

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 215  
5461076

BETWEEN                      THE ESTATE OF STEVEN  
   EDWARD McEWING  
   Applicant

A N D                              GEOVERT LIMITED  
   Respondent

Member of Authority:        James Crichton

Representatives:              Michael Smyth, Counsel for Applicant  
   Anthony Parish, Advocate for Respondent

Submissions Received:        2 June 2016 from Applicant  
   17 June 2016 from Respondent

Date of Determination:        28 June 2016

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

**The substantive determination**

[1]     My determination of 26 February 2016 issued as [2016] NZERA Auckland 57, decided that it was still available to the estate of Steven Edward McEwing to make an application for costs in respect of the substantive matter (which had been the subject of several previous determinations of the Authority) and that the protest about remedies granted in the substantive determination could also proceed. In that latter regard, the issue was dealt with in my determination dated 20 May 2016.

[2]     That left the fixing of costs as the only remaining issue and a timetable for submissions to be filed and served was fixed, to enable costs to be dealt with.

[3]     Those submissions have now come to hand and this determination fixes costs in respect of the matter.

## **The application for costs**

[4] The applicant was the successful party in the substantive proceeding and as a consequence of my determination of 26 February 2016, was able to pursue costs against the respondent and now seeks costs in respect of the totality of the proceedings.

[5] Costs are sought not just in respect of the original substantive determination but also the various attendances required to enable Mr McEwing to have a costs award fixed in his favour. Moreover, an uplift is sought in the notional daily tariff, because of the respondent's conduct in the proceeding (particularly the respondent's determination to advance a counterclaim and then subsequently withdraw it).

[6] Mr McEwing incurred total costs in the order of \$14,100 of which \$9,400 was incurred in respect of the substantive determination.

## **The response**

[7] In its submissions in reply, Geovert Limited (Geovert) says first that it is not true to say that Mr McEwing was entirely successful because he was not successful in satisfying the Authority that his redundancy was not a genuine one. Furthermore, Geovert says that it played no part in incurring costs for Mr McEwing when the latter pursued the Authority to get corrections made to the errors in the original determination and Geovert says that it cannot be held responsible in costs for the errors made by the Authority in the original determination.

[8] It is contended for Geovert that its behaviour was appropriate at all times and that it did not materially contribute to the cost of the litigation.

## **Determination**

[9] The principles relating to the award of costs in the Authority are well settled and need not be recited again here. It is enough to observe that costs usually follow the event, that the Authority typically approaches costs setting by way of a daily tariff and that that daily tariff is able to be increased or diminished by reference to the particular circumstances of the case. Factors that will allow for an uplift include evidence of the behaviour of the unsuccessful party contributing to the costs of the successful one.

[10] The fundamental question in respect of the determination of costs in the present case is who should bear the cost of the Authority's errors in the original determination. It is a given that the late Mr McEwing's counsel incurred costs in engaging with the Authority and having those errors addressed. So it follows that Mr McEwing bore the costs of those attendances and his estate now seeks to have Geovert contribute to those costs.

[11] But Geovert says, understandably, that it is not its fault that the Authority made errors in its original determination and applying the usual principles, I agree with them. Geovert can only be held responsible for matters within its control where its behaviour or the way in which it chose to argue its case caused the late Mr McEwing to incur additional cost which would not otherwise have been incurred.

[12] On that basis alone then, I am not persuaded that the costs incurred by the late Mr McEwing in correcting the record on the face of the original determination is a cost that he can appropriately seek a contribution to, from Geovert.

[13] However, the vast bulk of the late Mr McEwing's costs were incurred in the original determination and it is entirely appropriate that the estate look to Geovert for a contribution to those costs which, as I have already noted, amounted to about \$9,400.

[14] On the estate's calculation, which I agree with, the starting point must be \$3,500 being the notional daily tariff for the original hearing time.

[15] I am not persuaded by the estate's claim that there is anything improper in Geovert's withdrawn counterclaim; it was, as Geovert says, a claim it was entitled to make given the circumstances and on the face of it, a claim that it could have persevered with and so I am not persuaded that there is any entitlement to an uplift in the notional daily tariff because of that factor.

[16] However, in the particular, and unusual, circumstances of this case, I think some modest uplift in the daily tariff is appropriate to reflect the fact that a fair and reasonable employer would, rather than resist the application to reopen so as to allow costs to be determined, have agreed to costs being fixed in the normal way. To reflect that factor I add an additional sum of \$2500 to the daily tariff.

[17] On top of that, I allow \$1,000 by way of disbursements as a contribution to the totality of the disbursements so the sum Geovert must pay to Mr McEwing's estate as a contribution to his legal costs in this matter is \$7,000.

James Crichton  
Chief of the Employment Relations Authority