

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 519  
5517799

BETWEEN COLIN BENDER CHARTERED  
ACCOUNTANTS LIMITED  
Applicant  
AND NEIL BLAKE  
Respondent

Member of Authority: Anna Fitzgibbon  
Representatives: James Turner, Counsel for the Applicant  
Respondent in person  
Submissions: 28 November 2014 from the Applicant  
No submissions filed by the Respondent  
Date of Determination: 17 December 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. The respondent, Mr Neil Blake, is ordered to contribute \$1,750 towards the applicant, Colin Bender Chartered Accountants Limited's legal costs.**

**The substantive determination**

[1] In a determination of the Authority dated 19 November 2014<sup>1</sup> the Authority determined that the underlying and true nature of the relationship between the applicant, Colin Bender Chartered Accountants Limited (the Company) and the respondent, Mr Neil Blake, was that of an employment relationship. Accordingly, the Authority found that it had jurisdiction to deal with the Company's substantive claims against Mr Blake.

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<sup>1</sup> [2014] NZERA Auckland 474

[2] The Company and Mr Blake were each given an opportunity to file memoranda as to costs.

[3] On 28 November 2014, the Company filed its memorandum as to costs. Mr Blake requested the matter of costs be dealt with following the determination by the Authority of the substantive matters between the parties. The Authority declined the request and directed Mr Blake to file his memorandum as to his costs in accordance with the timetable. Mr Blake failed to do so.

[4] The Company seeks an award of costs in the sum of \$3,250 plus \$71.56 for the filing fee. The total in costs sought by the Company amounts to \$3,321.56.

[5] It was submitted on behalf of the Company that costs incurred by it significantly exceeded the sum being sought. However, the Company was prepared to limit the costs claimed to the sum of \$3,321.56 given the investigation meeting only determined the preliminary issue and on the basis that the substantive issue is yet to be determined.

[6] The Authority's power to award costs arises from Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act). This confers a wide discretion on the Authority to award costs on a principled basis.

[7] 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>2</sup>.

[8] Counsel for the Company referred me to the decision in *PBO* and highlighted the following well known principles:

- Costs are discretionary;
- The discretion is to be exercised in accordance with principle and not arbitrarily;
- Costs are to be considered on a case by case basis in accordance with equity and good conscience;
- A party's conduct that has unnecessarily increased costs can be taken into account;

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<sup>2</sup> [2006] 7 NZELC 98, 128; [2005] 1 ERNZ 808

- Whether all or any costs incurred were unnecessary or unreasonable;
- Costs generally follow the event;
- Frequently costs will be judged against a notional “daily rate”; and
- “Without prejudice” offers can be taken into account when setting costs.

[9] The general principle is that costs follow the event, and I see no reason to depart from that in this case. The Company was entirely successful in its claim that Mr Blake was its employee and was not an independent contractor. The investigation meeting occupied almost a full day.

[10] Counsel for the Company referred the Authority to the Employment Court decision of *Mattingly v. Strata Title Management Ltd*<sup>3</sup> in support of the proposition that a pro rata approach to costs can take place in part-day hearings. In *Mattingly*, the Employment Court considered that because the investigation hearing concluded at 2pm with a lunch break, applying a starting point of a full day of \$3,500 was not appropriate. The Court instead applied a starting point of half a day of \$1,750.<sup>4</sup>

[11] The actual investigation hearing time in this case was 4 hours, 15 minutes and in the absence of any argument to the contrary, I agree that the starting point in assessing costs should therefore be a half day, being \$1,750.

[12] Counsel for the Company referred me to other relevant factors taken into account by the Court in *Mattingly* when assessing reasonable costs. One factor was the failure to accept a reasonable offer. In this case, the parties attended mediation on two occasions, unsuccessfully. Counsel for the Company submitted that Mr Blake’s failure to concede that he was an employee put the parties to the unnecessary expense of having a preliminary hearing to determine the matter.

[13] On this occasion, I do not agree with Counsel’s submission. Mr Blake was strongly of the view that he was a contractor and not an employee. Mr Blake was entitled to raise the matter as a jurisdictional point for determination by the Authority.

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<sup>3</sup> [2014] NZEmpC 15

<sup>4</sup> *Mattingly* paras.[16] to [19]

[14] In the circumstances, it is my view that costs on a pro rata basis should be applied. Accordingly, I order Mr Blake to contribute \$1,750 towards the Company's costs in respect of the preliminary issue.

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