IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2020] NZERA 427
3116072

	BETWEEN	AWESOME ART LIMITED Applicant
	AND	IAIN MILNE Respondent

Member of Authority:	Michael Loftus
Representatives:	Kathy Jarrett, for the Applicant Phillip Drummond, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	9 October 2020 and 14 October 2020 from the Applicant 12 October 2020 from the Respondent
Determination:	15 October 2020

DETERMINATION OF THE AUTHORITY

[1] On 8 June 2020 I issued a determination in which I concluded Mr Milne had a personal grievance against his former employer, Awesome Art Limited (Awesome Art).[1] Remedies were awarded and costs reserved.

[2] As the successful party, Mr Milne subsequently sought a contribution toward the costs he incurred pursuing his claim. Awesome Art's response was to lodge an application asking the consideration of costs be removed to the Employment Court. It is that application this determination addresses, with the parties agreeing it be considered on the papers.

[1] Milne v Awesome Art Limited [2020] NZERA 222

[3] The applicable section is 178(2) of the Employment Relations Act 2000. It provides:

> *The Authority may order the removal of the matter, or any part of it, to the court if—*
> *(a) an important question of law is likely to arise in the matter other than incidentally; or*
> *(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or*
> *(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or*
> *(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.*

[4] A paragraph in Awesome Art's opening to its submission states *The Employment Relations Authority failed at mediation, the investigation meeting and in the determination consideration or acknowledgement of s13H of the Industry and Training of Apprenticeship Act to take into account the apprenticeship training code*.[2]

[5] Aside from the above Act's citation and the fact the Authority simply cannot fail at mediation as it is not part of the jurisdiction, this summarises Awesome Art's approach.

[6] Awesome Art's submission focuses on issues canvassed in the substantive determination and reiterates a view the Authority misunderstood its role. It says Mr Milne was an apprentice and notwithstanding the fact he was also an employee that meant the Authority ventured into an area in which it had neither jurisdiction nor knowledge.

[7] That approach is reflected in the original application to remove and there-in lies Awesome Arts' problem. It was explained in both Mr Milne's replies and during a telephone conference to discuss the application that this misses the point. The issue is not the substantive determination, which is now before the Court, but whether or not a costs application should be removed. Notwithstanding the explanation of what was involved and required, Awesome Art's submission fails to address that question with no argument about why determination of costs should be removed.

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[2] Awesome Art's submission at [6]

[8] The reply submission again reiterates the view the Authority acted beyond its jurisdiction and failed to consider the fact of apprenticeship. It also argues the facts of this case mean it is without precedent so the Court should consider it but once again the argument concentrates on the substantive issues and not costs.

[9] Mr Drummond's submission does address removal of costs, or more correctly why it should not occur.

[10] His initial argument is the Act precludes removal in this instance as s178(1) limits removal to situations where the Court is being asked to *hear and determine the matter without the Authority investigating it*. The argument is costs are an adjunct to the substantive matter which the Authority has already heard and therefore removal can no longer occur.

[11] It may be a moot point as to whether costs are separate from or incidental to the substantive matter but that need not be determined. This is because the case law is clear - it is appropriate, indeed desirable, that costs be determined pending a challenge and that is the approach adopted by the Authority if possible.[3]

[12] Secondly Mr Drummond argues that if that were not the case the provisions of s178(2) do not apply and there is no ground for transfer. With that I agree.

[13] The law regarding the manner in which costs are determined in the Authority is extremely well settled and has been for some fifteen years.[4] There is nothing vaguely resembling an important question of law in that regard.

[14] There is nothing about a costs determination which justifies urgency and nor is there any public interest in a matter that is limited to a civil dispute between the parties.

[15] There is nothing before the Employment Court which involves a similar or related issue. What is before the Court is an application from Awesome Art that it be allowed to pursue a challenge of the substantive determination out of time. While that is between the same parties it is not similar or, at least in respect to subject matter, related. If the application is successful the challenge will address the substantive issues and not focus on costs.

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[3] *Swales v AFFCO New Zealand Ltd* EmpC Auckland AC19/01, (23 March 2001)

[16] For completeness I note Awesome Art has raised nothing that might otherwise persuade me the circumstances are such the Court should decide costs in the first instance.[5]

Conclusion and Costs

[17] For the reasons stated above the request I remove consideration of Mr Milne's costs application to the Employment Court is declined.

[18] Mr Milne, in the Statement in Reply, suggests I address costs in respect to this application. Awesome Art failed to reply or mention the issue which leaves little option but to reserve costs in respect to this application.

[19] If Mr Drummond wishes to add to the final paragraphs of his Statement in Reply he should do so within 7 days. If he wishes to simply confirm the application for costs is as currently tendered, or withdraw it, he should advise accordingly. Once the Authority hears from Mr Drummond Awesome Art will, if necessary, have a further seven days in which to reply.

Michael Loftus
Member of the Employment Relations Authority

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[4] *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135
[5] Section 178(2)(d) of the Employment Relations Act 2000