

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 238  
5516209

BETWEEN JOSUE DOMINGO  
Applicant

AND MENG SUON and NGAN  
HENG trading as TOWN &  
COUNTRY FOODS  
Respondent

Member of Authority: Andrew Dallas

Representatives: Nathan Santesso, Advocate for the Applicant  
Michael Meyrick, Counsel for the Respondent

Determination: 12 July 2016

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] In *Josue Domingo v Meng Suon and Ngan Heng trading as Town and Country Foods*<sup>1</sup> (the determination), I made various findings and orders.

[2] Paragraph [48] of the determination, stated:

Costs

[48] As Mr Domingo was represented on a “pro bono” basis, there is no order for costs. However, Town and Country must reimburse Mr Domingo \$71.56 being the Authority’s filing fee.

[3] Despite this, Counsel for Meng Suon and Ngan Heng trading as Town and Country Foods (Town and Country) applied for costs against Mr Domingo for failure by him and his representative to attend mediation.

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<sup>1</sup>[2016] NZERA 170

[4] Mr Domingo opposed this application and sought costs himself for responding to it. By this stage, Mr Domingo was no longer being represented “pro bono” by his advocate and was now a fee-paying client.

### **Parties’ submissions on costs**

#### *Town and Country*

[5] Town and Country says the failure of Mr Domingo and his representative to attend mediation on 13 October 2014 caused it to incur costs of \$2792.00 (including travel and legal costs) and these should be reimbursed by Mr Domingo.

[8] Town and Country’s solicitor set out his concerns about Mr Domingo’s failure to attend mediation in a letter to the Authority dated 14 October 2014. This letter stated that Town Country “cannot seek costs for the failed mediation”.

[9] By letter dated 16 October 2014, Mr Domingo’s then representative acknowledged the failure to attend the mediation. Evidently this was the result of a “double booking”.

#### *Mr Domingo*

[10] Mr Domingo sought \$900.00 for preparing his response to Town and Country’s costs application. He also sort to re-litigate his claim for travel costs associated with the investigation meeting, which were previously declined in the Authority’s substantive determination.

### **Power to award costs**

[11] The power of the Authority to award costs arises from cl 15 of sch 2 of the Employment Relations Act 2000 (the Act) which states:

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable
- (2) The Authority 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.

[12] The approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Ltd v Da Cruz*<sup>2</sup> and *Fagotti v Acme & Co Limited*.<sup>3</sup>

## **Discussion**

### *Town and Country's claim*

[13] As a general rule costs are not available for mediation.<sup>4</sup> Town and Country's correspondence of 14 October 2014 accepted this.

[14] Two possible exceptions may be relevant: if the default by one party in respect of the mediation falls within a category of "aggravated" circumstances<sup>5</sup> or where there has been a serious breach of good faith by a party directed to mediation under s 159(2) of the Act. Neither was the situation here. The failure to attend the first scheduled mediation was not established to be anything other than, at worst, a mistake and not a breach of good faith.

### *Mr Domingo's claim*

[15] Mr Domingo's claim for costs was unexpected given the fact he was previously represented by his Advocate on a "pro bono" basis. The basis of this change in relationship was not explained. The amount claimed also appeared too much given the short memorandum Mr Domingo lodged about costs.

## **Result**

[16] The applications for costs by both parties are declined.

Andrew Dallas  
Member of the Employment Relations Authority

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<sup>2</sup>[2005] 1 ERNZ 808

<sup>3</sup>[2015] NZEmpC 135

<sup>4</sup>*Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 935, 937 and *Naturex Limited v Rogers* [2011] NZEmpC 9 at [16]

<sup>5</sup>*Real Cool Ltd v Gunfield* [2009] NZEmpC 127 at [3]