

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 353
5423053

BETWEEN A
 Applicant

A N D B
 Respondent

Member of Authority: James Crichton

Representatives: Matthew Young, Advocate for the Applicant
 Richard Harrison, Counsel for the Respondent

Submissions Received: 14 September and 30 October 2015 from the Applicant
 6 August 2015 from the Respondent

Date of Determination: 12 November 2015

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In my substantive determination issued as [2014] NZERA Auckland 497 on 4 December 2014, I found exclusively for the respondent, B, and reserved costs.

[2] While that decision has now been challenged by A, in accordance with the Authority's invariable practice, costs in the Authority now need to be fixed.

The application for costs

[3] B, as the successful party, applies to the Authority for costs to be fixed having unsuccessfully sought to deal with the costs issue by agreement. Costs of \$14,000 are sought.

The response

[4] A submission on costs was filed by A's advocate on 14 September 2015 but because of some confusion an affidavit in support was not filed until 30 October 2015. The purpose of that affidavit is simply to demonstrate appropriately that A's personal

circumstances are somewhat reduced since the dismissal from the service of B and to support the submission made on A's behalf that only a modest award can be justified.

[5] In fact, A accepts that on normal principles (the application of the daily tariff), a maximum award of \$10,500 would be justified, but that in the particular circumstances of the case (A's reduced financial circumstances), an award of \$1,500 would be just.

[6] A rejects B's claim for an additional day allowance to cover the preparation of submissions.

Determination

[7] A refers to *Gates v. Air New Zealand Ltd* [2010] NZEmpC 26 (Judge Couch) as authority for the proposition that causing hardship to the unsuccessful party in the imposition of costs which is excessive or disproportionate, entitles the Court or Authority to reduce a costs award that would otherwise be appropriate.

[8] While that is undoubtedly true, as Her Honour Judge Inglis observed in *Tomo v. Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, while ability to pay is a relevant factor in the costs arena, "*it is not a trump card*".

[9] This was a matter dealt with in the Authority over a total of three hearing days (inclusive of an unsuccessful application by A for interim reinstatement) and applying the daily tariff approach to those hearing days would result in an award of costs of \$10,500. I agree with A's advocate that there is no reason to allow an extra day of the daily rate for the preparation of the submissions, as B has claimed and so the starting figure remains \$10,500.

[10] My next task is to consider whether that base figure ought to be added to or taken away from. A maintains that his financial circumstances are such as to preclude him making anything other than a very modest contribution to B's costs. I accept that on the basis of the affidavit evidence before me, A is in very reduced circumstances. It would appear that he has virtually no assets, is earning less than \$30,000 per annum and has very significant indebtedness.

[11] On the face of it, any award of costs is going to be a struggle for A to meet on anything other than some sort of time payment basis.

[12] In that regard, I must take into account the observations of Judge Inglis in *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137 when Her Honour expressed some doubt on whether there was a legal basis on which, at the fixing of a costs award, the Court or the Authority might allow time payment. Of course, as the Court went on to observe, that does not mean that those arrangements cannot be entered into voluntarily between the parties or indeed in the course of subsequent enforcement action.

[13] Given all of those considerations and my conviction that A is genuinely impecunious, based on the evidence before me, I conclude that the proper contribution for A to make, given his particular circumstances, is \$2,500.

[14] A is to pay \$2500 to B as a contribution to B's successful defence of A's claim in the Authority.

James Crichton
Member of the Employment Relations Authority