

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 44/09  
ARC 77/09**

IN THE MATTER OF            a challenge to a determination of the  
   Employment Relations Authority

AND IN THE MATTER OF    an application for joinder

BETWEEN                      ECOCOVER (NZ) LIMITED  
   First Plaintiff

AND                              MURRAY LESLIE CRUICKSHANK  
   Second Plaintiff

AND                              PHILIP LOUIS DUNN  
   Defendant

Hearing:            30 November 2009  
                                 (Heard at Auckland in Chambers)

Appearances: SH Barter, Counsel for Plaintiff  
                                 Lawrence Ponniah, Counsel for Defendant

Judgment:        30 November 2009

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**ORAL INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN**

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[1]     The plaintiff, a private company, applies to join, as another plaintiff in its challenge to a costs determination of the Employment Relations Authority, its managing director who was an original named party in the Authority. That application is opposed by Philip Dunn although it was Mr Dunn who originally nominated the director, Murray Cruickshank, as a party in the Authority and sought relief against him in that forum.

[2]     Mr Dunn's claim was for payment of a bonus said to be due to him by EcoCover (NZ) Limited (ENZ). Mr Dunn also claimed against Mr Cruickshank personally for penalties for breaches of the Wages Protection Act 1983 and for

breaches of the requirements of good faith behaviour contained in the Employment Relations Act 2000 (“the Act”). Mr Cruickshank attempted to persuade Mr Dunn to abandon those claims against him personally but it was only on the day of the Authority’s meeting and at the prompting of the Authority Member that these claims against Mr Cruickshank were withdrawn. Unfortunately there is no transcript of the Authority’s investigation meeting and the matter is not dealt with expressly in the Authority’s substantive determination issued on 14 July 2009 (AA 230/09). The outcome was described by the Authority in its costs determination as a withdrawal of the claims against Mr Cruickshank by consent. Counsel present at the investigation meeting, Mr Barter, assured me that the withdrawal of the claims against Mr Cruickshank personally was subject to the express reservation of costs.

[3] Following the Authority’s investigation, it found for ENZ on the remaining substantive issues before it.

[4] Both ENZ and Mr Cruickshank applied for costs in the Authority. Its determination made no mention of Mr Cruickshank’s liability for separate costs and he is not included in the entitling. The Authority did not go so far as to say that he had been formally discharged as a party.

[5] The Authority’s determination on costs, which is the subject of the challenge, was issued on 27 August 2009 (AA 230A/09). The Authority concluded:

*[12] Mr Cruickshank and ENZ were put to unnecessary cost in preparing to defend [themselves] from those allegations. Since I am unable and have not been asked to separate Mr Cruickshank’s costs from those of ENZ (whose key witness is Mr Cruickshank), I have taken this factor into account in the context of an award in favour of ENZ.*

...

*[19] ... I accept that the extent to which irrelevant evidence was produced in an attempt to impugn Mr Cruickshank’s credibility should sound in costs.*

...

*[21] ... I find ENZ is entitled to an award of costs in its favour. The weight I have given the factors just discussed leads me to make an award at the Authority’s notional daily rate, rather than to find costs should lie where they fall.*

*[22] Mr Dunn is therefore ordered to contribute to ENZ’s costs in the sum of \$3,000.*

[6] It is not appropriate for me to examine or determine the substantive issues between the parties on this challenge.

[7] The defendant's grounds for opposing Mr Cruickshank becoming a second plaintiff include, first, that there is no determination of the Authority relating to him that can be the subject of challenge to the Employment Court. I do not agree. The foregoing passage illustrates that Mr Cruickshank was a named participant in the proceeding that, in respect to costs, is now the subject of a challenge. That Mr Cruickshank may not have been named as a party in the Authority's entitling is, in my view, erroneous and is not a sustainable ground for opposing the application now before the Court.

[8] The second ground of opposition is that Mr Cruickshank and indeed his company ENZ were out of time for challenging the Authority's determination on costs. That is not to the point. The challenge to the Authority's determination of 27 August 2009 is within time and there is no time restriction upon making this application to join an additional party. ENZ and Mr Cruickshank say that the Authority failed erroneously to award costs to Mr Cruickshank and, separately, made an insufficient award to the company.

[9] Third, Mr Dunn says that the claim against Mr Cruickshank was discontinued before the Authority issued its determination on 27 August 2009. That is correct insofar as it goes but simply discontinuing a claim against a party does not extinguish that party's entitlement to costs unless the discontinuance is expressly on such terms. There is no suggestion of that in this case.

[10] Finally, Mr Dunn says that the Authority's determination of 27 August 2009 confirms that it was not requested to determine separately costs in relation to Mr Cruickshank. Further, and in any event, Mr Dunn says that the determination of 27 August 2009 includes reference to any separate liability to Mr Cruickshank and rejects this. That is, however, a matter for substantive determination. At issue now is whether Mr Cruickshank is entitled to be a named party to the challenge for the purpose of advancing his own claim to costs against Mr Dunn which the Authority declined to award.

[11] As I have already indicated, it is regrettable, in my view, that the Authority's determinations were entitled so as to show the company as the only respondent. An agreement had been reached at the investigation meeting not to pursue claims against Mr Cruickshank personally but that did not mean that he was no longer a party to the proceeding, even if just for costs' purposes. The failure to include Mr Cruickshank's name in the entitling to the determinations may, in turn, have caused the Registry of this Court to decline to accept proceedings with Mr Cruickshank identified as a separate plaintiff as I find he is entitled to be and indeed should always have been.

[12] The law governing this application is contained in s221 of the Act 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.*

[13] It is in the interests of justice to rectify that position now and I do so by formally joining Murray Leslie Cruickshank as second plaintiff. The entitling to these proceedings must henceforth include Mr Cruickshank in that capacity.

[14] The plaintiffs will now need to file and serve an amended statement of claim which should be done within the next 7 days. Mr Dunn may then have until 4 pm on Wednesday 23 December 2009 to file and serve a statement of defence to those amended proceedings. The matter can then be set down for a call-over in the new year. Counsel for the parties may care to give some consideration, for economic if for no other reasons, to dealing with the substantive issues by written submissions rather than at a hearing, although to have a hearing is of course their choice.

[15] Mr Cruickshank would normally be entitled to costs on this application but in view of circumstances this morning that made Mr Ponniah's attendance at court less than economic for his client, I think the most just course is to let costs lie where they fall today.

GL Colgan  
Chief Judge

Judgment delivered orally at 11.11 am on Monday 30 November 2009