

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 412
5441206

BETWEEN

PETER ELSMORE
Applicant

A N D

MATERIAL PROCESSING
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Nicholas Koreneff, Counsel for the Applicant
Tim Grimwood, Counsel for the Respondent

Submissions received: No submissions from Applicant
9 September 2014 from Respondent

Date of Determination: 9 October 2014

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In the substantive determination issued on 9 July 2014 as [2014] NZERA Auckland 293, I dismissed Mr Elsmore's various claims against Material Processing Limited.

[2] Costs were reserved.

The claim for costs

[3] As the successful party, Material Processing Limited invites the Authority to fix costs.

[4] Those costs are a modest \$5,319.65 inclusive of GST.

[5] Full indemnity costs are sought, on the footing that the applicant's case was always hopeless, even on his evidence.

The response

[6] As the intituling makes clear, there was no responding submission from Mr Elsmore, but his advocate, despite being unable to get instructions, very properly advanced some observations of his own touching on his personal knowledge of the applicant's circumstances.

[7] The essence of those advises were that the applicant was a superannuitant with limited means and therefore not in a position to satisfy a significant costs award.

Determination

[8] The legal principles on the fixing of costs in the Authority are now well settled. The clear and straightforward submissions from counsel for the respondent set out those legal principles accurately.

[9] Amongst the principles correctly identified by the respondent's submissions were the fundamental precept that costs usually follow the event, the fact that the Authority has a discretion to consider matters such as the ability to pay and that while the notional daily tariff may be a useful starting point for costs fixing, there is power to either uplift the daily tariff or reduce it provided those actions are in accordance with principle.

[10] In the present case, the argument for an uplift is a contention that Mr Elsmore's case was always hopeless and the argument in favour of a reduction in the daily tariff is the scant, but nonetheless persuasive, information that Mr Elsmore is a person in reduced circumstances.

[11] Were it not for Mr Elsmore's financial position, I would have been minded to award full solicitor client costs in accordance with the submissions advanced for the respondent employer. But I am satisfied that Mr Elsmore is a person in reduced circumstances not only because of the observations to that effect made by his former advocate, but also because that intelligence is on all fours with the evidence advanced for Mr Elsmore at the investigation meeting.

[12] In the particular circumstances of the case, I think it can be argued persuasively that, even on Mr Elsmore's evidence, the evidence that he was a casual employee was overwhelming, and in consequence he was paid correctly, and the

evidence that he resigned his employment rather than was constructively dismissed is also palpable. Given those two fundamental conclusions, it is difficult to see how on any construction Mr Elsmore could have succeeded and therefore the argument for full solicitor client costs to reflect the reality that the employer had been put to quite unreasonable cost in defending an action which had no merit.

[13] In all the circumstances, I am obligated to take account of Mr Elsmore's circumstances but not so as to excuse the liability for a contribution to the respondent's costs entirely. Parties to proceedings in the Employment Relations Authority need to understand that any litigation comes with risk (even in a low level inquisitorial forum such as the Authority) and a significant risk is represented by the fact that if the party concerned is unsuccessful, in the normal course they can expect to be asked to make a contribution to the costs of the successful party.

[14] It follows that in proceeding with a case in the Authority, particularly a case as weak as this one, the attendant risk may be very significant indeed.

[15] Having given the matter earnest consideration, I am satisfied that the proper course of action is to direct that Mr Elsmore is to pay to Material Processing Limited the sum of \$3,500 as a contribution to their costs in defending his unsuccessful claim. In fixing on that figure, I have effectively given Mr Elsmore a \$2,000 reduction or thereabouts on the award I would otherwise have made were it not for his financial circumstances.

[16] Because of those reduced financial circumstances, I direct that Mr Elsmore is to have time to pay the amount awarded by equal instalments from his superannuation payments.

James Crichton
Member of the Employment Relations Authority