

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 87
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, Advocate for the Applicant Ruory Fairbrother, on behalf of the Respondent
Further submissions	15 June 2016 from the respondent 30 June 2016 from the applicant
Determination:	25 July 2016

COSTS DETERMINATION OF THE AUTHORITY (No 2)

[1] On 20 January 2016 I issued a costs determination.¹ That determination was based on two written submissions from the applicant's representative Mr Anthony Lyons, as well as the respondent's submissions.

[2] Mr Lyon's initial submissions furnished invoices for costs of \$3,314.03 accrued as a result of obtaining legal advice from a third party. No detail as to his costs was provided other than to assert a total sum for his services. Mr Lyon's later submissions 'in reply' attached additional invoices but these were overlooked by the Authority.

[3] Should Mr Lyon's appear in the Authority again I recommend he ensure that all relevant documentation he wishes to rely upon, including invoices, be placed

¹ *Dewes v MAP Upper Hutt Limited trading as Auto Super Shoppe Maidstone* [2016] NZERA Wellington 10

before that Authority at first instance and so that the other party is able to view the material and have an opportunity to comment.

[4] Mr Lyon's subsequently wrote to the Authority advising that he had sent electronic copies of invoices which reflected the costs incurred.

[5] On 15 February 2016 the Authority advised the parties that the costs determination of 20 January 2016 would be stayed to allow the respondent an opportunity to address those matters.

[6] Clause 15(b) of Schedule 2 to the Employment Relations Act provides:

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.

[7] The parties have each now had further opportunity to provide submissions on Mr Lyon's invoices and application for costs.

Discussion

[8] 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 In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*³ the Employment Court set out a range of principles to guide the Authority when assessing a costs application. I have not restated these in full, but have referred to the relevant principles where applicable to this determination.

[9] The applicant was largely successful in establishing his claims. Costs should follow that event. It remains unclear whether Mr Lyon's is seeking full reimbursement of all costs incurred (in effect indemnity costs of \$10,714). In my previous determination I noted that it is not the practice of the Authority to order full reimbursement of all costs associated with bringing a claim unless, in commencing, continuing or defending a proceeding, the unsuccessful party has engaged in exceptionally bad behaviour. I am satisfied that the parties held genuine differences over matters claimed by the applicant and this is not a case where it would be appropriate to award costs on an indemnity basis.

² Clause 15(a) of Schedule 2 of the Employment Relations Act.

³ [2005] ERNZ 808

[10] Turning to whether Mr Dewes' costs were reasonable, I have now viewed the additionally furnished invoices totalling \$7,400 which reflect Mr Lyon's direct services to the applicant and which appear to have been (partially) paid.

[11] The respondent points to some activities itemised in Mr Lyon's invoices that relate to events prior to the preparation and lodging of Mr Dewes' statement of problem, and also to exchanges between the parties after the substantive determination was issued. I agree it is not appropriate that those matters be included in an evaluation of costs expended to progress Mr Dewes' claims before the Authority.

[12] There have been further difficulties in assessing the reasonableness of costs incurred where the quantum of time spent in preparation for the Authority's investigation had not been properly particularised or separated from those activities not relevant to my assessment.

[13] Nevertheless, I am unwilling to conclude that the total sum of costs asserted is so out of proportion to similar matters before the Authority that I could objectively regard them as unreasonable.

[14] I have considered the circumstances of the substantive investigation meeting the relevant costs principles, including that a unsuccessful party is generally required to contribute to a successful parties' costs and that the Authority's notional daily tariff, currently set at \$3,500 per full day of investigation, is a useful starting point to assess costs.

[15] Mr Dewes' claims were not legally complex. The investigation meeting was conducted over a day and a half.⁴ In the absence of good reasons to uplift or decrease the tariff I consider \$5,000 is an appropriate contribution towards costs. I am unwilling to make an order of costs associated with this application where no information as to expenditure has been provided.

Order

[16] Pursuant to Section 15 of Schedule 2 of the Employment Relations Act the order contained at para [21] in the costs determination of 20 January 2016⁵ is by this

⁴ Including meal and tea breaks, and for the parties to discuss possible terms of settlement

⁵ Ibid at n.1

determination varied as follows: MAP Upper Hutt Limited trading as Auto Shoppe Maidstone is to pay Mr Joseph Dewes the total sum of \$5,000 as a contribution towards his costs and \$71.56 as the cost of the filing fee.

Michele Ryan
Member of the Employment Relations Authority