

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 125  
3085317

BETWEEN                      SANGHOON KIM  
                                         Applicant  
  
AND                                MEGA PAINTING LIMITED  
                                         Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:              Applicant in person  
                                         Michael Kim, counsel for Respondent  
  
Submissions received:      10 March 2021 from Applicant  
                                         3 March 2021 from Respondent  
  
Determination:                30 March 2021

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A.      Mr Kim is ordered to pay to Mega Painting Limited the sum of \$2,590 as a contribution toward costs and disbursements within 28 days of the date of this determination.**

[1]      In a determination dated 25 February 2021 I found Mr Kim was an independent contractor and accordingly, the Authority had no jurisdiction to investigate and determine his claims.<sup>1</sup> I reserved the issue of costs and invited the parties to resolve this between them. They have been unable to agree on costs and I have been asked to determine the issue.

[2]      The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority

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<sup>1</sup> *Kim v Mega Painting Limited* [2021] NZERA 74.

thinks' reasonable.<sup>2</sup> The principles applying to costs are well settled and do not require repeating.<sup>3</sup>

[3] An assessment of costs in the Authority will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.<sup>4</sup>

[4] The investigation meeting took half a day which equates to a starting point of \$2,250. Mega Painting Limited seeks an award of costs of \$9,131 plus disbursements of \$175.06.

[5] Mega Painting Limited seeks payment of disbursements for translation of documents and for the filing fee. Given that Mega Painting Limited did not pay a filing fee, the claim for reimbursement of the filing fee cannot succeed. However, the disbursements associated with the translation of documents are recoverable as claimed.

[6] Mr Kim objects to the amount claimed by Mega Painting Limited on the grounds that it would amount to a full recovery of costs by Mega Painting Limited and includes mediation costs of \$3,450. Mr Kim submits that an award of \$2,250 is a fair and reasonable contribution.

[7] Mega Painting Limited seeks an uplift to costs on the grounds that Mr Kim rejected a reasonable offer to settle all matters before the Authority investigation meeting.

[8] The Authority will take into account any offers made by the parties to settle matters.<sup>5</sup> If the Applicant does not beat the offer, there should be a steely response as that would be in the broader public interest.<sup>6</sup>

[9] That approach was reiterated by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* where the Court said:<sup>7</sup>

It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers,

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<sup>2</sup> Employment Relations Act 2000, Schedule 2, clause 15.

<sup>3</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].

<sup>4</sup> Practice Note 2, Costs in the Employment Relations Authority.

<sup>5</sup> *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

<sup>6</sup> *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172, (2004) 17 PRNZ 16 (CA) at [53]

<sup>7</sup> *Mitchell* above n 5 at [18]-[20].

proceed with litigation and then fail to achieve any more than was previously offered. ... The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

[10] On 19 June 2020 Mr Kim was offered a sum of money in full and final settlement of his claims. The offer was made in the context of Mega Painting Limited's stated view that Mr Kim was not an employee and would not be successful in his application. Mr Kim was given five days to consider the offer, at which time it would lapse.

[11] Mr Kim has not provided any explanation as to why he rejected the calderbank offer. I have concluded his apparent rejection was unreasonable given his lack of success at the Authority.

[12] Costs should not be used to punish an unsuccessful party for seeking to assert their rights under the Act to access the Authority.<sup>8</sup> After considering all relevant factors I consider a slight uplift is appropriate in this case.

[13] Mr Kim is ordered to pay to Mega Painting Limited the sum of \$2,590, which includes disbursements of \$90, as a contribution toward costs within 28 days of the date of this determination.

Vicki Campbell  
Member of the Employment Relations Authority

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<sup>8</sup> *Elisara v Allianz New Zealand Limited* [2020] NZEmpC 13; (2020) 10 NZELC at [32].