

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 54  
3057832

BETWEEN TROYDEN EVANS  
Applicant

AND PROGRESSIVE ELECTRICS  
LIMITED  
Respondent

Member of Authority: Nicola Craig  
Representatives: The applicant in person  
David Rooke, counsel for the respondent  
Investigation Meeting: On the papers  
Submissions Received: Nothing received from the applicant  
12 December 2019 from the respondent  
Date of Determination: 5 February 2020

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**DETERMINATION OF THE AUTHORITY**

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[1] The respondent Progressive Electrics Limited (PEL or the company) seeks to have the claim of the applicant Troyden Evans struck out and costs awarded to the company. The basis on which strike out is sought is Mr Evans' lack of involvement and failure to progress his claim.

**The proceeding**

[2] Mr Evans represented himself when he filed his case in March 2019. His claims covered concerns about his employment agreement and various employer actions, including wage deductions made by PEL.

[3] PEL filed a statement in reply, denying Mr Evans' claims. The company alleged that Mr Evans still owed the company several thousand dollars for tools Mr Evans bought using PEL's account and study costs which the company paid.

[4] The case was referred to mediation on 26 April 2019. The Mediation Service were unable to contact Mr Evans either by email or phone and thus closed their file. Subsequently the file was reopened and a date was set for a September mediation. PEL and its representative attended the mediation rooms but Mr Evans did not. The Authority then attempted to contact Mr Evans, but no communication was received from him.

[5] PEL indicated that it would like to pursue a counterclaim regarding the amount it claimed Mr Evans owed to it. However, subsequently PEL's representative advised that the company would accept dismissal of the claim and not pursue any set off or counterclaim but sought a costs order. Mr Evans was given an opportunity to provide a response but none was received.

### **Application to strike out**

[6] PEL seeks to have Mr Evans' claim struck out on the basis of what I describe as want of prosecution.

[7] I am not satisfied that the Authority has the power to strike out a claim on that basis without carrying out an investigation.<sup>1</sup>

[8] Schedule 2 of the Employment Relations Act 2000 (the Act) has some relevant provisions. The Authority may dismiss a claim considered to be frivolous or vexatious, under clause 12A of Schedule 2. The test for such action is high and PEL has not so far pursued this avenue.<sup>2</sup>

[9] There is also a power to dismiss a claim where a party does not attend an investigation meeting however, no investigation meeting has been held in this case.<sup>3</sup>

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<sup>1</sup> *GEA Process Engineering Ltd v Schicker* [2019] NZEmpC 166

<sup>2</sup> *Gapuzan v Pratt & Whitney Air New Zealand Services t/a Christchurch Engine Centre* [2014] NZEmpC 206 at [52] and *Lumsden v SkyCity Management Ltd* [2015] NZEmpC 225 at [39]

<sup>3</sup> Cl 12 of Schedule 2 of the Act

[10] I therefore decline to strike the proceeding out. In the event that no action is taken by Mr Evans for at least three years the matter must be treated by the Authority as withdrawn, under clause 14(2) of Schedule 2 of the Act.

### **Costs**

[11] The Authority's jurisdiction to deal with costs is set out in clause 15 of Schedule 2 of the Act.

[12] The principles which guide the Authority's approach to costs have been outlined by the Full Employment Court in *PBO Ltd (formally Rush Security Ltd) v Da Cruz*<sup>4</sup> and more recently confirmed in *Fagotti v Acme & Co Ltd*<sup>5</sup>. One of those principles is that costs generally follow the event.

[13] In this case there has been no resolution of Mr Evans' claim nor of PEL's claim. Costs have been awarded on some occasions when a claim has been withdrawn however, that has not occurred here and so the outcome of the proceeding is unknown. The Authority does not usually award costs at interlocutory or interim stages of its process.

[14] Taking into account these circumstances I do not consider this to be an appropriate time to make a costs award. Should Mr Evans withdraw his claim or the Authority regard his claim as withdrawn, PEL shall be entitled to seek costs.

**Nicola Craig**  
**Member of the Employment Relations Authority**

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<sup>4</sup> [2005] 1 ERNZ 808

<sup>5</sup> [2015] NZEmpC 135