

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 125
5466542

BETWEEN

DAVID ELDER
Applicant

A N D

PHILLIP KING
RESTORATIONS LIMITED
Respondent

Member of Authority: James Crichton

Representatives: David Flaws, Advocate for the Applicant,
Phillip King, Advocate for the Respondent

Submissions received: 10 April 2015 from the Applicant
30 March 2015 from the Respondent

Date of Determination: 6 May 2015

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In my substantive determination on this matter issued as [2014] NZERA Auckland 508 on 9 December 2014, I rejected Mr Elder's claim for personal grievance and found exclusively for Phillip King Restorations Limited.

[2] Costs were reserved. More specifically, in the substantive determination I drew attention to the fact that, although Mr Phillip King acted for his company before the Authority, he had sought legal advice when the personal grievance claim had first been raised with him and he made that fact clear at the investigation meeting.

The claim for costs

[3] Phillip King Restorations Limited incurred legal costs from a reputable firm of employment lawyers in the sum of \$1,687.05 and of that sum, \$1,500 is claimed as a contribution sought from Mr Elder.

[4] The invoice furnished by the law firm has been provided to the Authority and it clearly sets out the services that were provided, referring to a personal grievance and various attendances with Mr Elder's advocate. I have no hesitation in concluding that the invoice relates to the instant matter notwithstanding the fact that the law firm did not actually appear for Phillip King Restorations Limited in the Authority's investigation meeting.

The response

[5] Submissions for Mr Elder proceed on the footing that it would be "*most unusual*" for the Authority to allow costs where the successful party acted for itself in the investigation meeting.

[6] If, notwithstanding that submission, costs were to be awarded, Mr Elder seeks time to pay because he is in financial difficulty. Mr Elder's advocate provides some detail around Mr Elder's financial difficulties.

Determination

[7] I am satisfied it is appropriate for me to give consideration to the legal costs incurred by Phillip King Restorations Limited notwithstanding the fact that Mr King himself represented his firm at the investigation meeting. It is apparent from the invoice provided to the Authority from the law firm concerned and the evidence of Mr King at the investigation meeting that the work done by the law firm related to Mr Elder's personal grievance and formed part of the employer's proper response to the grievance raised by Mr Elder.

[8] Elements of the employer's response to Mr Elder's grievance would appear to have been dealt with by the law firm and I am satisfied that I ought to consider those elements as costs legitimately incurred by the successful party in the defence of its position, notwithstanding the fact that the employer was actually unrepresented at the investigation meeting.

[9] The investigation meeting proper took half a day's hearing time but I subsequently attended at the employer's business to obtain the evidence of another witness who I considered to be critical to my understanding of the factual matrix. The effect of the aggregation of those two passages of time would, I consider, be the equivalent of two-thirds of a normal hearing day. On that basis then, applying the

daily tariff rate to that circumstance, a starting figure of \$2,300 (being two-thirds of the daily tariff of \$3,500) might be appropriate.

[10] Of course, as I have just made clear, legal costs were not incurred for the totality of the attendances that would normally be required of a lawyer or advocate dealing with a personal grievance matter from start to finish. I can only award costs in favour of Phillip King Restorations Limited if those costs have actually been incurred.

[11] Plainly, the costs incurred relate only to part of the normal attendances a lawyer would be expected to be involved with in a matter of this kind. Looking at the narration on the bill and its date, I consider I can make a reasonable judgment about how much of the totality of the bill ought to be contributed to by Mr Elder.

[12] In that regard, I note and accept comments in Mr Elder's submissions to the extent that the lawyer's attendances ended fully 2½ months before the investigation meeting so it is fair to say that none of the usual costs incurred in the investigation meeting itself were met in this particular case. For instance, there can have been no costs incurred in preparing briefs of evidence, researching the law or attendance at the hearing itself.

[13] Indeed, my considered view is that the extent of the attendances that would have been paid for by the successful employer, when set against the starting figure that I identified using the daily tariff approach, would be rather less than 50% of the normal attendances of a lawyer or advocate dealing with a claim of this kind.

[14] Using this approach, I think the starting figure for Mr Elder to contribute to Phillip King Restorations Limited's costs is \$750. This represents my assessment of how much of the bill incurred by the successful employer would be recoverable from the unsuccessful party measured against the likely daily tariff rate figure for this particular matter. Put another way, if the employer had used its lawyers throughout, the starting figure based on the Authority's daily tariff of \$3,500 for a full day's hearing would have been \$2,333.

[15] The figure set by the Authority in fixing costs is seldom more than a contribution. The daily tariff approach seeks to encapsulate an average of the costs that a successful party might incur but frequently there is complaint that the amount derived from this equation is insufficient to meet the costs actually incurred by a

successful party. In all things, the Authority seeks to do justice between the parties by, in the case of a costs award, making some provision for the unsuccessful party to contribute to the costs of the successful party but not requiring so great a contribution as to militate against parties bringing their claims.

[16] Next, I must consider whether, by virtue of Mr Elder's reduced financial circumstances, he is entitled to a further reduction in the amount that he should contribute to Phillip King Restorations Limited.

[17] I am satisfied that the amount of \$750 is the appropriate figure for Mr Elder to contribute to Phillip King Restorations Limited as a contribution to its costs in successfully defending his claim for personal grievance because parties have to bear some burden of cost when their claim is unsuccessful. It is a longstanding principle of the law that the unsuccessful party contributes generally to the costs of the successful party and there is no reason to depart from that principle here.

[18] However, because of Mr Elder's reduced circumstances, he should have time to pay the amount due and I direct that Mr Elder is to come to an arrangement with Phillip King Restorations Limited such that he pays a set amount each fortnight in reduction of his indebtedness until the total amount is paid.

James Crichton
Member of the Employment Relations Authority