

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 2/08
5079920

BETWEEN GRAHAM INNES
 Applicant

AND KENJI MIYAZAWA
 Respondent

Member of Authority: James Crichton

Representatives: David Beck, Counsel for Applicant
 Jeff Goldstein, Counsel for Respondent

Submissions received: 11 October 2007 from Respondent
 29 October 2007 from Applicant

Determination: 16 January 2008

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 30 August 2007, the Authority resolved to allow a strike-out application brought by Mr Miyazawa, thus determining that Mr Innes was not employed by Mr Miyazawa.

[2] Costs were reserved.

The claim for costs

[3] Mr Miyazawa, the successful party, incurred costs of \$2,500 exclusive of GST in his successful application to the Authority to strike-out Mr Innes' proceedings. In his statement in reply in relation to this matter, Mr Miyazawa gave notice of his intention to seek solicitor/client costs together with an order that the costs awarded be claimed either against Mr Innes himself or Mr Innes' counsel in the latter's personal capacity.

[4] In the submissions filed by Mr Miyazawa in respect of his costs application, Mr Miyazawa relies on the High Court decision of *Harley v. McDonald* [1999] 3 NZLR 545 (CA). In that decision, the Court of Appeal determined that the solicitor on the record had an obligation to the Court to satisfy her or himself that the case being brought is not one which has no possible chance of success.

[5] Mr Innes, as the unsuccessful party, suggests that costs should lie where they fall and relies on his contention that the matter brought was not frivolous or vexatious, together with the claim that *there was a significant factual issue at stake*. No doubt Mr Innes has a claim which can be properly advanced against his employer, but the difficulty with this particular matter is that the Authority's decision found that there was not one piece of evidence which supported Mr Innes' apparent eleventh hour decision to contend that he was employed by Mr Miyazawa personally.

[6] In relation to the contention that counsel for Mr Innes should be personally liable, Mr Innes submits that the case of *Harley v. McDonald* can be distinguished on the footing that the level of incompetence or want of skill in that case was manifest and the nature of the proceeding in the High Court was not comparable to proceedings before an inquisitorial tribunal such as the Employment Relations Authority.

[7] I think those submissions are well founded. It is clear law that the principles attaching to costs determinations in the Authority are not those which ought to inform such decisions in Courts of record where the adversarial nature of proceeding requires different principles to be applied: *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 applied.

[8] However, I do think this is a case where full solicitor/client costs ought to be recoverable. Mr Miyazawa gave notice of the making of this claim in his statement in reply and the claim made by Mr Innes before the Authority had, on the Authority's determination as issued, not one shred of evidence to support it. In those circumstances, Mr Innes' claim to have been employed by Mr Miyazawa may not be vexatious or frivolous, but it is certainly in my judgment completely inappropriate for Mr Innes to be able to put Mr Miyazawa to the costs associated with defending himself against an entirely unsustainable claim and not expect to meet Mr Miyazawa's costs in full.

Determination

[9] For the reasons I have just advanced, I am persuaded that this is one of those rare cases where full solicitor/client costs ought to be recovered against the unsuccessful party and accordingly I direct that Mr Innes is to pay to Mr Miyazawa the sum of \$2,500 in respect of the latter's legal costs.

James Crichton
Member of the Employment Relations Authority