms Ale contends that Ms Lovegrove:

... cynically removed the company from the Register after being unsuccessful in the Employment Court and after being ordered to pay costs.

[17] Kids at Home was removed from the Register by the Companies Office a year after it had ceased trading. This was not an act of impropriety by Ms Lovegrove. In my view, it was a function of the Companies Office.

[18] Ms Ale's frustration is understandable. The timing of the removal was unfortunate and coincided with the award of costs in favour of Ms Ale by the Employment Court in respect of her partially successful challenge to the Authority's determination of 2 April 2015, that certain grievances raised by Ms Ale had not been raised within the statutory timeframe<sup>10</sup>.

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<sup>8</sup> [2011] NZEmpC 13

<sup>9</sup> [2012] NZERA Christchurch 219

<sup>10</sup> [2015] NZERA Auckland 103

[19] Taking into account the overall circumstances of this case, I consider costs should lie where they fall and I exercise my jurisdiction accordingly.

[20] There is no award of costs

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**