

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 71
5388493

BETWEEN WAYNE WOODWARD
 Applicant

A N D TOTALLY BOATING 2004
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Anjela Sharma, Counsel for Applicant
 Sarah Daly, Counsel for Respondent

Investigation meeting: Determined on the papers

Submissions Received: 14 May 2015 from the respondent
 28 May 2015 from the applicant

Date of Determination: 2 June 2015

DETERMINATION No 3 OF THE AUTHORITY

- A. The respondent’s application to lodge its memorandum of costs after the deadline imposed by the Authority’s determination dated 21 March 2014 is declined.**
- B. Costs are reserved.**

[1] By way of a determination dated 21 March 2014¹ the Authority declined Mr Woodward’s application to reopen the Authority’s investigation into the matter which was the subject of its determination dated 11 November 2013².

¹ [2014] NZERA Christchurch 42

² [2013] NZERA Christchurch 231

[2] In its March 2014 determination the Authority reserved costs and directed the parties to seek to agree how costs were to be dealt with. It further directed that if the parties failed to agree within 28 days of the date of the determination, the respondent would have a further 14 days within which to serve and lodge a memorandum of counsel, with Mr Woodward having a further 14 days to serve and lodge a memorandum in reply. Therefore, the respondent had until 2 May 2014 within which to serve and lodge its memorandum seeking costs, if agreement could not be reached.

[3] On 14 May 2015 the Authority received an application for leave to lodge the respondent's memorandum on costs, together with a copy of that memorandum. That application for leave is opposed by Mr Woodward. This determination addresses whether leave should be granted.

[4] Ms Daly's memorandum recites the events leading to the last date for the lodgement of the respondent's memorandum on costs and states that *contrary to the client's instructions Mr Ballantyne failed to file a memorandum on costs*. Mr Ballantyne was counsel acting for the respondent at that time.

[5] Ms Daly states that Mr Ballantyne no longer works for C&F Legal Limited, which firm acts for the respondent. She also states that a review of Mr Ballantyne's file notes and email correspondence indicated that the appropriate memorandum had been lodged with the Authority, but that this has proved not to be the case.

[6] Ms Daly had earlier enquired of the Authority whether it had issued an determination on costs with respect to the reopening application, but a search of the file and the Authority's email system revealed that no submissions had ever been received from Mr Ballantyne, and that there had been no communications from Mr Ballantyne, or C&F Legal about costs until Ms Daly contacted the Authority on 13 April 2015.

[7] Ms Daly states that she is unable to provide any more details of the facts surrounding Mr Ballantyne's failure to lodge the appropriate memorandum, but states that *the omission was his alone, and that [the respondent] should not suffer as a result of it*.

[8] Ms Sharma opposes the application on behalf of Mr Woodward, who has sworn an affidavit in support of that opposition.

The applicable legal principles

[9] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[10] Section 221 of the Act provides as follows:

221 Joinder, waiver, and extension of time

In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—

(a) direct parties to be joined or struck out; and

(b) amend or waive any error or defect in the proceedings; and

(c) subject to section 114(4), extend the time within which anything is to or may be done; and

(d) generally give such directions as are necessary or expedient in the circumstances.

[11] The courts have developed principles to assist them assess whether a party should be granted leave to carry out a step after the time set down for it has expired. In this case, these principles can be summarised as follows:

- (a) The reasons for failure to serve and lodge the costs submissions; for example whether the failure was inadvertent, deliberate, neglectful, or accidental;
- (b) Where prejudice lies in granting or refusing to accept the costs memorandum out of time;
- (c) The substantive merits of the application for costs.

[12] Ms Daly suggests that the words of clause 15(2) of Schedule 2 of the Act give the Authority the discretion to grant the leave she seeks and to determine the issue of costs as if the parties had lodged their memoranda within the time directed. With respect, I do not agree, as the discretion at Clause 15(2) refers to the variation or

alteration of any order relating to the apportioning of costs and expenses between the parties or any of them, and not any direction as to the lodgement of a memorandum on costs. However, I am content that the Authority does have the power to grant leave under s.221 of the Act.

What were the reasons for the failure to serve and lodge the memorandum of costs?

[13] One must be cautious not to jump to conclusions as to why the respondent's memorandum on costs was not lodged with the Authority, and Mr Ballantyne has not been asked to comment, as far as I can ascertain. Ms Daly's submissions state that Mr Ballantyne's file notes indicate that he did prepare and lodge the memorandum. However, it was not received by the Authority. This could have been because of a technical issue, and it is reasonably common that emails go astray or get caught in firewalls.

[14] There is no suggestion by Ms Daly or Ms Sharma that Ms Sharma received the respondent's memorandum on costs, and so one can assume that either Mr Ballantyne did not serve and lodge it or he did, but that it was not received by either the Authority or Ms Sharma.

[15] In summary, it is not possible to ascertain with any certainty whether the failure by Mr Ballantyne was inadvertent, deliberate, neglectful, or accidental. This element of the test is therefore not very helpful in this matter.

[16] One can also only speculate why Mr Ballantyne did not chase up a copy of Ms Sharma's memorandum in reply (which he should have expected her to have served and lodged if she had received Mr Ballantyne's memorandum) or the Authority's costs determination. However, it is not known by the Authority when Mr Ballantyne left the employment of C&F.

[17] However, whilst it is not the respondent's fault that Mr Ballantyne's memorandum did not reach the Authority for whatever reason, it does share some of the responsibility for not following up with its representatives before now in respect of the Authority not issuing its costs determination, which it must have been expecting.

Where does the prejudice lie in granting or refusing to accept the costs memorandum out of time?

[18] In his affidavit, Mr Woodward deposes that he is entitled to move on, and to know that the process is behind him. He states that he should not be the *scapegoat* in a situation that was totally outside of his knowledge and control. He says that the *ongoing saga* has caused him great stress which, at his time of life, is not good for his personal wellbeing and health.

[19] When balancing the prejudice to Mr Woodward of having to face a late costs application against the prejudice to the respondent of not having its costs application accepted, I am mindful that over a year has gone by since the deadline passed for the respondent's costs submissions to be received. Mr Woodward could reasonably have expected a costs determination to have been issued by the Authority by the end of June 2014. If leave were granted, then the Authority's costs determination would be likely to be issued at the end of June 2015, one year later.

[20] Whilst Ms Daly submits that there is no prejudice to Mr Woodward in allowing the costs memorandum to be received late, he is entitled to assume that the matter was closed when no submissions from Mr Ballantyne were received. He must now face the prospect of having to defend the application for costs, which are sought from the respondent on an indemnity basis, in the sum of \$3,565.95. I accept his evidence that he is suffering stress as a result of the matter re-emerging unexpectedly, through no fault of his own.

[21] Clearly, the respondent will also suffer prejudice if it is not allowed to pursue its costs application. However, the respondent is an ongoing business, whereas Mr Woodward is either in retirement or nearing retirement. On balance, I believe that the prejudice to Mr Woodward in allowing the late lodgement of the costs memorandum outweighs the prejudice to the respondent in disallowing it.

The substantive merits of the application for costs

[22] I cannot judge the substantive merits of the application for costs with accuracy, as I have not had the benefit of Ms Sharma's submissions on the matter. However, it is clear that Mr Woodward's application to reopen the investigation was unsuccessful. In such circumstances, costs would be likely to follow the event, and a contribution awarded in favour of the respondent.

[23] However, it is rare that costs are awarded on an indemnity basis in the Authority, and it is doubtful that it would have been in this case.

Conclusion

[24] On balance, I am not in favour of allowing the respondent to lodge its memorandum of costs over one year later than the date that it was due. Time limits are imposed by the Authority for a reason; namely, certainty and closure. Parties are entitled to be able to rely on those time limits, and Mr Woodward would be prejudiced if he now had to face a costs application.

[25] Whilst the respondent would likely have been successful in its costs application against Mr Woodward (albeit not on an indemnity basis) responsibility for the respondent losing that opportunity does not lie with Mr Woodward.

[26] I decline to allow the respondent to lodge its costs memorandum after the deadline imposed in the Authority's determination dated 21 March 2014.

Costs

[27] The defence by Mr Woodward of the respondent's application is likely to have incurred a cost for him. I reserve costs, and invite the parties to seek to agree how they should be dealt with between them. However, if agreement cannot be reached within 28 days of the date of this determination, Mr Woodward shall have a further 14 days within which to apply to the Authority for an order that a contribution towards his costs be made by the respondent. The respondent shall then have a further 14 days within which to reply.

David Appleton
Member of the Employment Relations Authority