

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 196
5587577

BETWEEN DONALD STUART FERGUSON
Applicant
AND PLACEMENT PAINTERS
LIMITED
Respondent

Member of Authority: David Appleton
Representatives: No response for the applicant
Glenn Hunt, advocate for Respondent
Submissions received: 7 October from respondent
No response for the applicant
Date of Determination: 1 November 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] By way of an application dated 8 August 2016¹ the Authority dismissed the claims by the applicant due to his non-appearance without explanation. The respondent's counterclaim was dismissed because the Authority did not have the jurisdiction to investigate it.

[2] Costs were reserved. Mr Hunt has lodged copies of the invoices that show the costs incurred by the respondent in defending the claims against it by Mr Ferguson. Mr Ferguson was given the chance to respond, via the counsel that was on record, Mr Rollo, but no response has been received from either Mr Ferguson or Mr Rollo.

[3] The invoices lodged by Mr Hunt on behalf of the respondent are as follows:

¹ [2016] NZERA Christchurch 131

- a. \$1,650.73 plus GST in an invoice from Weston Ward and Lascelles (lawyers) dated 28 September 2015;
- b. \$1,176.74 plus GST in an invoice from Weston Ward and Lascelles dated 26 November 2015;
- c. \$847.00 plus GST in an invoice from Weston Ward and Lascelles dated 22 February 2016;
- d. \$1,608.74 plus GST in an invoice from Weston Ward and Lascelles dated 30 June 2016;
- e. \$800 plus GST in an invoice from Bennett Reddington Ltd (accountants) dated 22 August 2016; and
- f. \$1250 plus GST in an invoice from Weston Ward and Lascelles dated 8 September 2016.

[4] Before considering whether costs should be awarded to the respondent and, if so, in what amount, I will address two of these invoices. The first relates to work carried out prior to the statement of claim being lodged in the Authority. It is not appropriate for the Authority to award costs in relation to work unrelated to its proceedings, and so I exclude this invoice from consideration.

[5] The third invoice related largely to preparation for and attendance at mediation. This is a matter where the parties were directed to mediation by the Authority. Whilst His Honour Chief Judge Colgan has found that it is open to the Court (and presumably the Authority) to award costs incurred in attending mediation where the parties have been directed to do so, His Honour did not find that the Court is bound to do so². A discretion remains. In this case, at the time mediation was directed, both parties were represented by counsel. Both parties should therefore have known that mediation was a pre-requisite to an investigation meeting, and the direction should have been unnecessary. I therefore decline to include the costs of mediation in consideration of the matter.

[6] The total of the remaining invoices that relate to the proceedings in the Authority amount to \$4,835.48, excluding GST.

² *Pri Flight Catering Limited and Pacific Flight Catering Limited v Debasish Saha* [2015] NZEmpC 25, at [3] et seq.

Should costs be awarded against Mr Ferguson?

[7] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

15 Power to award costs

(1) 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) 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.

[8] The Authority is also bound to follow the well-known *Da Cruz*³ principles, the following of which are relevant in this case:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That awards will be modest.

³ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808

- i. That frequently costs are judged against a notional daily rate.
- j. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[9] No reason has ever been given to the Authority for Mr Ferguson's non-appearance at the investigation meeting. The case is unusual in that Mr Ferguson's counsel also did not appear, and did not communicate with the Authority to explain the absence of him and his client (and has never done so). It may be that Mr Ferguson was wholly reliant on his counsel, but as the applicant, in the absence of any information to the contrary, he is prima facie responsible for attending the investigation meeting and supporting his application with evidence. Therefore, he is prima facie responsible for any costs awards made in favour of the respondent.

[10] The respondent can bear no responsibility for Mr Ferguson's non-appearance, and it is just, in my view, that a contribution towards the costs incurred by the respondent in defending the claims be awarded against Mr Ferguson.

How much should be awarded?

[11] I estimate that, if the investigation had proceeded, the matter would have taken a little less than a full day to investigate, including hearing submissions. Therefore, it is appropriate to take the daily tariff as a starting point. This was \$3,500 at the material time. Should this be uplifted or reduced?

[12] I see no reason to uplift the figure. Whilst there is clearly fault of some kind on the part of the applicant in not appearing, costs are not to be used as a punishment. In addition, whilst Mr Ferguson is prima facie responsible for not appearing, there is the chance that he did not know about the investigation meeting due to a failing on the part of his counsel. It would not be just to increase the daily tariff without being sure that he bore full responsibility and had no reasonable excuse for his non-attendance.

[13] Should the tariff be reduced? The investigation meeting lasted very little time (setting aside the time taken up in waiting for Mr Ferguson and Mr Rollo to appear). The respondent incurred no legal costs in attending the meeting, as it was not, at that point represented. If it had been represented, the investigation had proceeded, and the respondent had won, it is unlikely that it would have recovered more than the daily

tariff in costs. It would not be just to award the respondent the same costs when the meeting lasted barely 10 minutes. I therefore believe that it is appropriate to reduce the daily tariff by a modest amount. On balance, I believe that the appropriate amount to award is \$3,000.

Orders

[14] I order Mr Ferguson to pay to the respondent the sum of \$3,000 as a contribution to its costs.

David Appleton
Member of the Employment Relations Authority