

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Neil Allan (applicant)

**AND** Longlas Ltd (respondent)

**REPRESENTATIVES** The applicant represented himself  
Blair Scotland for Longlas Ltd

**MEMBER OF AUTHORITY** Denis Asher

**SUBMISSIONS RECEIVED** by 26 March 2007

**DATE OF DETERMINATION** 29 March 2007

**COSTS DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. Mr Allan withdrew his employment relationship problem on 21 February 2007, i.e. just over two weeks from the investigation set down for 8 March and almost a month after the agreed deadline by which the Company prepared and filed its witness statements. His withdrawal followed, but is not necessarily linked to, an application by the Company for strike out.
2. The Company now seeks costs. Mr Allan asks that no costs be awarded against him.

**Company's Position**

3. In its submissions filed on 5 March, the Company's counsel, Mr Blair Scotland, says amongst other things that he wrote to Mr Allan's then representative on 26 February seeking his

client's views on a contribution to his client's costs, but received no response. The Company then instructed Mr Scotland to seek a formal determination from the Authority as to costs.

4. The Company's submission sets out the well-known principles relating to costs. Case law is also cited including *R & T Ostern t/a RST Enterprises Ltd v Hunter* unreported, Colgan J, 25 Jun 2001 (AC 23B/01), in which a personal grievance was abandoned at a later stage thereby requiring the reasonable preparation for the hearing, with costs being awarded to the disadvantaged party. In *Data Group Ltd v Gillespie*, AC 16/04, the Employment Court awarded an employer a contribution to its costs when the matter was withdrawn four days before that party was required by the timetable to exchange documents.
5. As to discretionary factors, the Company asks the Authority to have regard to the vagueness of the statement of problem which caused the Company's witness statements to go into greater detail, so as to address all possible issues. Matters were made worse by Mr Allan's failure to meet the agreed deadline to file his witness statements; in the end he did not file any statements on his own behalf.
6. On three separate occasions the Company was obliged to ask Mr Allan to provide legible copies of documents attached to his original statement of problem. These copies were not received until 5 February, three days before the Company's witness statements were due to be filed with the Authority, thereby obliging the Company to undertake unnecessary preparation and correspondence.
7. The Company reasonably incurred additional costs as a result of its strike out application, which was prompted by the lack of evidence provided in support of Mr Allan's claim, both in his original statement of problem and as a result of his failure to meet the agreed timetable for filing witness statements.
8. The withdrawal occurred just over two weeks from the hearing date at which time the Company had undertaken the majority of its preparation for the hearing, including its witness statements, questions for the witnesses and submissions to the Authority.
9. The cost of successfully defending Mr Allan's claim has significantly impacted on the respondent, which is a husband and wife business.
10. The Company understands Mr Allan is presently employed and owns his own house. It therefore does not accept that impecuniosity is a tenable argument.

11. The Company's actual costs from receipt of the statement of problem to and including filing the strike out application total \$11,022.36 plus GST, the primary costs being Mr Scotland's services of 39.3 hours @ \$225.00 plus GST per hour (a break down was attached to the first costs submission). Travel costs for Mr Scotland attending on the Company in Levin on two occasions, to interview witnesses, etc, total \$188.
12. Based on the above, the Company seeks a significant contribution to its actual and reasonably incurred costs. A sum of \$7,274.75 is claimed.
13. In its final submission, and amongst other matters, the Company asks that Mr Allan provide medical evidence in support of the matters set out in his submission, particularly in respect of the time of his employment with it. In breach of his statutory duty to be responsive and communicative, it says that information was not provided while Mr Allan was an employee of the Company. No medical diagnosis was provided by Mr Allan until he attached a more detailed medical certificate to his statement of problem. In the meantime its offers of counselling, requests for further medical information and suggestion the parties undergo an independent process to resolve their issues were ignored.
14. The Company was forced, unnecessarily, to expend significant time and expense in defending itself because of Mr Allan's very serious allegations against it.

### **Mr Allan's Position**

15. In a submission received on 19 March Mr Allan says, amongst other things, that the costs claimed are unreasonable and beyond his capacity to pay. He does not say why, nor does he describe his income, outgoings, assets or liabilities.
16. He also says he withdrew his grievance because of medical advice, and advice from his then representative based on that medical advice, in particular that his blood pressure remained at a dangerously high level. He remains of the view that his previous employment with the Company was the cause of his present medical condition but – if I understand correctly his submission – he accepts he would have difficulty in proving his claim. Mr Allan also says, in addition to relitigating the merit of his original grievance, that he has acted in good faith throughout.
17. Mr Allan says he recently underwent a medical operation resulting in a cost to him of \$5000 which he is obliged to repay over time. His ability to pay the Company any costs is, he says,

severely limited. He does not own a house: the house in which he lives is the property of his partner. Mr Allan does not deny that he is employed.

18. He asks the Authority not to order costs against him.

## **Discussion**

19. The manner in which this application was brought on was, from the outset, unimpressive. The statement of problem is a poor example of its kind. It lacks articulation, focus and specificity. Concerns about these shortcomings were raised early on by Mr Scotland, for example, the letter dated 30 January to Mr Allan's then representative, and copied to the Authority at that time. That letter also warned of a strike out application unless Mr Allan's problem was withdrawn by 1 February and raised a costs warning. It appears to have gone unanswered.
20. Around the same period, and after the agreed deadline of 25 January for Mr Allan to file his statement, Authority support staff expended considerable effort in eventually obtaining advice from Mr Allan's representative that his client would not be filing a witness statement, but that he would be relying on his statement of problem. An email dated 31 January provided confirmation.
21. By way of an application filed on 14 February the Company asked the Authority to strike out Mr Allan's claim. The application relied on the claim that Mr Allan's statement of problem did not disclose a tenable employment relationship problem and insufficiently particularised a problem: the Company was therefore unable to properly respond to Mr Allan's claim. It also said Mr Allan's failure to provide medical information in support of his claim unfairly prejudiced the Company's ability to respond to the statement of problem. Attached to the strike out application was a letter dated 18 December 2006 to Mr Allan's then representative asking if his client would agree to an independent medical examination. It appears the parties were unable to reach agreement on the terms for an independent examination.
22. As a result of the strike out application and my concern that Mr Allan's failure to file a witness statement exacerbated the problems caused by the lack of particulars in his statement of problem, I convened a telephone conference of the parties on 19 February. In advance of that conference, and by email dated 15 February, Authority support staff conveyed to the parties by email my concerns about the parties' situations. In respect of the strike out application, I conveyed my view that – in the absence of clearly articulated statements from Mr Allan – it was likely to be premature to argue his case was untenable and had no prospect

of success. I also observed that the serious allegations raised by Mr Allan required equally serious supporting evidence, and that there was no such evidence to hand. I therefore directed Mr Allan *“to provide witness statements in advance of the investigation in support of the evidence he (and others in support) intend to provide, under oath or affirmation, at the investigation, and to do so by close of business on Tuesday 27 February 2007”*.

23. My communication reminded the parties that costs were increasing and that they and their representatives were under a well recognised obligation to be conscious of the costs they were accumulating.
24. During the subsequent telephone conference I expressed my view to the parties that the opportunity still existed for them to reach agreement on costs in the event Mr Allan elected to withdraw his problem. Mr Allan’s representative agreed to clarify with his client if he still wanted to proceed: the strike out application, by agreement, was placed on hold. In a letter dated the same day Mr Scotland advised that it would seek solicitor-client costs should it be required to proceed with its strike out application.
25. By email dated 21 February, Mr Allan’s then representative advised his client was withdrawing his employment relationship problem.
26. I am satisfied that Mr Allan’s failures from the outset to fairly and reasonably particularise his claims, his failure to promptly address the Company’s concerns about those shortcomings (e.g. to obtain an independent medical assessment given that Mr Allan’s constructive dismissal grievance relied significantly on his claim his employer’s actions were responsible for his medical condition), his failure, in particular, to adhere to the timetable agreed by his representative for the filing of his witness statement and his decision to withdraw at almost the last moment – and well after the Company had been obliged to prepare for the investigation – caused the Company significant unnecessary costs.
27. However, I do not accept that costs for the strike out application were caused unnecessarily by Mr Allan. That is because I am not prepared to conclude his case stood no prospect of success. The Company would have been on more certain ground had it asked the Authority, much sooner, to require the applicant to file an amended statement of problem, to particularise his claims, and for its obligation to file witness statements to be placed on hold pending a more satisfactory statement by Mr Allan of his employment relationship problem.
28. Mr Allan does not deny having current employment but has not specified his income or outgoings, other than to say he has a medical debt of \$5,000 which he is obliged to pay off

over time. Similarly, I have no evidence of the significant impact claimed in respect of the costs the Company has been put to.

29. Having regard to the above, I am satisfied the Company is entitled to recover some of its costs: *Data Group Ltd v Gillespie* unreported, Travis J, 22 March 2004, AC 16/04. I am satisfied it should recover a significant portion of those costs and that \$3,000 represents a fair and reasonable contribution to the costs incurred by the Company as a consequence of Mr Allan's actions. In reaching this decision I accept as reasonable both the amount of time claimed by Mr Scotland (excepting the unspecified cost for the strike out application) and his hourly rate. This award is also consistent with the outcome of Mr Allan proceeding with his case and not succeeding.
30. I am confident the Company will reach agreement with Mr Allan on a repayment regime, taking fair and reasonable account of his financial circumstances.

### **Decision**

31. Mr Allan is to pay to the Company, as a contribution to its fair and reasonable costs, the sum of \$3,000 (three thousand).

**Denis Asher**

**Member of Employment Relations Authority**