

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 134
3204679

BETWEEN DAVID CRICHTON
Applicant

AND DIG & TIP EARTHWORKS
LIMITED
First Respondent

AND SELWYN LANCE
TORRANCE
Second Respondent

Member of Authority: Natasha Szeto

Representatives: Saadi Radcliffe, counsel for the Applicant
Selwyn Torrance for the First Respondent

Submissions received: 1 December 2023 from the Applicant
Nil from the Respondents by 30 January 2024

Date: 6 March 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] On 20 November 2023, I issued a determination¹ in which I concluded Dig & Tip Earthworks Limited (Dig & Tip) had failed to comply with two clauses of a Record of Settlement it had entered into with its former employee, David Crichton.

¹ *Crichton v Dig & Tip Earthworks Limited* [2023] NZERA 688.

[2] In that determination, I referred to the Authority's usual practice of applying the daily tariff to determine costs and the parties were encouraged to resolve any issue of costs between them. They have been unable to do so.

[3] Mr Crichton lodged and served a Memorandum of Costs dated 1 December 2023. The Memorandum relates to the costs incurred on the substantive matter only. There is now also an Application to the Authority for Compliance Orders against Mr Torrance (and associated costs), which is the subject of a separate proceeding.

[4] Mr Crichton seeks an award of between \$8,000 and \$10,000 plus GST, plus the filing fee of \$71.55 and a further contribution to costs incurred on the costs application. Through his counsel, Mr Crichton says actual costs incurred were approximately \$15,000 plus GST on a time-recorded basis, which will be reduced to \$10,000 plus GST and disbursements.

[5] Mr Crichton submits this is a case in which Dig & Tip should properly be held liable for indemnity costs under standard principles² on the basis of its unreasonable conduct and the extent to which its conduct contributed to expense. However, Mr Crichton does not seek indemnity costs, but a substantial uplift to the Authority's daily tariff.

[6] He submits that the following factors justify an uplift:

- (a) Additional breaches of the record of settlement requiring amendments to the statement of problem;
- (b) Repeated failure to comply with Authority directions in respect of records;
- (c) Costs incurred by Mr Crichton having to draft and submit memoranda in response to Dig & Tip's "evolving and duplicitous stories";
- (d) Preparation of the common bundle;
- (e) Dig & Tip's "wastefulness throughout the proceedings".

² *Bradbury v Westpac Banking Corp* [2009] 3 NZLR 400, (2009) 19 PRNZ 385 (CA) at [27] and *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500 at [165].

Procedural history

[7] Dig & Tip did not meet its timetable to respond to the costs application by 18 December 2023. At a Case Management Conference (CMC) with both parties on 30 January 2024, Mr Torrance for the company confirmed that he would not be lodging any information in relation to the costs application and this was recorded in a Minute of the Authority.

[8] On 22 February 2024, Mr Crichton lodged a Memorandum of Counsel requesting that the Authority dispose of costs urgently, and to accompany those matters by Orders for very prompt payment.

[9] Mr Crichton advised the Authority that this matter was the subject of a case management conference before the Employment Court on 21 February 2024 and has now been set down for formal proof on 21 March 2024.

[10] As permitted by s 174E of the Act, this costs determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received, although everything submitted has been taken into account.

Analysis

Urgency Application

[11] Mr Crichton has applied for urgency in respect of all matters currently before the Authority on the basis of:

- (a) Mr Torrance's actions to incorporate a new company with the same or a substantially similar name as the first Respondent company; and
- (b) A challenge to the substantive determination which is to be heard in the Employment Court.

[12] An application for urgency is dealt with under clause 17, Schedule 2 of the Act.

Where any person applies to the Authority to accord urgency to an investigation, the Authority must consider that application and may, if satisfied that it is necessary and just to do so, order that the investigation take place as soon as practicable.

[13] As Dig & Tip and Mr Torrance have confirmed they do not wish to respond to the costs application, I conclude they have had a full and fair opportunity to participate in the proceedings in compliance with the principles of natural justice.³

[14] In a Minute of the Authority dated 29 February 2024, I advised the parties that this determination on the application for costs is being progressed and is nearing completion. It is not necessary to accord this matter urgency in the circumstances.

[15] For the sake of completeness, I record that an application for costs should not be stayed pending the outcome of challenge to the court. The starting point is that a challenge does not operate as a stay, and a successful party is entitled to ask the Authority to make a costs award.

[16] The Employment Court has previously found:⁴

The usual, but not invariable, practice in such situations is to promptly conclude all outstanding questions in this Court including costs... By determining costs now, all matters considered by this Court will be available for reconsideration... The defendant has applied for costs as it was entitled to. In these circumstances it is also entitled to a decision on that application.

[17] I have not identified any prejudice that would be suffered by either party if the Authority proceeds to determine the costs application. To the contrary, a prompt decision on costs would be in all parties' interests for matters to be concluded as soon as possible given the proceedings currently before the Employment Court. I find there is no good reason why I should not proceed to determine costs.

Costs Principles

[18] Costs are at the discretion of the Authority.⁵ The Authority has adopted a daily tariff approach as the starting point for considering costs which parties are advised of at the CMC, and is well known. The current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days.⁶

³ Section 157(2)(a) of the Employment Relations Act 2000.

⁴ *Swales v AFFCO New Zealand Ltd*, EMC Auckland AC19/01, 23 March 2001, at [3].

⁵ *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

⁶ Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi (February 2024) at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>

[19] The parties can expect the Authority to adhere to the approach of applying the daily tariff, unless there is good reason to depart from it.

[20] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*⁷ as confirmed in *Fagotti v Acme and Co Limited*⁸. It is a principle set out in *Da Cruz* that costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. The financial situation of the party paying costs can be a relevant factor to take into account. Awards made should be modest, and consistent with the Authority's equity and good conscience jurisdiction.

[21] As the successful party, Mr Crichton is entitled to a contribution to his costs actually and reasonably incurred. My records show the investigation meeting took almost one full day. The starting point for assessing costs is therefore that an appropriate amount would be \$4,500.

[22] Mr Crichton says Dig & Tip has acted in bad faith throughout the proceedings from the outset when multiple breaches of the record of settlement were committed. He also says that an award in mere tariff terms would encourage non-compliance. Mr Crichton accepts the Authority's role in awarding costs is not to punish, but to properly compensate for costs actually and reasonably incurred in holding the respondent to its bargain under the Record of Settlement.

[23] It is a well-settled principle that costs are not intended to punish or express disapproval at an unsuccessful party's conduct. But where the unsuccessful party has acted unreasonably, thereby also unnecessarily increasing costs, an uplift can be considered. I acknowledge that this has been a prolonged and expensive dispute. Part of the reason for this is the dispute over the interpretation of certain clauses in the Record of Settlement. However, Dig & Tip also clearly bears some responsibility for the prolonged and expensive nature of the dispute due to its conduct that I consider unnecessarily increased Mr Crichton's costs. This included failing to file records and information in compliance with directions and orders of the Authority. On 23 February 2023, Dig & Tip was directed to conduct a search of records and provide records and information to the Authority within 14 days. It asserted that it did not have further records. On 14 March 2023, Dig & Tip was directed to lodge and serve wages and time

⁷ [2005] 1 ERNZ 808.

⁸ [2015] NZEmpC 135 at 114.

records as required by the Act and the Holidays Act 2003 within 7 days. Records and information were not provided to the Applicant and Authority until 16 May 2023.

[24] I accept that the late provision of records, and the state of the records provided, meant that Mr Crichton incurred further cost after the investigation meeting to collate substantial written submissions responding to the records themselves and to Dig & Tip's explanation of the records given at the investigation meeting.

[25] I consider that if all records and information had been available to Mr Crichton and the Authority in accordance with timetabling directions, the investigation meeting would have taken up to a further half day of investigation time. On that basis, and taking into account parity with other costs awards in the Authority, I consider an uplift of \$1,750 is appropriate. That results in a nominal award of \$6,250 before considering Dig & Tip's financial situation which can be a relevant factor to take into account.

[26] Mr Torrance has previously made claims about his own and the company's "unstable financial situation" and has said that Dig & Tip has had to close trading due to financial problems.

[27] Mr Crichton has provided sworn evidence that he is "generally aware of the financial position of Mr Torrance". He refers to his "numerous business interests" and what appear to be significant assets. Mr Torrance has provided sworn evidence refuting Mr Crichton's evidence.

[28] Neither party has filed any corroborating information regarding the financial health of Dig & Tip. Mr Crichton's beliefs do not provide a basis for assessment. Mr Torrance has not filed any financial information in response to Mr Crichton's costs application.

[29] There being no specific and reliable evidence before the Authority about the company's financial situation, I consider the financial situation of Dig & Tip to be a neutral factor in my consideration of an appropriate award of costs. I therefore will not reduce an appropriate award of costs on the basis of financial impecuniosity.

[30] Mr Crichton is entitled to have his filing fee reimbursed, and I order that to be paid to him.

[31] While the Applicant urges the Authority not to set an award at “mere tariff level”, there is no basis to support the Authority should award costs incurred in respect of seeking costs. Mr Crichton has not incurred the cost of a further application fee, for instance. I decline to make any additional order.

[32] Stepping back to look at matters overall, I consider an award of \$6,250 which includes a modest uplift to the daily tariff, represents an appropriate costs award in the circumstances.

Orders

[33] For the reasons set out above, I order Dig & Tip Earthworks Limited to pay Mr David Crichton within 14 days of the date of this determination:

- a) The sum of \$6,250 as a contribution to his costs on this application.
- b) The filing fee of \$71.55.

Natasha Szeto
Member of the Employment Relations Authority