

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 50
5431908**

BETWEEN KEERITHI MERENNAGE
Applicant

AND RITCHIES TRANSPORT
HOLDINGS LTD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Helen White, Counsel for Applicant
Kerry Amodeo & Gemma Mayes, Counsel for Respondent

Submissions received: 17 December 2014 from Applicant
13 February 2015 from Respondent

Determination: 17 February 2015

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2014] NZERA Auckland 406 the Authority found that the Applicant, Mr Keerithi Merennage, had been unjustifiably dismissed by the Respondent, Ritchies Transport Holdings Ltd (Ritchies).

[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 the parties have filed submissions in respect of costs.

[3] This matter involved the determination of a preliminary matter which was dealt with 'on the papers' with written submissions by the parties, and a substantive matter which involved a day and two-thirds of a day of an Investigation Meeting, with written submissions from the parties being submitted subsequent to that.

[4] Ms White, on behalf of the Applicant, applied for leave to apply for costs outside of the 28 day timeline for so doing set out in paragraph [153] of determination [2014] NZERA Auckland 406 on the basis that an aspect of the Authority's determination relating to whether or not WINZ payments should be deducted from the sums awarded to the Applicant needed clarification.

[5] On 23 December 2014 Ms Mayes on behalf of the Respondent applied for leave to file costs submissions outside the time frame set by the Authority, and this was granted until 13 February 2015.

[6] Ms White is seeking a contribution towards costs at the usual tariff rate in the Authority plus GST in respect of the preliminary matter and the substantive matter Investigation Meeting plus disbursements, including the Applicant's return airfare to Australia, necessitated by his attendance at the Investigation Meeting which took place in Auckland, the filing fee, and the cost of copying the common bundle.

[7] Mr Amodeo and Ms Mayes submit that:

- The usual daily tariff rate in the Authority does not attract an additional amount for GST;
- The second day of the Investigation Meeting should not attract a full daily tariff rate on the basis that it concluded at 3.00 p.m.;
- The Applicant's belated and unsuccessful application for name-suppression during the Investigation Meeting should further reduce the usual daily tariff amount;
- A half day tariff in respect of the preliminary matter is not justified on the basis that no evidence was filed by either party, and the Applicant's submissions were one page in length with the attachment of an Authority determination in support of its submissions;
- The Respondent should not be required to meet the cost of the Applicant's airfares for attending the Investigation Meeting; and
- There appear to be two different amounts being claimed by the Applicant in respect of the preparation of the common bundle.

Principles

[8] 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.*

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

[10] 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.

[11] 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.”

Determination

[12] Having considered the circumstances and the submissions on the matter from the parties; whilst the Applicant’s application for costs occurred outside the time limits I set in determination [2014] NZERA Auckland 406, I am prepared to grant leave for a late submission.

[13] The normal rule is that costs follow the event and the Applicant is entitled to a contribution to his costs.

[14] 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 Merennage’s actual costs is reasonable.

Tariff

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

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

[16] The preliminary matter was determined 'on the papers', the submissions were not extensive, and I consider a contribution towards costs in the sum of \$750.00 to be appropriate in respect of the preliminary matter.

[17] Ms White has filed evidence in support of her submissions as to the level of costs she incurred as a result of attending the Investigation Meeting. I note that these have been submitted very late by Ms White despite the Respondent having alerted Ms White to the omission on 23 December 2014.

[18] I accept that the invoices submitted by Counsel, albeit very late in the proceedings, support the level of costs claimed, and therefore award costs based on the usual tariff rate in order to avoid the injustice that would otherwise arise to the Applicant by excluding them.

[19] I further accept that there should be a pro-rate deduction for the hearing time on the second day of the Investigation Meeting, and make a reduction in respect of the late raising of the non-publication order.

Airfare

[20] The costs of the Applicant and Respondent attending an Investigation Meeting are expected to be funded by the parties themselves. An exception to this is costs associated with the attendance of legal representation at an investigation meeting, provided these costs have been actually and reasonably incurred and are supported by invoices.

Copying of the common bundle

[21] Whilst there are two invoices filed in support of a claim in respect of copying the common bundle, I note that the bundle was not filed until July 2014. Accordingly I accept the second invoice dated 29 July 2014 in the amount of \$283.00 inclusive of GST as being the appropriate invoice for consideration.

[22] I order Ritchies to pay Mr Merennage a contribution towards his actual costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000 as follows:

- i. Costs in respect of the preliminary matter: \$750.00
- ii. Costs in respect of the substantive matter: \$5,750.00
- iii. Copying of the common bundle: \$283.00 inclusive of GST

[23] Mr Merennage is also to be reimbursed the filing fee of \$71.56.

Eleanor Robinson
Member of the Employment Relations Authority