New Zealand Employment Relations Authority Decisions

Golding and anor v Pye CA83A/10 (Christchurch) [2010] NZERA 625 (1 July 2010)

Last Updated: 5 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 83A/10 5276039

BETWEEN

A N D

JOSHUA GOLDING and SARAH HAMMOND
Applicants

ALAN PYE Respondent

Member of Authority: Representatives:

Submissions Received:

Helen Doyle

Tim Twomey, Counsel for Applicant Jeff Goldstein, Counsel for Respondent

24 May 2010 from Applicants 17 May 2010 from Respondent

Determination:

1 July 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority found in its determination dated 6 April 2010 that the respondent did not employ the applicants but their true employer was a company, St Omer Resort Limited. I reserved the issue of costs but referred the parties to the approach taken by Judge Perkins with respect to costs in *Colosimo v. Parker* [2007] 8 NZELC 98,622. Agreement could not be reached as to costs and the Authority has now received submissions from Mr Goldstein and Mr Twomey.

The respondent's submissions

[2] Mr Goldstein submits that *Colosimo* and the approach therein is able to be distinguished from this matter for several reasons. The first is that the applicants chose not to bring proceedings against St Omer Resort Limited although they were given the opportunity to by the Authority during a telephone conference and further they initially raised personal grievances against St Omer Resort Limited before doing so against the respondent.

[3] Mr Goldstein submits further that in *Colosimo* the Court held the company was no longer registered and was an empty shell, but there was no such evidence before the Authority in this matter. He submits that there was no evidence, as there had been in *Colosimo* about how the applicants had been treated and that the Court made no order as to costs in *Colosimo* because the employee was successful against the second respondent and unsuccessful against the first respondent, whereby in this case the applicants were wholly unsuccessful in their claim against the first respondent.

[4] Mr Goldstein submits that the relevant principles to be applied are those set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808. He submits that costs should follow the event and indeed that there should be

an increase in the normal tariff because of the importance of the proceeding to the respondent who was, he submits, unjustly accused of being the applicants' employer.

[5] Mr Goldstein submits that actual costs incurred by the respondent were $9,196 plus GST and that the investigation took close to a full day. My notes reflect the meeting commenced at 9.30am and finished at 3pm. Mr Goldstein submits that each of the applicants should contribute at least $1,500 to the respondent's costs.

The applicants' submissions

[6] Mr Twomey also refers to *PBO Ltd.* He places emphasis in his submissions on the nature and role of the Authority which was referred to in *PBO* and the duties of good faith. Mr Twomey also refers to the Employment Court specifically noting in *PBO* the Authority's equity and good conscience jurisdiction and in that respect that costs will not always follow the event.

[7] Mr Twomey submits that the approach taken in *Colosimo* to costs is correct and that as a matter of equity and good conscience the respondent should not recover costs against the applicants for the following reasons:

• Although it was recorded in the Authority's notice of direction dated 9 November 2009 that *evidence at the investigation meeting will be that contained in the statement of problem and statement in reply* at the

commencement of the investigation meeting on11 February 2010 Mr Goldstein produced two statements for the respondent and another witness from unsworn draft affidavits intended to but not sworn and filed in support of the application to strike out the proceedings.

- Mr Twomey submits that the applicants were taken by surprise on the investigation meeting day. My notes reflect that there was an adjournment and although no objection to statements being produced Mr Twomey submits they contributed to an increase in hearing time and that had the draft affidavits on which the statements were based been available to the applicants before the hearing date a different outcome may have ensued.
- The applicants were never provided with a written employment agreement as required under the Employment Relations Act 2000 in circumstances where the respondent had been a director of several companies which employed people.
- In *Colosimo* the Court observed that even though a company is regarded as a separate entity in law, its activities and integrity must be judged by the actions of its directors and shareholders.

[8] Mr Twomey does not accept that Mr Goldstein's attempts to distinguish *Colosimo* have relevance to the present matter. He submits there was little point in joining St Omer Resort Ltd to proceedings given the company's legal and financial position being a management company whose sole role was to undertake the management of the St Omer Lodge on behalf of the owners and the closure of the Lodge. In that regard he relies on a document attached to the statement of problem. He submits that by not continuing the proceeding against St Omer Resort Ltd the respondent in his capacity as sole director saves costs by not being required to have the company represented in any proceeding.

[9] Further Mr Twomey says there is prime facie evidence in the statement of problem that the applicants had been badly treated and disadvantaged. Mr Twomey submits that an award of costs against the applicants would be contrary to the Authority's equity and good conscience jurisdiction and that having regard to the respondent's business experience and directorships he had a duty to ensure that his company employees had employment agreements or at the very least a letter on company letterhead confirming their central terms of employment. Mr Twomey also submits the applicants have limited financial resources and Ms Hammond has had difficulty obtaining employment and Mr Golding is working in a tavern. He submits that due to the length of dealing with the preliminary matter counsel has had to significantly discount the applicants' costs.

Determination

[10] Mr Pye was the sole director of St Omer Resort Ltd. A company offers protection from liability as the respondent, an experienced businessman and director of other companies, is no doubt aware. The Employment Relations Act 2000 requires that an individual employment agreement be in writing and include the names of the employer and employee - s.65 Employment Relations Act 2000. That is a requirement that has been in force for almost ten years.

[11] If the employer is a company as was found in this matter such obligation is also contained in s. 25 of the Companies Act 1993 that provides that a company must ensure its name is clearly stated in :

i. *Every written communication sent by, or on behalf of, the company;*
ii. *Every document issued or signed by, or on behalf of, the company that evidences or creates a legal obligation of the company.*

[12] I accept Mr Goldstein's submissions that this case is not on all-fours with *Colosimo.* However, I do not find that that is sufficient to detract from the underlying conclusions in *Colosimo* that the omission to provide an employment agreement by St Omer Resort Ltd falls ultimately to be considered as an omission of its director, the respondent. There was no employment

agreement in this case and had there been a hearing would not have been required.

[13] I further accept that in the ordinary course of events this preliminary matter would have occupied the Authority for possibly an hour or two. There may have been a number of reasons why it took longer, however I do accept that late production of statements based on unsworn affidavits on the day of the investigation meeting did contribute to some delay in terms of this matter. An adjournment was required so that the applicants could consider the material.

[14] Costs normally follow the event. I find in this case the respondent must assume some responsibility as director of St Omer Resort Ltd for the failure to provide or make sure that there was provision of a written employment agreement. I have also in the exercise of my discretion as to costs taken into account that this matter should probably not have taken more than one or two hours, and the applicants' limited financial resources.

[15] I make no award for costs in this case to the respondent.

Helen Doyle
Member of the Employment Relations Authority
