

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 112
5449737

BETWEEN DARREN ASHLEY KEELING
Applicant

AND MEXTED MOTORS LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Applicant (self-represented)
Rod Lindgard, Advocate for Respondent

Investigation Meeting: On the papers

Determination: 3 November 2014

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] Costs were reserved in [2014] NZERA Wellington 86 on 29 August 2014. However, I indicated in that determination that costs should lie where they fall, as a suggestion to fix the matter. Since then, Mexted Motors Limited (Mexted) has requested a sum of costs in the amount of \$5,000. Mr Keeling has requested that costs lie where they fall. He feels aggrieved now that he did not engage a representative to cover all the underlying issues in his employment relationship. Be that as it may his claim before the Authority was a narrow one.

[2] Mexted's reasons for its claim are:

- (a) That Mr Keeling involved Mexted being directed to attend mediation;
- (b) That Mr Keeling had an unmeritorious case;
- (c) That Mr Keeling's conduct was "*unreasonable*" before the Authority.

[3] Mexted says it was always confident with the wording and application of its employment agreement provision on the commission payments because they had been developed with specialist advice. I take it that this means Mexted believes that litigation was not needed.

[4] The Authority's investigation meeting lasted only a half day.

Determination

[5] Mexted was successful in defending Mr Keeling's claim, and it is entitled to consideration for costs. It has incurred the expense of a representative to defend Mr Keeling's claim.

[6] Also, Mr Keeling was entitled to test his view of the commission provision. Mexted has relied on the test of time in applying its interpretation of the provisions, and without having any issue about it previously. Be that as it may, Mr Keeling had a genuine matter to test before the Employment Relations Authority.

[7] Despite the submissions made by Mr Lindgard about Mr Keeling's behaviour in the Authority's investigation, I have to factor in that Mr Keeling represented himself, and that there needs to be some latitude in the manner in which the employment relationship problem is cast and presented before the Authority. Mr Keeling decided not to get legal representation, and in making that decision has limited his costs and of course without experience in the Authority he cannot be expected to know or understand all of the nuances that apply. Some allowance has to be given to this within reasonable parameters. I hold that Mr Keeling did not go outside such parameters to put Mexted to any unnecessary costs.

[8] Costs are a matter of principle, decisions are not made to penalise any party. Costs in the Authority are based on a daily tariff and there need to be reasons to uplift the tariff or lower it.

[9] The parties must meet their own costs for attending mediation, whether they attend voluntarily or by direction. Mediation is the primary process for dispute resolution under the Employment Relations Act 2000 (the Act) and any party must expect to attend mediation and try and save costs early in the process.

[10] I accept that Mr Keeling's claim on the commission was going to be difficult for him to prove, and since Mexted has been successful in defending the claim, costs should follow the event. This is because it has been put to expense and it was reasonable for it to get representation for assistance.

[11] On the basis of a half day hearing, the preparation required and attendance at the Authority's investigation meeting, I hold that the tariff should be lowered from a full day to the equivalent of a half day tariff for costs. I rely on the following:

- a. That mediation costs must be met by the parties. It is the primary dispute resolution process and it is entirely reasonable to expect Mexted to have attended in the first instance.
- b. That Mexted was entitled to hold the opinion that Mr Keeling's claims were unmeritorious, but that view is based on Mr Keeling not accepting Mexted's view of the matter. He was entitled to test the matter on genuine grounds.
- c. That Mr Keeling's behaviour was not unacceptable in the Authority's investigation. Mexted is entitled to believe that his behaviour was unacceptable, but as I have said Mr Keeling was not represented, dealt with the matter himself and had a genuine view of it. It seems this was underlined by other issues not part of the claim, but such issues did not assume any primacy to cause unnecessary costs in the time that was needed. Some allowance has to be given to Mr Keeling for this. He did not cross the line by causing unnecessary costs being incurred by Mexted, I hold. This is supported by a half day hearing and the preparation for attendance, and that Mexted decided that it needed professional help and assistance for the Authority's investigation.

[12] Mr Keeling is to pay Mexted Motors Limited \$1,750 costs.

P R Stapp
Member of the Employment Relations Authority