

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 10
5454005

BETWEEN JOSEPH DEWES
 Applicant

AND MAP UPPER HUTT LIMITED
 trading as AUTO SUPER
 SHOPPE MAIDSTONE
 Respondent

Member of Authority: Michele Ryan

Representatives: Anthony Lyons, for the Applicant
 Ruory Fairbrother on behalf of the Respondent

Submissions received: 5 November 2015 on behalf of the Applicant
 30 November 2015 on behalf of the Respondent
 1 December 2015 ‘In reply’ on behalf of the Applicant

Determination: 20 January 2015

COSTS DETERMINATION OF THE AUTHORITY

[1] Following a determination¹ which found Mr Joseph Dewes was owed arrears of wages and had been unjustifiably dismissed, the parties have filed memoranda as to the issue of costs.

[2] Mr Anthony Lyons, who assisted Mr Dewes at the Authority’s investigation, initially sought \$7,000 as contribution to Mr Dewes’ costs.² In ‘Final Submissions’ Mr Lyons now seeks full costs of \$10,785.59³ including the filing fee.

[3] The respondent is no longer represented by counsel. It says prior to the Authority’s investigation Mr Lyons adopted a combative approach which precluded it from reasonably resolving the matter. It says a contribution should be made to its costs in all the circumstances.

¹ *Dewes v MAP Upper Hutt Ltd t/a Auto Super Shoppe Maidstone* [2015] NZERA Wellington 81

² Contained in his ‘Application for Costs on behalf of the Applicant’ received on 5 November 2015

³ On 7 December 2015

The law

[4] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act.

[5] The Authority's discretion to order costs and the quantum of any award must be exercised in a principled and not arbitrary way. The Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*⁴ set out a range of principles to guide the Authority when assessing a costs application. I have not restated these in full, however relevant to this matter the following tenets apply:

- costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award;
- it is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- costs generally follow the event;
- costs will be modest;
- frequently costs are judged against a notional daily rate.

[6] The Authority's current notional daily tariff is \$3,500 per day of investigation. There is then a discretion for the Authority to raise or lower the tariff depending on the circumstances of the matter and applying the principles set out above.

Discussion

[7] The investigation occurred over two days. The first day of the investigation lasted between 10am and 3pm and second day of investigation took a full day. The claims were not legally complex.

[8] I accept that not all of Mr Dewes' claims were successful but his main applications of unjustifiable dismissal and arrears of wages were upheld and it is

⁴ [2005] ERNZ 808

appropriate that costs fall in his favour, subject to other factors set out in this determination.

[9] Relevant to the circumstances of this matter the Authority needs to assess:

- (a) whether full costs should be awarded;
- (b) whether the conduct of either party should impact on an order for costs
- (c) what are the applicant's costs and what is a reasonable contribution to costs

Should full costs should be awarded?

[10] Mr Dewes' request for full recovery of costs is, in effect, an application for indemnification.

[11] It is not the practice of the Authority to make orders reimbursing a successful party a sum equal to all costs sustained in bringing or defending claims. Costs in the Authority are modest. The fundamental purpose of awarding costs is to enable the successful party to recover a proportion of costs expended on representation at proceeding. No information was provided by Mr Lyons as to why the sum sought to address costs was increased over the course of providing submissions on the matter. Indemnity costs are rare and require exceptionally bad behaviour.⁵ There is nothing that I can identify in this matter that warrants the imposition of indemnity costs and I decline to do so.

Whether the conduct of either party should impact on an order for costs?

[12] Submissions for each party was highly critical of the other, particularly as regards the way Mr Dewes' claim for arrears of wages was progressed, and the respondent's decision to defend that claim. Neither argument leads me to consider uplifting or decreasing the daily tariff. It is clear that that there were genuine differences between the parties on all matters, which in the absence of the parties reaching prior agreement, needed to be determined by the Authority. Those issues have been decided in the substantive determination and it is not appropriate to make further orders with respect to the parties' differences in a costs determination.

⁵ *Bradbury & Ors v Westpac Banking Corporation* [2009] NZCA 234

[13] The respondent notes that Mr Dewes was unsuccessful with his claim in respect to issues around KiwiSaver.⁶ I accept the respondent had to spend time addressing those allegations however those matters did not occupy such a substantial portion of the investigation to justify a decrease to an award of costs.

What are the applicant's costs and what is a reasonable contribution to costs?

[14] The next question is whether the applicant's costs were reasonable.

[15] Mr Lyons' Final Submissions sets out the costs he says Mr Dewes accrued as in the following way:

\$71.56	<i>Application to the Employment Relations Authority</i>
\$2,083.10	<i>Morrison Kent, 28 August 2014</i>
\$1,230.93	<i>Morrison Kent, 26 September 2014</i>
\$4,250.00	<i>Anthony Lyons, 31 December 2014</i>
\$3,150.00	<i>Anthony Lyons, 07 December 2015</i>
<u>\$10,785.59</u>	

[16] Dealing firstly with the costs associated with Mr Lyons.

[17] During the Authority's substantive investigation Mr Lyons acknowledged he had not appeared in the Authority before. He advised he was an experienced businessman and his involvement with Mr Dewes' employment relationship problem arose through friendship with Mr Dewes' family. The implication was that his assistance to Mr Dewes was not in a business capacity where professional services were provided in exchange for remuneration.

[18] In 'Final Submissions' Mr Lyon's advised that his costs were \$7,400. Given Mr Lyons' portrayal of the relationship between himself and Mr Dewes I have reservations about this aspect of his application. Even if I accept that there was an agreement between Mr Dewes and Mr Lyons for representation in exchange for financial consideration Mr Lyons did not supply copies of any invoices he provided Mr Dewes with or request for payment. A party is not entitled to an award of costs unless costs have actually been incurred. Nor did Mr Lyons provide any information about what work he undertook, his charge out rate, or what time was apportioned to perform any activities. In this respect there is no means to fairly identify which actions were undertaken by Mr Dewes, or alternatively Mr Lyons, in preparation for

⁶ I found Mr Dewes had not raised a personal grievance in regards to this matter

the Authority's investigation.⁷ Those omissions have impeded my ability to assess the reasonableness of this aspect of costs sought and I am unwilling to speculate whether or any sum is appropriate. Accordingly I decline to award costs that correspond to Mr Lyons.

[19] Dealing next with costs associated with the law firm Morrison Kent. Mr Lyons furnished two invoices addressed to Mr Dewes which evidence professional attendance was undertaken in regards to his application to the Authority and consideration of the respondent's response and documentation. The invoices were not fulsomely detailed but I am sufficiently satisfied that costs of \$3,314.03 were incurred. I consider it appropriate that the respondent should contribute \$2,750 to those costs.

[20] Mr Dewes has applied for the fee associated with filing his matter in the Authority. This disbursement should be reimbursed by the respondent.

Order

[21] Pursuant to Section 15 of Schedule 2 of the Employment Relations Act I order MAP Upper Hutt Limited trading as Auto Shoppe Maidstone pay Mr Joseph Dewes the sum of \$2,750 as a contribution towards his costs and \$71.56 as the cost of the filing fee.

Michele Ryan
Member of the Employment Relations Authority

⁷ For example, the statement of problem (and subsequent amendments) were written in the first person which leads me to conclude that documentation was drafted by Mr Dewes