

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 49
5402124

BETWEEN DIANNE HEAD
 Applicant

AND BODY CORPORATE 352454
 Respondent

Member of Authority: David Appleton

Representatives: Robert Thompson, Advocate for Applicant
 Nicola Pointer, Counsel for Respondents

Submissions received: 15 February 2013 from Respondents
 4 March 2013 from Applicant

Determination: 6 March 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] The original first respondent, Avenue Hospitality Limited (AHL), seeks costs against the applicant arising out of a direction from the Authority dated 1 February 2013 that Body Corporate 352454 be substituted as the respondent in place of AHL and Mr Lankshear. The substitution was made by consent during a directions conference, following the service and lodging of a notice of interlocutory application by the original first and second respondents for an order striking out the applicant's application. The notice of interlocutory application was accompanied by an affidavit of a director of AHL and a second affidavit by Mr Lankshear, the second respondent.

[2] AHL seeks a contribution of \$2,000 to its costs arising out of the preparation of the notice of interlocutory application, the two affidavits, taking part in the telephone conference with the Authority and the usual attendances. Ms Pointer submits on behalf of AHL that it would not be appropriate for the Authority to wait until the outcome of the Authority's substantive investigation into the applicant's

personal grievance against Body Corporate 352454 as AHL is no longer a party to those proceedings.

[3] Mr Thompson, in reply, objects to an award of costs against the applicant on the basis that the Authority did not consider and/or make any decisions in relation to the application for strike out given that there was consent between the parties. He also argues that the invoice submitted by Ms Pointer does not reasonably identify the time spent and further submits that the costs are not reasonable in the circumstances.

[4] Mr Thompson also relies on the fact that the respondents initially refused to attend mediation, requiring the applicant to file a statement of problem. Alternatively, he asks that the Authority could consider and/or reserve costs submissions for the successful party once the matter has been fully heard.

[5] Finally, Mr Thompson submits that the costs would have been incurred in any event due to the applicant's lodging of her claim, irrelevant of the parties named in the application.

Determination

[6] I accept Ms Pointer's submission that it would not be appropriate to await the determination of the substantive investigation meeting in light of the fact that AHL is no longer a party to the proceedings.

[7] I also accept that it is appropriate for the Authority to consider an award of costs in respect of work done on behalf of AHL and Mr Lankshear which could have been avoided if the correct respondent had been cited in the first place (which was readily identified in the applicant's employment agreement).

[8] I note that Ms Pointer (whose charge out rate during the course of this proceeding was \$190 per hour plus GST and disbursements) was supervised by a partner (whose charge out rate is \$320 per hour plus GST and disbursements). However, the invoice submitted to the Authority does not break down how much of the time charged for was incurred by Ms Pointer and how much was incurred by the partner.

[9] I further note that the respondents prepared a notice of interlocutory application, together with affidavit evidence, prior to any direction by the Authority to

do so. As it turned out, Mr Thompson willingly accepted that he had cited the wrong respondents once he had seen the employment agreement between his client and Body Corporate 352454. The Authority is not privy to all of the communications that took place between Ms Pointer and Mr Thompson in relation to the identity of the correct respondents but, given that Ms Pointer does not submit that she tried to convince Mr Thompson of the correct respondent prior to her preparing and lodging her notice of interlocutory application and affidavits, I infer that there were no such communications.

[10] I agree with the submission of Ms Pointer that the general principles relating to the fixing of costs are well established from the case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 and that they are a discretionary remedy.

[11] I accept that costs were incurred by AHL in relation to defending the application made incorrectly against it and Mr Lankshear. However, I find it hard to accept that \$2,000 is a reasonable sum in respect of what turned out to be an extremely simple matter; namely Mr Thompson seeing the employment agreement and accepting that he had cited the incorrect respondents.

[12] Accordingly, I decline to award a contribution of \$2,000 but believe that some contribution should be made. I fix that contribution at \$500, as I believe that such a sum is a more reasonable amount.

Order

[13] I order the applicant to pay the sum of \$500 to Avenue Hospitality Limited in relation to its legal costs in defending the application incorrectly made against it and Mr Lankshear by the applicant.

David Appleton

Member of the Employment Relations Authority