

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 172
5339805

BETWEEN

DAYARAM DAYAL
Applicant

AND

ROGER SEYMOUR trading as
SEYMOUR CLEAN
SCHOOLS
Respondent

Member Authority: Michele Ryan

Representatives: Ben Paradza, Counsel for Applicant
Paul McBride, Counsel for Respondent

Submissions received: 31 August, 4 October 2011 from the Respondent
26 September 2011 from the Applicant

Determination: 9 November 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] Mr Roger Seymour requests an award for costs associated with responding to Mr Dayal's original statement of problem which had incorrectly and personally cited him as Mr Dayal's employer.

[2] Mr Dayal's employer was Seyclean Schools Ltd of which Mr Seymour is a director.

[3] Mr Dayal submits that Mr Seymour has acted unfairly and unreasonably in filing an application for costs on the matter, and in response he also seeks costs.

[4] The issues for the Authority to determine are:

- a. Should costs be awarded in the particular circumstances?
- b. If costs should be awarded, who should they be awarded to?

Background

[5] On 9 February 2011 Mr Dayal via his representative from Whitireia Community Law Centre, wrote to his employer and raised a personal grievance. Amongst other things he sought agreement from the employer to attend mediation at the Department of Labour Mediation Services.

[6] On 18 February 2011 Mr Seymour responded in writing to the issues raised and advised “*I am not going to mediation. There is nothing to negotiate*”.

[7] Mr Dayal then commenced proceedings on 31 May 2011 by lodging a statement of problem citing “*Roger Seymour t/a Seymour clean Schools*” as the employer.

[8] On 11 June 2011 Mr Seymour through his counsel lodged a statement in reply and stated: (i) he had never employed the applicant; (ii) he had never traded as ‘Seymour clean Schools’; (iii) there was no case to answer by Mr Seymour; (iv) Mr Dayal was well aware at all relevant times he was employed by a limited liability company; (v) any claims that Mr Dayal makes can only be against the employer; (vi) the claim against Mr Seymour must be dismissed and he is seeking costs. The statement in reply did not respond to Mr Dayal’s personal grievance.

[9] On 7 July 2011 the Authority received an amended statement of problem on behalf of the Mr Dayal which corrected the name of the employer. The amended statement of problem was sent to the employer who responded in a statement in reply.

[10] Mr Dayal and the employer attended mediation on 29 August 2011 and the Authority was subsequently advised that the matter was settled.

[11] On 31 August 2011 Mr Seymour filed a memorandum as to costs. He noted that the grievance between Mr Dayal and the employer had been resolved at mediation but that no resolution had been reached between that Mr Dayal and Mr Seymour personally. Mr Seymour says that Mr Dayal, by lodging a statement of problem naming him personally, put him to “*unnecessary and significant cost by way*

of having to respond to that application” and that his solicitor/client costs (evidenced by an invoice) comprised \$750 plus GST. Mr Seymour seeks an award at or about that level.

Mr Seymour’s submissions

[12] Mr Seymour submits that an award for costs is warranted as summarised below:

- i. Mr Dayal elected to bring the claim against the Mr Seymour personally despite it being self evident that such a claim could only be brought against the employer;
- ii. It should have been clear to Mr Dayal as a senior manager who his employer was, and by reference to work related correspondence, contracts, business cards and so forth;
- iii. Mr Seymour’s statement in reply addressed the identity of the employer and as a result Mr Dayal amended the statement of reply. By this action Mr Dayal indicated that the claim should not have been lodged against Mr Seymour and was withdrawn;
- iv. An applicant who files proceedings puts the respondent who is named in those proceedings to expense. Where the applicant then amends or withdraws the claim against that party, the applicant is liable for costs¹;
- v. Mr Seymour was required to give instructions to have his statement in reply prepared and filed, and therefore incurred costs.

[13] Mr Seymour raises concerns with a confidential Record of Settlement attached to the memorandum and provided to the Authority by Mr Dayal. Mr Seymour says it has been improperly provided and that the settlement cannot impact on the rights of Mr Seymour personally or the liability of Mr Dayal.

[14] Mr Seymour submits that if Mr Dayal, by his representative, was wrong to have filed a claim against him personally then the cost of that should lie elsewhere and not with Mr Seymour.

¹The respondent referred by way of example: IHC New Zealand v Scott unreported, Perkins J, 18 Oct 2006, AC 45A/06

[15] Mr Seymour further submits that Mr Dayal's application for costs should not be awarded. He says there is no evidence that costs have been incurred and it is improbable that the Community Law Centre charged Mr Dayal for its services. He also states costs on a costs award are unusual.

Mr Dayal's submissions

[16] Mr Dayal says it is unfair and inappropriate that he be required to meet the costs sought by the Mr Seymour. He submits:

- i. The "wrong" citing of the employer's name was nothing more than confusion or uncertainty as to the correct name of the employer;
- ii. Mr Dayal had been employed by Mr Seymour before the employer was incorporated and was not provided with an employment agreement which would have indicated a change of employer. Mr Dayal was not involved with or authorised to draft or sign documents on behalf of the company;
- iii. Neither the correspondence advising Mr Dayal of his dismissal or the response to his personal grievance identified the employer's full name. Nor did the correspondence identify Mr Seymour as acting on behalf of the employing company. Further Mr Seymour did not object or take issue with Mr Dayal as to the correct name of the employer until after Mr Dayal had filed a statement of problem;
- iv. Mr Seymour refused to attend mediation at first instance and Mr Dayal had no option but to file a statement of problem to seek a direction that the employer attend mediation.
- v. Mr Dayal amended the statement of problem to reflect the correct name of the employer;
- vi. Mr Seymour was not materially affected by the way the employer's name was cited.
- vii. The legal principles relied on by Mr Seymour should not be applied in the circumstances of this matter where all that has happened is that an incorrect name has been changed.
- viii. In response to Mr Seymour's application for costs he seeks \$1500 in costs.

Determination

[17] I have considered Mr Seymour's submission that the Record of Settlement attached to Mr Dayal's Memorandum as to Costs in Reply should be excluded from my considerations. I confirm I have not given it any weight in reaching a determination.

[18] The Authority's power to award costs is discretionary and is made following consideration of a number of factors as described in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*² including the merits of the matter and according to equity and good conscience.

[19] The circumstances of this matter are analogous to those described in *Registered Securities Ltd (In Liquidation) v Jensen Davies & Co* [1999] 2 NZLR 688 (CA). In that case the appellants issued proceedings against a company about matters that had arisen when that business was a firm and prior to its formation as a company. The directors of the company had previously been the partners in the firm. In deciding the matter the Court of Appeal considered the knowledge of the defendant and concluded that although the name inaccurately described the defendant, the information contained in the claim was sufficiently detailed that there could be no misapprehension by the defendant that the claim could be against another. The court characterised the appellant's mistake in incorrectly naming the defendant as a misnomer.

[20] In the present case Mr Dayal cited his employer in the statement of problem incorrectly. His error was a misnomer. The employer through its director Mr Seymour, was already aware that a personal grievance had been raised by Mr Dayal in respect of his employment. There had been communication between Mr Seymour and Mr Dayal about the grievance including a refusal by Mr Seymour to attend mediation. The statement of problem provided detail of events in which the employer had directly engaged. Given this level of engagement Mr Seymour must have been aware that the claim described in the statement of problem was against the employer and not Mr Seymour personally. In these circumstances I find there was no prejudice to Mr Seymour.

² [2005] ERNZ 808 (EmpC)

[21] Mr Seymour in his statement in reply elected to focus exclusively on the issue of the correct employer's identity. He accrued costs in approaching his reply in this way.

[22] In these circumstances an award of costs in favour of Mr Seymour is not warranted.

[23] Mr Dayal has not provided any evidence of costs incurred to support his claim and I decline to award costs in these circumstances as well.

Michele Ryan
Member of the Employment Relations Authority