

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 404
5319290

BETWEEN	GRANT BORRILL Applicant
AND	ELITE FITNESS EQUIPMENT LIMITED Respondent

Member of Authority: Alastair Dumbleton

Submissions/Memoranda Received 9, 12 and 15 September 2011

Determination: 19 September 2011

SUPPLEMENTARY DETERMINATION OF THE AUTHORITY

[1] In its determination dated 26 July 2011 ([2011] NZ ERA Auckland 331), the Authority found comprehensively against the applicant Mr Grant Borrill. It found his dismissal by the respondent Elite Fitness Equipment Limited was justified, his claim for outstanding commission payments had been previously resolved and he had breached good faith. For the breach a penalty of \$2,000 was ordered to be paid by Mr Borrill.

[2] In a section dealing with costs the Authority noted that Mr Borrill had been legally aided and that therefore, in accordance with s 40(2) of the Legal Services Act 2000, no order for costs could be made against him unless the Authority was satisfied there were exceptional circumstances.

[3] The Authority reserved the question of costs and gave the following directions at para.[41]:

... in the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Elite Fitness may lodge and serve a

memorandum as to costs within 28 days of the date of this determination. Mr Borrill will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this timeframe without prior leave.

[4] According to the Authority's directions, the last day for any memorandum as to costs to be lodged and served by Elite Fitness was 23 August 2011.

[5] Mr Gallagher, counsel for Elite Fitness, lodged and served a memorandum as to costs on 9 September 2011.

[6] Mr Harrison counsel for Mr Borrill has opposed the costs application being considered because it was made out of time and leave to extend time had not been granted or even sought. Counsel noted that Elite Fitness had not attempted to resolve the issue of costs, as the parties had been required to try and do by the Authority.

[7] Mr Harrison also noted a previous failure by Elite Fitness to meet a deadline directed by the Authority. He submitted that the respondent should be required to comply with the "clear direction" of the Authority in the strict timetable given for making any costs application.

[8] Mr Gallagher responded by memorandum in which he raised a number of matters going to the merits of the claim for costs. The implication in the submission is that directions of the Authority may lightly be set aside by it. Mr Gallagher also pointed to the challenge made to the Court by Mr Borrill against the determination and to an email received from Mr Harrison about Mr Borrill's legal aid status.

[9] The challenge was filed 28 days after the date of the determination, on the last day for taking that step and also the last day for applying for costs. The reasonably foreseeable event of a challenge, even a last-minute one, could have been allowed for by applying for an extension in the final few days of the 28 day period before it ran out. Mr Harrison's email was received after 25 August when advice was requested from him by Mr Gallagher, so it cannot be relied upon as influencing the decision not to apply for costs or to apply for an extension of time for doing so.

[10] I find that no reasonable explanation has been given as to why Elite Fitness could not have made an application for costs by 23 August, or at least by then have taken the quick and inexpensive step of applying for an extension of time. The Authority will usually readily extend the time in which things are to be done according to its directions, provided that request is made before the deadline has been

reached. The 28 day period given by the Authority was generous and hardly required great haste to be made by Elite Fitness if it wanted to keep its costs opportunity alive.

[11] After 23 August 2011 when nothing more had been heard from the parties the Authority's investigation closed pursuant to the directions given by it. They had been clear and precise and there is no suggestion to the contrary.

Determination

[12] I therefore decline to consider the respondent's application for costs.

A Dumbleton

Member of the Employment Relations Authority

(Pursuant to clause 16 of Schedule 2 of the Employment Relations Act 2000)