

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 7
3146641

BETWEEN MEGA PAINTING LIMITED
Applicant

AND SANGHOON KIM
Respondent

Member of Authority: Robin Arthur

Representatives: Michael Kim, counsel for the Applicant
Lawrence Anderson, advocate for the Respondent

Submissions: By telephone conference on 17 January 2022

Date: 18 January 2022

COSTS DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination Sanghoon Kim must pay \$562.50 to Mega Painting Limited as a contribution to its costs.**

[1] Mega Painting Limited (MPL) sought an order for costs incurred in relation to an application for a compliance order against Sanghoon Kim. The order sought related to a costs award made in an earlier determination of the Authority.¹ The Authority had ordered Mr Kim to pay costs of \$2,590 to MPL after finding he had worked as an independent contractor and the Authority did not have jurisdiction to hear grievance and wage arrears claims he wished pursue.² It ordered those costs to be paid by no later than 28 April 2021. They remained unpaid by the time MPL lodged its application for a compliance order on 22 July 2021. Mr Kim subsequently paid \$1,000 of those costs on 13 September 2021 and the remainder of \$1,590 on 10 December 2021.

¹ *Kim v Mega Painting Limited* [2021] NZERA 125 (30 March 2021).

² *Kim v Mega Painting Limited* [2021] NZERA 74 (19 January 2021).

[2] In its compliance order application MPL initially also sought an award of further costs of \$2,300 for what it said were legal expenses incurred in following up payment of the earlier costs awarded by the Authority. After Mr Kim paid part of the original costs award in September 2021, MPL reduced its costs claim to \$1,000. When Mr Kim paid the remainder of the original costs award in December 2021, MPL asked the Authority proceed to determine whether costs should be awarded on its compliance application.

[3] This issue has been resolved on the basis of brief written submissions, made by email, and oral submissions from the parties' representatives at a telephone conference.

[4] I had given the parties a preliminary indication that costs on the compliance application, given the relatively limited attendances required and its resolution without requiring an investigation meeting, could appropriately be set on the basis of one-eighth of the Authority's usual daily tariff, that is \$562.50. MPL submitted a more appropriate level was one-sixth of the tariff, that is \$750, taking into account having to attend a telephone conference because the parties had not resolved the issue on the basis of the Authority's preliminary indication.

[5] Mr Kim, through his advocate, proposed two main reasons that no order should be made requiring him to pay costs on MPL's compliance application. Firstly, he submitted the normal principle of costs following the event of success did not apply because he had paid the outstanding amounts before any compliance order was made. This meant, he said, MPL had not achieved any success by getting the order it asked for. Secondly, he referred to an offer he made "without prejudice save as to costs" in August 2021 to pay the amounts due in instalments that would have been completed by around mid-November 2021. If MPL had accepted his offer, payment of the original costs award would have been completed earlier than 10 December when he paid the remaining amount in a lump sum.

[6] Neither of Mr Kim's submissions were sufficient to negate the grounds for a costs award in the circumstances of this case. MPL had reasonably pursued a compliance order after Mr Kim had not paid the ordered amount and had said he would pay it off at the rate of \$3 a week. Instalments at that rate would have taken 16 years to pay the amount due. Although Mr Kim eventually paid the amount in two larger

instalments, this only occurred some months after MPL had incurred the expenses of lodging an application in the Authority.

[7] Mr Kim's without prejudice offer in mid-August, if accepted, would have seen MPL receive full payment only one month earlier than it ultimately did. It was still some eight months after he was due to pay that amount under the Authority's order. His offer also proposed that it be settled without him paying anything towards the costs of the compliance application. His offer letter referred to "cases of a similar nature" often involving costs contributions of around \$500. MPL did not accept the offer.

[8] Taking a 'steely approach' to the effect of such settlement offers, MPL's request for costs to be set at one sixth of tariff is declined. Instead, allowing for the costs reasonably incurred prior to the offer, an award of costs at one eighth of the Authority's usual daily tariff was appropriate. Mr Kim put MPL to the expense of pursuing payment of an award it had been entitled to receive within the timeframe set by the Authority.

[9] Accordingly, Mr Kim must pay \$562.50 to MPL by no later than 28 days from the date of this determination as a contribution to its costs and expenses in applying for a compliance order.

Robin Arthur
Member of the Employment Relations Authority