IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 76
5352432

	BETWEEN	GORAN MARSIC Applicant
	A N D	BODY CORPORATE 198245 (THE RIDGE) Respondent

Member of Authority:	Rachel Larmer
Representatives:	Te Kani Williams, Counsel for Applicant Tim Rainey, Counsel for Respondent
Submissions Received:	3 February 2012 from Respondent 24 February 2012 from Applicant
Date of Determination:	29 February 2012

COSTS DETERMINATION OF THE AUTHORITY

A. Mr Goran Marsic is ordered to contribute $3,000 towards the legal costs incurred by Body Corporate 198245 (the Ridge).

[1] In a determination dated 09 December 2011[1] the Authority held that the applicant was not an employee, so it did not have jurisdiction to hear his dismissal grievance.

[2] The parties were encouraged to resolve costs by agreement, and failing that a timetable was set for costs to be dealt with by an exchange of memoranda. The original timetable was extended on application of the respondent to accommodate the intervening Christmas break. The applicant's subsequent request for a short extension of time within which to file his costs submissions was also granted.

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1 [2011] NZERA Auckland 522

[3] Costs usually follow the event and there is no reason to depart from that general principle, so the respondent as the successful party is entitled to a contribution towards its actual legal costs.

[4] The respondent said its actual legal costs were $11,501.45[2] and it sought full indemnity costs on the basis that the applicant's claim was wholly without merit.

[5] I find that this is not an appropriate case for indemnity costs.

[6] The Court of Appeal in *Bradbury v Westpac Banking Corp*[3] held that indemnity costs "*are exceptional and require exceptionally bad behaviour"*. The Court of Appeal's decision identified a number of non-exhaustive categories of circumstances in which indemnity costs have been ordered, none of which are relevant to this matter.

[7] I find that the applicant has not engaged in any behaviour which would warrant an award of indemnity costs.

[8] The general principles for awards of costs in the Authority were set out by the Full Employment Court in the leading case of *PBO Limited (formerly Rush Security Limited) v Da Cruz*[4]. These principles are so well known that I have not set them out here, suffice to say I have been guided by those well recognised principles when assessing the amount of costs which should be awarded in this case.

[9] I consider it appropriate to adopt the Authority's usual tariff based approach to costs in respect of this matter. This approach involves adopting a notional daily tariff which is then adjusted, in a principled way, to reflect the particular circumstances of this matter in order to meet the justice of the case.[5]

[10] I accept Mr Williams' submission that the respondent's invoices for legal fees include the cost of mediation prior to the Authority's investigation meeting as well as attendances relating to settlement negotiations. The respondent is not entitled to an award of costs for these matters.

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2 Invoices were submitted in support of this amount
3 [2009] NZCA 234
4 [2005] ERNZ 808
5 *Carter Holt Harvey v Eastern Bays Independent Industrial Workers Union & Ors* [2011] NZEMPC 13

[11] The respondent has also claimed $499.39 as an administration fee without any explanation of what this fee consists of, whether it relates to disbursements which have actually been incurred, or why such disbursements were reasonable and necessary.

[12] The onus is on a party seeking to be reimbursed for disbursements to fully and properly explain to the Authority what each disbursement it has claimed related to and why it was properly incurred. The respondent has failed to do so, so I make no order regarding disbursements.

[13] The investigation of this matter took 6¼ hours, which is slightly less than the time incurred during a normal full one day investigation. To recognise that, I have decided to adopt a notional daily tariff of $2,500 as a starting point.

[14] I turn now to consideration of a principled adjustment to that notional daily tariff and find that there are no factors which would warrant an increase to it.

[15] In terms of factors which would warrant an increase to the notional daily tariff, the respondent submitted that the applicant unreasonably rejected a reasonable settlement offer which was made on 15 September 2011[6] which proposed that the respondent would not seek costs if the applicant withdrew his claim.

[16] I consider that that was a reasonable offer made sufficiently in advance of the investigation meeting for the applicant to have adequate time to consider it. If it had been accepted then both parties would have been better off because they both would have avoided the additional costs associated with attending the investigation meeting and preparing submissions post the investigation, as well as the costs associated with this costs application.

[17] It is therefore appropriate to increase the notional daily tariff to $3,000 to reflect the applicant's unreasonable refusal of the respondent's realistic settlement offer.

[18] I do not accept Mr Rainey's submission that there was no evidential basis for the applicant's claim. The respondent had provided the applicant with a number of communications which used the word "*employment*" in connection with his work

[6] The Authority's investigation meeting was held on 20 September 2011.

situation and I consider that influenced the applicant's decision to challenge the respondent's claim that he was an independent contractor. I consider that the respondent bears the responsibility for sending the applicant misleading communications regarding his work situation.

[19] I also reject the respondent's claim for two days' preparation time. This was a straightforward preliminary matter which involved well established legal principles. There is no basis to justify an award of preparation time.

[20] I consider that an award of costs in favour of the respondent of $3,000 is appropriate in light of the particular circumstances of this matter.

[21] Accordingly, I order Mr Marsic to contribute $3,000 towards the respondent's legal costs.

Rachel Larmer
Member of the Employment Relations Authority