

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 228
5344202

BETWEEN BRUCE CRAIG
 Applicant

A N D DIRECT FREIGHT LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Submissions Received 12 July and 10 September 2012

Date of Determination: 19 October 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority (member Dzintra King) issued a Determination dated 25 June 2012 – [2012] NZERA Christchurch 125 - ordering the respondent Direct Freight Ltd to make various payments to the applicant Mr Bruce Craig. They were for:

- (a) Unpaid overtime;
- (b) Unpaid wages;
- (c) Pay for working on public holidays;
- (d) Pay in lieu of notice;
- (e) Annual holiday pay;
- (f) Interest;
- (g) A penalty for breach of a provision of the Employment Relations Act 2000.

[2] A Certificate of Determination issued by the Authority set out under each head the amounts found due, which in total were \$12,514.

[3] In both the Determination and Certificate the respondent party was named as “Lindstrom Holdings t/a Direct Freight Limited.” From the name on Mr Craig’s

written employment agreement it is clear that his employer was Direct Freight Limited. The employer as an incorporated company is correctly to be referred to by the legal name given it at registration and I have therefore used that name in this costs determination. There is no change of the personality of the employer.

[4] In its determination the Authority directed Mr Craig to file an application for costs within 28 days and Direct Freight Ltd was directed to file a reply within 14 days of receipt of any application made.

[5] An application was received by the Authority from Mr Craig's representative within time on 12 July 2012. A memorandum dated 20 August 2012 under the letterhead of Direct Freight Ltd was received in the Authority on 10 September 2012. The memorandum provides a "breakdown for the cost incurred for this case" in a total amount of \$27,435. The timing of this memorandum from Ms Bing Liu, who is a director of Direct Freight Ltd, and its content echo the Authority's comments on the less than satisfactory conduct of the respondent and its particular actions which "considerably extended the time required for the hearing". The response from the company is also not compatible with the usual event based application for costs and it will be disregarded by the Authority in considering Mr Craig's application.

[6] It is submitted for him that he ought to be awarded "all legal costs incurred since the personal grievance was filed on 21 April 2011 to the date of determination ... being \$11,516.41 (GST inclusive)."

[7] The fact that the applicant has incurred legal costs of nearly the same amount as he has recovered through his grievance and other claims, is not a reason for awarding full costs, something very rarely ordered by the Authority or the Employment Court and in the civil jurisdiction generally.

[8] Some of the reasons why the claim for costs in this case is high are that all costs have been sought from the raising of the grievance in April, five months before the application was lodged in the Authority, costs of attending mediation have been sought and the costs of having two advocates engaged for the investigation meeting, as well as costs for the time taken for them to travel from Nelson and Christchurch to Blenheim where the mediation and investigation meetings took place.

[9] A selection of costs determinations given by the Authority since 2000 will show that costs are not awarded for mediation and also that there needs to be some

justification for the use of more than one professional representative in a case. Costs are normally only a contribution to actual costs reasonably incurred in preparing for and participating in an investigation including the investigation meeting. Attempts made to resolve a potential grievance before it has been raised are not matters that should be taken into account in costs. The general principles relating to costs set out in case law - *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 – do not support an award of costs at the level sought in this case.

[10] In fixing costs I will allow for more than a single day of investigation meeting, to take account of the member's observations about the respondent's inactivity adding to the meeting time required. I shall regard investigation meeting time in this case as being a day and a half because of the lack of cooperation from the respondent, as commented on by the Authority in its determination.

[11] The Authority's notional daily tariff is currently \$3,500. I find that a reasonable contribution to the applicant's costs and expenses in the circumstances of this case is the \$3,500 tariff plus a \$1,000 margin for aspects of the respondent's conduct leading to further costs being unreasonably incurred. It should not be necessary for an employee to have to bring a claim for unpaid annual holiday and public pay and other straightforward pay entitlements, particularly if proper wage, time and holiday records have been kept by the employer and have been produced when requested by the employee, as the law requires.

Determination

[12] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000, Direct Freight Ltd is ordered to pay \$4,500 costs to Mr Bruce Craig. The company is also to reimburse Mr Craig the \$71.56 filing fee.

A Dumbleton

Member of the Employment Relations Authority

(Pursuant to clause 16 of Schedule 2 of the Employment Relations Act 2000)