IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 217
ARC 90/09

IN THE MATTER OF	a de novo challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to join second defendant
BETWEEN	ZHANPING YANG Plaintiff
AND	L E BUILDERS LIMITED Defendant

Hearing: On the papers

Counsel: R B Hucker, counsel for plaintiff
Rebecca Teirney, counsel for Lawrence Eng Loo

Judgment: 14 December 2012

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

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[1] In her judgment of 29 October 2012,[1] Judge Inglis allowed the plaintiff's challenge to the Employment Relations Authority's determination,[2] which had held that the plaintiff was not an employee. After awarding lost wages and interest as well as compensation, her Honour then dealt with the issue of costs. She noted that the plaintiff had previously applied for orders joining Mr Lu as a party in order for costs to be sought against him personally, but that I had adjourned that application pending determination of the substantive challenge.[3] She invited the plaintiff to indicate whether he was pursuing the application.

[1] [2012] NZEmpC 185.
[2] AA 358/09, 9 October 2009.
[3] [2011] NZEmpC 131.

[2] Counsel for the plaintiff filed a memorandum on 29 November 2012 seeking costs on a party to party basis against the defendant but also advising of the plaintiff's instructions to proceed with the application that I had previously adjourned. It was considered appropriate that before Judge Inglis dealt with the issue of costs, I should deal with the application for joinder.

[3] I note at the outset that in the application for joinder, Mr Lu was referred to as Mr Loo. The latter spelling corresponded to the documents filed in the Company's Register which showed him to be Leong Eng Loo, the sole director of L E Builders Ltd, the defendant in the current proceedings. I shall now adopt the spelling of "Loo", which was the way the plaintiff's application for joinder was worded.

[4] In my reasons for adjourning the application to join Mr Loo as a party until the substantive challenge had been dealt with, I set out the history of the defendant company from when it was removed from the register and then restored at the plaintiff's behest. I also noted that Mr Loo had filed an affidavit which dealt with the merits of the case and explained the reason for the resolution voluntarily winding up the defendant company was because it had been running at a loss. It disclosed that Mr Loo's health was poor and that he was advised there was to be a change in legislation which would require building companies to be run by licensed builders and, although he was experienced, he was not licensed and could not have continued to operate the defendant company. Since the defendant company stopped operating, Mr Loo deposed that he had not worked and was currently in receipt of a benefit and that he, like the plaintiff, was in receipt of legal aid.

[5] The plaintiff sought an order joining Mr Loo, an order for costs relating to his application for joinder and his application for substituted service on Mr Loo, and all the costs associated with the restoration of the defendant company to the register. I recorded that the initial grounds for the application for joinder had been because Mr Loo always had full control of the proceedings, was the real party and had aided and abetted the purported breaches of the plaintiff's employment agreement. The claim of aiding and abetting breach was abandoned as the application for penalty was time barred by s 135(5) of the Employment Relations Act 2000 (the Act).

[6] I recorded that the application for joinder was made under s 221 of the Act and r 4.56 of Part 4, subpart 9 of the High Court Rules. Section 221 of the Act, insofar as it is relevant, provides:

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

[7] I also cited the case both counsel relied on, the Court of Appeal decision in *Kidd v Equity Realty (1995) Ltd.*[4] After referring to s 221, the Court of Appeal stated:

> [12] We accept that the authorities as to High Court awards of non-party costs are not directly applicable because the Employment Court does not have a direct jurisdiction to award costs against a non-party. This is why the respondents sought to have Mr Kidd made a party. But given the broad and untechnical language of s 221, we consider that if an award of costs against Mr Kidd was appropriate, it was within the jurisdiction of the Employment Court to join him as a party for the purpose of making such an award. And of course, fixing costs in these circumstances is necessarily retrospective in character.
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> [13] In short, we are satisfied that there was jurisdiction to join Equity Realty and Mr Kidd as parties. That, however, leaves open the question of whether the joinder was appropriate, which in turn depends on whether orders for costs ought to have been made.

[8] The Court of Appeal determined that it was not an appropriate case for awarding costs against Mr Kidd and also set aside the joinder order for this purpose, as not being appropriate. I noted that counsel in the present case, confronted with this requirement, submitted a costs order at this stage would be appropriate because, on the reasoning of the Court of Appeal in *Kidd*, Mr Loo could then be joined as a party. In effect this made the application for joinder an application for an award of costs against a non-party.

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[4] [2010] NZCA 452.

[9] I observed that there were difficulties because of the effect of cl 19 in schedule 3 in the Act which provides:

> **19 Power to award costs**
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> (1) The court in any proceedings may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the court thinks reasonable.
>
> (2) The court 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] I therefore concluded that before Mr Loo could be made a party so that costs could be awarded against him, it would have to be appropriate for such a costs order to be made. At the point of joinder he would cease to be a non-party.

[11] I observed that it was only if the plaintiff was successful in establishing that he was a party to a contract of service that he could then have his claim that he was unjustifiably dismissed dealt with. The plaintiff was successful in that aspect of the challenge.

[12] There was then required to be evidence that it was the actions of Mr Loo in relation to a tax code declaration that would justify the application for costs against Mr Loo. At that stage, I had sympathy with both parties and saw the matter as finely balanced. I concluded it was not appropriate to join Mr Loo as a party because of the reservations expressed by the Court of Appeal in *Kidd*, until the outcome of the substantive challenge.

[13] I have considered the judgment of Judge Inglis and the factual findings she made. The defendant was not represented at the hearing. The Judge accepted the plaintiff's evidence that he had raised the issue of his employment status with Mr Loo and that some time later he was asked to sign a form by Mr Loo's secretary. The judgment records the report by the Document Examination Section of the New Zealand Police on the form the plaintiff signed. The report supported his evidence that he did not fill in the form, other than his signature, and that he was unaware of what it said. The judgment records that the plaintiff was directed by Mr Loo and the

foreman as to the work he performed and that on 30 August 2008 the plaintiff and another employee were called to a meeting by Mr Loo and both were advised not to come back the following week.

[14] Her Honour found that the real nature of the relationship between the plaintiff and the defendant company was that of employer and employee and that the dismissal was unjustified. There appeared to be no question that the employer was the defendant company and not Mr Loo. There is nothing in the judgment to suggest that Mr Loo was not acting at all times in his capacity as a director of the company and not in a personal capacity. There was no express finding of impropriety against him which would have justified his joinder.

[15] In these circumstances, I consider it would not be appropriate for an order of costs to have been made against Mr Loo personally. On the basis of the *Kidd* decision, it is therefore not appropriate for him to be joined as a party to these proceedings, solely for the purposes of costs. The application for joinder is therefore dismissed.

[16] Costs are reserved.

B S Travis
Judge

Judgment signed at 3.45pm on 14 December 2012