

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 19
5378488

BETWEEN SANJEEV KUMAR
 Applicant

AND USHA FOOD LIMITED trading
 as GARAM MASALA INDIAN
 RESTAURANT
 Respondent

Member of Authority: Michele Ryan

Representatives: No appearance by or on behalf of the Applicant
 Ross Jamieson for the Applicant

Submissions received: 14 February 2013 for the Applicant
 1 February 2013 for the Respondent

Determination: 18 February 2013

COSTS DETERMINATION OF THE AUTHORITY

Application for costs

[1] Despite the applicant's failure to attend a meeting convened for the purpose of investigating his claims, I found in a determination dated 14 January 2013 that the applicant's claims as regards outstanding statutory holiday pay were accepted and the respondent was ordered to pay the applicant \$188.50 minus PAYE.

[2] However the applicant's claim of an unjustified dismissal was not upheld in circumstances where his claim was not supported by sworn or affirmed evidence, and that claim was dismissed. The investigation meeting was concluded within two and a half hours. Costs were reserved.

[3] The respondent seeks an order for \$1,500 as contribution to costs associated with a day's preparation and attendance by his representative. However I was not

provided with any information which evidenced the sum of costs incurred by the respondent.

[4] The respondent acknowledges that the applicant was in receipt of a grant of legal aid but submits there are exceptional circumstances which warrant an order for costs. The respondent says that its director and representative attended mediation and made a reasonable offer to settle the matters between the parties. It also says that the respondent was obliged to sell its business at a financial loss but despite these extenuating circumstances it appropriately engaged representation and at all times complied with the Authority's directions.

[5] I understand the inferences to be taken from the respondent's submissions are that the applicant was unreasonable to refuse the respondent's offer during mediation and further that the applicant's refusal resulted in unnecessary costs associated with preparation and attendance before the Authority.

[6] The respondent also submits that it had conceded in its statement in reply dated 19 September 2012 that it had not paid monies as regards the applicant's entitlement to payment for statutory public holidays. The inference I take from this submission is that the respondent accepted liability for the legitimate claims relating to holiday pay prior to the investigation meeting and therefore should not have been required to incur costs associated with the investigation. However it was not explained in the statement in reply or at the investigation meeting why the respondent had not paid the applicant his entitlement to the various claims for statutory holiday pay prior to the investigation meeting when it had accepted these monies were due.

[7] Counsel for the applicant provided submissions in reply and advised that he had been unable to obtain instructions from the applicant but reiterated previous advice that the applicant was legally aided.

[8] Counsel for the applicant also took issue with the respondent's submission that it had complied with the Authority's process and noted the respondent's statement of reply was filed late, was out of time and provided only at the urging of the Authority.

Analysis and determination

Do exceptional circumstances exist?

[9] Section 45(2) of the Legal Services Act 2011 provides:

No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.

[10] In *Awa v Independent News Ltd* [1996] 2 NZLR 184 the High Court found that there was no intrinsic test for the phrase “*exceptional circumstances...*” The Court determined that each case needed to be considered on its own merits.

[11] Six weeks’ prior to the investigation meeting counsel for the applicant advised the Authority and the respondent’s representative that efforts to contact the applicant had been unsuccessful and that there was some doubt that he may attend the investigation but that without the applicant’s instructions the matter could not be withdrawn. The respondent was advised by the Authority that should the applicant present himself on the day of the investigation a request for an adjournment would likely be granted if requested. I consider the respondent had an opportunity to manage its costs which it did, for example; it did not file statements of evidence.

[12] Although I regard it as unusual for an applicant to not attend an investigation scheduled to investigate his or her claims I do not assess the applicant’s conduct in this matter as conduct which caused the respondent unnecessary costs and gives rise to a claim of exceptional circumstances.

[13] As regards the respondent’s inference that the applicant was unreasonable to accept its offer during mediation I am unwilling to consider information in respect of discussions and/or offers made in the confines of a confidential mediation conference and those aspects of the respondent’s submissions which refer to the content of mediation have not been considered.

[14] Having considered all the circumstances I am not persuaded to grant an order in favour of the respondent for contribution to costs where it has not provided any information as to what costs were incurred and where I have not found that the

applicant's conduct increased the costs of the respondent such that an award should be made against him.

[15] Finally, whilst the applicant was unsuccessful in his claim for a personal grievance, it appears he was required to continue to pursue his claims for payment of statutory holiday entitlements to obtain an order from the Authority to have the respondent to comply with its accepted statutory obligations pursuant to the Holidays Act 2003. In all the circumstances I consider this is a matter where costs should lie where they fall and I decline to make an order for costs in favour of the respondent.

Michele Ryan
Member of the Employment Relations Authority