

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 15
5378631

BETWEEN MICHAEL INGRAM
 Applicant

AND SOUTHERN FLOORING
 (2011) LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Sarah Saunderson-Warner, counsel for the applicant
 Robert Moir, for the respondent

Costs submissions
received: Received from the applicant at the investigation meeting
 on 3 October 2012
 No costs submissions received from the respondent

Determination: 21 January 2013

COSTS DETERMINATION OF THE AUTHORITY

- A. Southern Flooring (2011) Limited is to pay Michael Ingram \$1750.00 in costs.**
- B. Southern Flooring (2011) Limited is to pay Michael Ingram \$71.56 for the filing fee.**

[1] On 3 October 2012 I conducted an investigation meeting. At the end of the meeting, having received legal submissions on Mr Ingram's behalf I gave the respondent 14 days to make written legal submissions in response if it wished to do so. Instead I received an e-mail from the respondent's accountant, Mr John Davey, stating that he:

...expected that the Company's Assets would not significantly exceed its liabilities as the Company's activities have been funded by bank loan and overdraft.

It is difficult to see how the Company would be able to pay a claim in Mike Ingram's favour.

[2] Clause 15 of Schedule 2 of the Act confers a wide discretion on the Authority to award costs and expenses. This discretion is to be exercised judicially and in accordance with principle.

[3] Each case is to be treated in light of its own circumstances. The primary purpose of costs is to compensate the successful party. Mr Ingram was successful in his claims.

[4] However, if an award of costs on the usual basis would cause excessive or disproportionate hardship, costs may be reduced to reflect the unsuccessful party's circumstances.¹ In the *Gates* case Judge Couch explained that:

...a party is presumed to be able to pay any award of costs the Court might make and it is for that party to raise any issue of hardship. When it is raised, a claim that undue hardship would result is must be supported by acceptable and sufficient evidence.

[5] Mr Davey has raised an issue of the respondent's potential difficulty in paying the amounts ordered in the Authority's substantive decision. However, there was no evidence presented in support of Mr Davey's opinion.

[6] The leading case on costs in the Authority is the Full Employment Court's decision in *PBO Ltd (formerly Rush Security) v Da Cruz*.² The following well established principles apply to costs in the Authority:

- a. The Authority has a discretion on whether to award costs and if so what amount.
- b. The discretion must be exercised in accordance with principle and not arbitrarily.
- c. The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- d. Equity and good conscience must be considered on a case by case basis.

¹ *Gates v. Air New Zealand Ltd* [2010] EMPC 26

² [2005] ERNZ 808

- e. Costs should not be used as a punishment or 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. Without prejudice offers can be taken into account.
- h. Awards of costs will be modest.
- i. Frequently costs are judged against a notional daily rate, which is currently \$3,500.00.
- j. Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.
- k. The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

[7] I have had regard to those key principles when fixing costs in this matter.

[8] Ms Saunderson-Warner submits that the respondent prolonged the matter and caused delays which resulted in greater legal costs for Mr Ingram than were necessary. Although the statement of reply was filed late after that the respondent did not cause any further delay, although it did not submit any written brief of evidence. The respondent was not represented for much of the time from the filing of the applicant's statement of problem up to and including the investigation meeting. In those circumstances I am not inclined to move the award of costs upwards from the usual daily tariff approach.

[9] The legal costs incurred by Mr Ingram are reasonable.

[10] The hearing took less than a full day and I consider that Mr Ingram should be reimbursed for a half-day at the tariff rate. Therefore, Southern Flooring (2011) Limited should pay Michael Ingram \$1750.00 in legal costs.

[11] Southern Flooring must also reimburse Mr Ingram the filing fee of \$71.56.

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Christine Hickey
Member of the Employment Relations Authority