

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 394
5451096**

BETWEEN

NATHAN McDERMOTT
Applicant

AND

McDERMOTT TRANSPORT
AND EXCAVATION LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Glenda Norris-Palmer, Advocate for Applicant
George Swanepoel, Counsel for Respondent

Submissions received: 10 September 2014 from Applicant
24 September 2014 from Respondent

Determination: 26 September 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2014] NZERA Auckland 340 the Authority found that the Applicant, Mr Nathan McDermott, had been unjustifiably dismissed by the Respondent, McDermott Transport and Excavation Limited.

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and both parties have submissions in respect of costs.

[3] This matter involved a half day Investigation Meeting. Mr Morgan, on behalf of the Applicant, citing actual costs of \$5,309.04 (including GST), is seeking a contributory award at the normal daily tariff rate in the Authority of \$3,500.00.

Principles

[4] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

s. 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.*

[5] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[6] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*².

[7] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁴ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.” The normal rule is that costs follow the event and Mr McDermott is entitled to a contribution to his costs.

[8] I observe that the actual costs cited on behalf of Mr McDermott appear to be rather on the high side for what was a half day investigation meeting, and having scrutinised the listed services provided in the attached invoice to submissions, they appear to include the costs of mediation and for preparation of evidence at the Investigation Meeting.

[9] I note that whilst parties may choose to be legally represented at a mediation of an Authority investigation process, this is entirely a matter for each party. There are no requirements that a party be legally represented.

[10] Mediation is a confidential process and it a matter of public policy that the parties meet their own costs.

[11] I find that there are no circumstances in this case which persuade me that I should depart from the established principle of not awarding costs in respect of mediation

[12] It is unusual for the Authority to allow preparation time per day of the investigation meeting. In this particular case, there were no difficult legal issues or extensive witness evidence requiring preparation in excess of what is usually required for a case falling within the jurisdiction of the Authority.

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

[13] Accordingly having had regard to the principles set out in *Da Cruz*, the time taken for the Investigation Meeting, and the conduct of the parties, I consider that a contributory award towards Mr McDermott's actual costs is reasonable.

[14] Adopting the notional daily tariff rate of the Authority as \$3,500.00, I take that as the appropriate starting point for costs.

[15] I order McDermott Transport and Excavation Limited to contribute the sum of \$1,750.00 towards Mr McDermott's actual costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority