

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 81
5448996

BETWEEN MOHAMMED IRFAN ALI
Applicant

A N D ABHISEK QUALITY FOODS
LIMITED
1st Respondent

A N D RAMESH ANAND
RAJAGOPAL
2nd Respondent

A N D ELILARASI RAMESH ANAND
3rd Respondent

Member of Authority: David Appleton

Representatives: Robert M Thompson, Advocate for the Applicant
Paul McBride, Counsel for Mr Rajagopal and Mr
Ramesh Anand

Investigation Meeting: Determined on the papers

Submissions Received: 14 May 2015 from Mr McBride
26 May 2015 from Mr Thompson

Date of Determination: 15 June 2015

COSTS DETERMINATION OF THE AUTHORITY

- A. I join Mr Rajagopal and Mr Ramesh Anand to these proceedings for the purposes of this costs determination only.**
- B. I order the applicant to pay to Mr Rajagopal and to Mr Ramesh Anand a contribution towards their joint costs in the total sum of \$1,000, to be paid in ten monthly instalments.**

Employment relationship problem

[1] By way of a determination dated 11 May 2015¹ the Authority declined Mr Ali's application to join to the proceedings two directors and shareholders of the respondent company, Messrs Rajagopal and Ramesh Anand. It also declined Mr Ali's application for the Authority to issue a determination in his favour on the substantive issues without holding an investigation meeting.

[2] Costs were reserved in the determination and Mr McBride and Mr Thompson invited to serve and lodge memoranda setting out their positions. Those memoranda have been received by the Authority.

[3] Mr McBride states in his memorandum that Messrs Rajagopal and Ramesh Anand incurred a total of \$1,575 plus GST in defending the joinder application. Strictly speaking, the application which Mr Ali made for summary judgement was against the respondent, for which Mr McBride was no longer acting, although Mr McBride did address the application for summary judgement in his submissions resisting the joinder application. I assume that the costs of \$1,575 plus GST either include Mr McBride's work in resisting that application for summary judgement, and that Messrs Rajagopal and Ramesh Anand have been charged for that work too, or that Mr McBride does not seek for the costs associated with that work to be recovered. Either way, the total costs said to have been incurred amount to \$1,575 plus GST.

[4] Mr McBride seeks a contribution of two thirds of the costs incurred. Mr McBride also invites the Authority to consider joining Mr Thompson to the proceedings for the purpose of making him liable for any costs award in favour of Messrs Rajagopal and Ramesh Anand, *to the extent that the Authority considers that the application comprised a frolic on the part of Mr Thompson, as opposed to in the name of the Applicant*. Mr McBride relies on the Court of Appeal case of *Kidd v Equity Realty*² for authority to follow such a course.

[5] Mr Thompson refers me to the seminal case on the award of costs in the Authority, *PBO Ltd v Da Cruz*³, and emphasises that:

¹ [2015] NZERA 61

² [2010] NZCA 452

³ [2005]ERNZ 808

- a. An award of costs does not automatically occur in every case;
- b. The Authority has discretion as to whether costs should be awarded, and should not be applied arbitrarily; and
- c. The starting point is whether to award costs; not the amount of costs to award.

[6] Mr Thompson also submits that a two thirds contribution is the approach adopted in the Employment Court rather than the Authority, and that the Authority is not bound to adopt the same approach.

[7] Mr Thompson also submits that the joinder application was a reasonable one to make and that representatives should be able to represent their clients without fear of an award of costs against them. He also distinguishes *Kidd*.

[8] Finally, Mr Thompson states that any award of costs against Mr Ali would cause him financial hardship, as he has to financially support his parents, wife and new-born daughter, and has no savings. He is also prevented from taking on additional jobs to earn extra money because of his work visa restrictions. Accordingly, he asks that an order be made that costs lie where they fall or that any award is modest, at the lower end of the scale.

Discussion

[9] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[10] I accept that the Authority is bound by the principles set out in *Da Cruz* when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

Against whom should the order for costs be made?

[11] I do not accept that there is sufficient evidence to justify joining Mr Thompson to these proceedings for the purpose of issuing a costs order against him personally. Whilst it is more likely than not that Mr Thompson conceived of the notion of joining Messrs Rajagopal and Ramesh Anand, there is no evidence that he proceeded with the application without Mr Ali's express consent. Indeed, it is common for advisers to suggest the taking of steps to their clients in pursuing or defending proceedings.

[12] Adopting the principles set out in *Kidd*⁴, there is no evidence to suggest that Mr Thompson has demonstrated any impropriety or has acted in his own interests rather than Mr Ali's in making the joinder and summary judgement applications. If he did not explain to Mr Ali the risks as to costs that Mr Ali would be running in instructing him to pursue these applications, (and there is no evidence Mr Thompson did not do so) then that is a matter between him and Mr Ali.

Should costs follow the event?

[13] I do not see any reason in this case for costs not to follow the event. Mr Ali failed in his application to have Messrs Rajagopal and Ramesh Anand joined to the proceedings, and these two individuals were entitled to instruct counsel to defend the applications. In doing so, they incurred costs and have a reasonable expectation in getting a contribution to those costs, having been entirely successful in defending the applications.

[14] This is not the sort of case (a test case examining a novel point of law, for example) where costs should lie where they fall.

Were the costs incurred reasonable?

[15] In addition, I am satisfied that the costs incurred are reasonable and were reasonably incurred. Mr McBride is senior counsel and his charge out rate of \$350 an hour is standard at his level. Furthermore, four and a half hours work incurred in considering the application, taking instructions and addressing the application in written submissions to the Authority (which were succinct and relevant) does not appear to be unreasonable.

What is an appropriate level of contribution?

[16] The Authority determined the joinder matter on the papers, and so the usual daily tariff approach adopted by the Authority does not fit neatly with this matter. Had an investigation meeting occurred, it is likely that it would have taken half a day, which would have resulted in a contribution towards costs of half the daily tariff of \$3,500; namely, \$1,750. However, this is more than Mr McBride is seeking.

⁴ I refer to paragraph [16] of *Kidd*.

[17] I accept that the level of contribution should be modest. However, they must also go some way to reimburse Messrs Rajagopal and Ramesh Anand for the costs they have incurred in defending the application to join them to the proceedings.

[18] Mr Thompson submits that Mr Ali is not in a financial position to pay a substantial award of costs. Whilst no evidence has been tendered to support this, I am prepared to take that submission at face value, knowing that Mr Ali is a tandoori chef (and thus, probably not highly remunerated) and who is in New Zealand on a work visa which is likely to restrict his ability to undertake additional paid work. I am also aware that he was significantly and unlawfully underpaid by his previous employer, Abhisek Quality Food Limited.⁵

[19] I could adopt one of two approaches in acknowledging Mr Ali's likely impecuniosity. The first is to order him to pay only a very modest sum in costs; the other is to order that he pay a more significant sum, but that he do so in instalments. The first approach would deprive Messrs Rajagopal and Ramesh Anand from an opportunity to recover a reasonable contribution to their costs. I am therefore more in favour of the second approach.

[20] I acknowledge that the two thirds approach in fixing the level of contribution is not one usually adopted in the Authority. However, that does not preclude the Authority from adopting that approach when the daily tariff approach is not appropriate and there are no other significant factors prevailing against it. I therefore, adopt the approach suggested by Mr McBride, with a small modification, and fix Mr Ali's contribution to the costs incurred by Messrs Rajagopal and Ramesh Anand at \$1,000.

[21] However, recognising Mr Ali's financial limitations, I shall order that the sum of \$1,000 is to be paid in ten monthly instalments of \$100 a month each, the first such payment to be made within 14 days of the date of this determination.

Messrs Rajagopal and Ramesh Anand must be parties to the matter

[22] The use of the words *The Authority may order any party to a matter to pay to any other party* in clause 15(1) of Schedule 2 of the Act makes clear that costs cannot be awarded in favour any person unless they are a party to the proceedings. Therefore, in

⁵ I refer to the Authority's determination dated 15 June, [2015] NZERA Christchurch 80.

order to be able to award costs in favour of Messrs Rajagopal and Ramesh Anand they must be joined to the proceedings. However, this joinder, which I order under s. 221 of the Act, is strictly for the purposes of this costs determination.

Order

[23] I order that Messrs Rajagopal and Ramesh Anand be joined to these proceedings solely for the purposes of an award of costs in their favour pursuant to this determination.

[24] I order Mr Ali to pay to Messrs Rajagopal and Ramesh Anand the sum of \$1,000, which Mr Ali may pay in ten monthly instalments of \$100 each, the first such payment to be made within 14 days of the date of this determination, and each subsequent instalment to be made no later than one calendar month after each previous payment, until the entire sum has been paid in full.

[25] Mr Ali is to pay the instalments to Messrs Rajagopal and Ramesh Anand in such proportions as Mr McBride shall advise in a written memorandum to be sent to Mr Thompson within 7 days of the date of this determination. In the absence of any such written advice within that time frame, Mr Ali shall pay \$50 each month to Mr Rajagopal and a further \$50 each month to Mr Ramesh Anand, provided that each of them (or Mr McBride on their behalf) has provided sufficient details of their respective bank accounts to enable payment to be made without impediment.

David Appleton
Member of the Employment Relations Authority