

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 118
5563601

BETWEEN STEPHEN McPHERSON
Applicant

A N D CARTER HOLT HARVEY
LIMITED
First Respondent

A N D CARTER HOLT HARVEY PULP
& PAPER LIMITED [now OJI
FIBRE SOLUTIONS (NEW
ZEALAND) LIMITED]
Second Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Lou Yukich, Advocate for the Applicant
Rob Towner, Counsel for the First Respondent
David France, Counsel for the Second Respondent

Submissions Received: 30 March 2016 from the First and Second Respondents
31 March 2016 from the Applicant

Date of Determination: 19 April 2016

COSTS DETERMINATION OF THE AUTHORITY

- A. The applicant, Mr Stephen McPherson is ordered to contribute \$2000 costs and disbursements to the first respondent, Carter Holt Harvey Limited (Carter Holt).**
- B. Mr McPherson is ordered to contribute \$2000 costs and disbursements to the second respondent, Carter Holt Harvey Pulp & Paper Limited (Carter Holt Pulp & Paper).**

- C. The costs awards are to be paid to Carter Holt and Carter Holt Pulp & Paper by Mr McPherson within 21 days of the date of this determination.**

Application for stay of costs investigation

[1] On Sunday, 20 March 2016, Mr Yukich filed an application seeking an adjournment of the Authority's investigation into costs on the basis that the Authority conducted its investigation on the papers "*with the Applicant being afforded no right of reply*". Mr Yukich also sought an adjournment on the basis that on 18 March 2016 the applicant filed a challenge *de novo* in the Employment Court to the Authority's determination of 16 March 2016¹

[2] On 13 November 2015, the Authority issued a direction that it considered the proceeding to be suitable for determination on the papers and set a timetable within which the parties were to file any further applications, affidavits and submissions. Mr Yukich, on behalf of Mr McPherson, confirmed and acted in accordance with the timetable.

[3] With regard to the second reason for seeking an adjournment in respect of costs, namely that there has been a challenge filed to the Authority's decision, this is not in itself a ground for seeking a stay or an adjournment by the Authority of its determination in respect of costs.

[4] As submitted by counsel for Carter Holt Pulp & Paper, if Mr McPherson is dissatisfied with the Authority's costs determination, he has a right to file a challenge to it in the Employment Court.

The Authority's determinations

[5] The Authority has been required to deal with and issue determinations on three occasions in respect of file 5563601.

[6] In its first determination dated 31 July 2015², the Authority determined, in summary, that:

¹ [2016] NZERA Auckland 86

² [2015] NZERA Auckland 227

- (a) The second applicant, the Manufacturing & Construction Workers' Union Inc, had no standing to bring any claims for remedies against Carter Holt and Carter Holt Pulp & Paper;
- (b) Accordingly, the Union was struck out as a party to the proceedings;
- (c) Costs were reserved.

[7] The second determination of the Authority was on 7 August 2015³. In this proceeding, the Union was struck out as a party to the proceedings along with claims for remedies against Carter Holt and Carter Holt Pulp & Paper. The Authority determined that the correct parties to the proceeding were Mr McPherson, Carter Holt and Carter Holt Pulp & Paper. Costs were reserved.

[8] The third determination of the Authority was delivered on 16 March 2016⁴. The Authority determined that Carter Holt had correctly calculated Mr McPherson's annual leave entitlements and Carter Holt Pulp & Paper had correctly applied the Holidays Act 2003 in respect of Mr McPherson's annual leave. Costs were reserved.

[9] In summary, Carter Holt and Carter Holt Pulp & Paper were the successful parties in each of the 3 determinations. On each occasion, costs were reserved by the Authority.

Costs memoranda filed by the parties

[10] Mr Yukich on behalf of Mr McPherson submits that the matter before the Authority should be considered in the nature of a test case and/or substantively a matter of interpretation and on that basis costs should lie where they fall.

[11] Alternatively, in the event that the Authority is not prepared to deal with the costs matter on these bases, Mr Yukich submits that any award should be modest, not more than half of the notional daily tariff of \$3,500 which should be apportioned equally between Carter Holt and Carter Holt Pulp & Paper.

[12] In support of his argument, Mr Yukich argues that no evidence has been produced in support of costs and Carter Holt and Carter Holt Pulp & Paper are substantial companies with significant resources.

³ [2015] NZERA Auckland 235

⁴ Ibid 1

[13] For Carter Holt, Mr Towner seeks costs of \$2,000. Mr Towner submits that despite the significant legal resources and costs incurred dealing with the matters, the Authority's normal approach to costs should be applied.

[14] For Carter Holt Pulp & Paper, Mr France argues that costs of \$4,000 should be awarded. Mr France seeks costs of \$750 for the first determination, costs of \$250 for the second determination and costs of \$3,000 for the substantive determination.

[15] Mr France refers to the unnecessary costs incurred as a result of Mr Yukich's conduct, including the costs incurred in the strike-out application in circumstances where it should have been apparent to the Union that it had no standing to be a party to the proceedings. This was the first determination.

[16] The second determination followed the Manufacturing & Construction Workers' Union Inc and Mr McPherson filing new proceedings on 3 August 2015 under a different, existing file number between the same parties.

[17] The third determination, which was the substantive determination, dealt with an issue which was almost identical to an issue recently determined by the Authority involving a different division (Pulp and Paper Industry Council) of the Manufacturing & Construction Workers' Union Inc and also Carter Holt and Carter Holt Pulp & Paper. This issue was referred to by the Authority in the substantive determination⁵.

The Authority's power to award costs

[18] The Authority's power to award costs arises from Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act). This confers a wide discretion on the Authority to award costs and expenses as it thinks reasonable.

[19] The principles guiding the Authority's approach to costs are well known and do not need to be repeated⁶.

⁵ *ibid* 1 para.[30]

⁶ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808

[20] These principles were recently considered and affirmed by a Full Court of the Employment Court in *Fagotti v Acme & Co Ltd*⁷.

[21] The general principle is that costs follow the event. The respondents were successful in respect of each of the three determinations issued by the Authority and are entitled to a contribution towards their costs.

Determinations made by the Authority ‘on the papers’

[22] Each of the determinations issued by the Authority was “*on the papers*” following agreement to this approach by the parties. Despite the Authority dealing with the issues before it on the papers, it is evident that a considerable amount of work was involved in each of the matters. Comprehensive affidavits and submissions were filed. Mr Towner submits that Carter Holt’s costs were significant. Mr France submits that Carter Holt Pulp & Paper were put to unnecessary cost. It is clear costs of preparation exceeded the Authority’s notional daily tariff.

[23] The normal starting point for costs in the Authority is \$3,500 per day⁸. The current matters before the Authority were dealt with on the papers. There were three matters which the Authority was required to deal with.

[24] Mr Towner referred to two costs determinations by the Authority in which it was held the starting point for the question of costs is \$1,750, which equates to half the daily tariff in the Authority, for a matter determined on the papers⁹.

[25] These determinations are useful guidelines. However, it is necessary for the Authority to make its own assessment of preparation and likely costs in each matter, whether or not determined ‘on the papers’.

Carter Holt’s costs

[26] Mr Towner for Carter Holt seeks a total of \$2000 in costs in respect of the 3 determinations. If the starting point in each case is \$1750, the total for the 3 determinations would amount to \$5250. My assessment is that costs of \$2000 sought by Mr Towner to be reasonable. I make an order accordingly.

⁷ [2015] NZEmpC 135

⁸ *Fifita (aka Bloomfield) v Dunedin Casinos Ltd* [2012] NZERA Christchurch 219

⁹ *Murphy v The Marketing (Recruitment) Team Ltd*[2014] NZERA Auckland 109 and *Blakeney- Williams v O’Brien t/a Caci Clinic Taupo*[2013] NZERA Auckland 486

[27] Mr McPherson is ordered to contribute \$2000 costs and disbursements to Carter Holt within 21 days of the date of this determination.

Carter Holt Pulp & Paper's costs

[28] Mr France seeks costs of \$750 in respect of the first determination, \$250 in respect of the second determination and \$3000 in respect of the third and substantive determination. A total of \$4000 is sought.

[29] No invoices were provided in support of the costs claim. I have no doubt that costs would have far exceeded this amount.

[30] I consider that in the circumstances \$2000 is reasonable and consistent with Carter Holt's costs.

[31] Mr McPherson is ordered to contribute \$2000 costs and disbursements to Carter Holt Pulp & Paper within 21 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority