

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 107
5387989

BETWEEN MIA NELSON
 Applicant

A N D HALDEMAN LLC
 Respondent

Member of Authority: David Appleton

Representatives: Luke Acland, Counsel for Applicant
 Stephanie Dyrberg, Counsel, until 10 May 2013, then
 Dr R Moodie, Counsel, until 5 June 2013, then Miriam
 Elliott, status unknown, for the Respondent

Submissions Received: 4 April 2013 and 22 May 2013 from Applicant; 15 April
 2013 from Respondent

Date of Determination: 11 June 2013

COSTS DETERMINATION OF THE AUTHORITY

Introduction

[1] Ms Nelson was successful in her application to the Authority and remedies were awarded to her as recorded in the Authority's determination dated 19 February 2013. Costs were reserved in that determination, and the parties were invited to agree how costs should be dealt with. In the absence of such an agreement, Ms Nelson was to serve and lodge a memorandum within 28 days of the date of the determination.

[2] In its determination the Authority found that Mr Katavich was not the employer of Ms Nelson. Accordingly, Mr Katavich was removed as a party to the proceedings, and only Haldeman LLC is liable to be considered to contribute to Ms Nelson's legal costs. In this determination, it shall be referred to as *the respondent*. No legal costs have been sought by Mr Katavich in respect of him being

cited as a party by Ms Nelson, but this is probably because he was represented by one of his company's employees.

[3] The respondent was originally represented by Ms Dyhrberg in the costs matter, although, on 10 May 2013, she informed the Authority that her firm no longer represented Haldeman LLC. She informed the Authority that Dr Rob Moodie thenceforth represented Haldeman.

[4] The Authority sought further information from Mr Acland on 10 May 2013, which was provided on 22 May, and the Authority invited Dr Moodie to respond to that further information within seven days. He did not do so and was contacted by the Authority on 31 May asking him to indicate whether he intended to make submissions and, if so, to seek leave to do so out of time. No such application (or indeed any response at all) was received by the Authority. On 10 June 2013, the Authority received a notice from Mr Katavich dated 5 June 2013 that Dr Moodie no longer represented him and Haldeman LLC, and that a new representative, Miriam Elliott, had been appointed. No application was made for leave for Ms Elliott to put in further submissions out of time.

[5] The respondent has had ample time within which to make its representations on Mr Acland's further information, either personally, or through one of its representatives. It would not be just to delay matters any longer because the respondent has chosen to change its representation yet again and, accordingly, this determination is made without the benefit of submissions from this latest representative.

Submissions received

[6] Mr Acland, on behalf of Ms Nelson, originally served and lodged a very short memorandum which the Authority received on 4 April 2013. This was 16 days late, although the Easter weekend did feature as four of those days. Mr Acland sought an order for costs *within the discretion of the Authority member*, reminding the Authority of an order it had made upon the respondent to serve and lodge briefs of evidence by 18 December 2012, and warning it of costs consequences if its failure to do so resulted in the Authority having to adopt a more time consuming approach to the taking of evidence. As it turned out, that approach was not necessary and no costs

consequences flowed from the original tardiness of the briefs of evidence of the respondent.

[7] Ms Dyhrberg submits that no costs should be awarded because Mr Acland's memorandum was lodged out of time. She also argues that, as Ms Nelson has challenged the finding of the Authority that the second respondent was the employer of Ms Nelson, the issue of costs should be stayed as the identity of the employer (and therefore the entity responsible for costs) has not been resolved.

[8] Addressing the matter of the lateness of Mr Acland's memorandum, it would have been courteous for him to have sought leave of the Authority to lodge his memorandum out of time. However, I shall infer from the fact of his lodging late that he seeks such leave. Although no explanation for the lateness was given in the submissions, I shall grant leave as no prejudice has been suffered by the respondent due to the lateness, and the issue of costs is not particularly time critical.

[9] Addressing the second objection, that the identity of the true employer is in dispute, the Authority has made its determination on that issue, and its determination stands until such point as it may be overturned by the Employment Court.

[10] The further information sought from Mr Acland by the Authority was to establish what level of costs he was actually seeking against the respondent, as none had been disclosed in his first memorandum. His second memorandum seeks a contribution of \$5,250, based upon the daily tariff of \$3,500 and the assertion that the investigation meeting took one and a half days.

[11] First, following the principles of *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, costs generally follow the event. Therefore, it is appropriate for the respondent to pay a contribution towards Ms Nelson's costs as she was successful in her substantive claims. However, the Authority must also be satisfied that the costs incurred are fair and reasonable. Unfortunately, even though Mr Acland has indicated what costs he seeks, he does not indicate what costs have been incurred by his client. It is therefore not possible to ascertain whether the costs sought are reasonable in the context of what Ms Nelson has actually been charged by Mr Acland's firm.

[12] Furthermore, whilst I agree with Mr Acland that a daily tariff of \$3,500 is an appropriate starting point in this case, I do not agree that one and half days were

spent in hearing. The first day started at 10.30 am and ended at 3.50 pm. The second day, when Mr Katavich's evidence was taken by telephone, started at 2pm and ended at 3.45 pm. In other words, in total, the equivalent of one full day was taken up by the evidence. I do not accept that the *administration needs* of Mr Acland would have increased that time taken in any substantial way, as is implied by Mr Acland in his second memorandum.

[13] Mr Acland submits, in addition, that extra costs were incurred by the respondent's actions. For example, he states that Ms Nelson led her evidence because the respondent had initially said it would not give any evidence. However, the applicant normally leads evidence first, and it is not understood how Ms Nelson and her witnesses going first would have incurred extra costs.

[14] Furthermore, Mr Acland states that he had *to prepare wider and further for cross examination* because the Authority allowed Mr Katavich to give evidence the following day, when this had not been anticipated. However, immediately prior to the start of the investigation meeting, the Authority had expected Mr Katavich to be present, and to have given evidence, and it is to be supposed that Mr Acland had an equal expectation. He should, therefore, have already prepared his cross examination.

[15] All in all, I do not accept that any uplift is warranted and I believe that a fair and reasonable contribution to Ms Nelson's costs in all the circumstances is the equivalent of one day's normal tariff; namely \$3,500.

Order

[16] I order the respondent to pay to Ms Nelson the sum of \$3,500 as a contribution to her legal costs.

David Appleton
Member of the Employment Relations Authority