

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 77/10
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BETWEEN MICHAEL BRYAN KELLY
 Applicant

 KATHRYN RAE MCGILL
 Applicant

AND LODGE AT 199 LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Submissions Received 29 July and 5 August 2009

Determination: 17 February 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] Following an investigation the Authority determined the claim brought by each applicant, Mr Michael Kelly and Ms Kathryn McGill, to recover \$14,000 as unpaid salary from the respondent, Lodge At 199 Limited.

[2] The Authority held that neither Mr Kelly nor Ms McGill was an employee within the meaning of the Employment Relations Act 2000 and they were therefore not able to have resolved by the Authority their claims arising from work carried out for Lodge At 199 Ltd.

[3] In accordance with the timetable set by the Authority, submissions were received in relation to costs.

[4] Lodge At 199 Ltd incurred total costs of \$6,266.93 for legal representation during the investigation. The company seeks a “*significant*” award of costs for “*the unnecessary and unjustified expenditure of time, money and resources to defend the action.*”

[5] The principles in relation to awards of costs by the Authority are set out in the Employment Court decision of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808, which was referred to in submissions.

[6] The awarding of costs and level of award are matters of discretion for the Authority under clause 15 of Schedule 2 of the Employment Relations Act 2000. That discretion is to be exercised in a principled way, keeping it in mind that the purpose of costs is to compensate a successful party, such as Lodge At 199 Ltd in this case, and not to punish an unsuccessful party, such as Mr Kelly and Ms McGill. Only in exceptional circumstances will the amount awarded exceed the level of a reasonable contribution towards actual costs.

[7] Exercising the Authority's discretion, I consider that a reasonable contribution to the actual costs incurred by Lodge At 199 Limited should be made by both Mr Kelly and Ms McGill. In bringing this case Mr Kelly was I think well aware that the joint venture he entered into for his and Ms McGills' potential commercial gain, was unlikely to be an employment relationship. He was an unlikely employee.

[8] Although brought as two claims, the problem of each applicant was in essence the same. Mr Kelly argued the case even without Ms McGill at the investigation meeting. The reality was that if his claim had succeeded, hers would have too.

[9] I fix total costs at \$3,400 and order Mr Kelly and Ms McGill to pay half of that sum each to Lodge At 199 Limited.

A Dumbleton
Member of the Employment Relations Authority