

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 300A/07
5039424

BETWEEN FA'AMOANA AFUIE
 Applicant

AND FYRAN MARINE LTD
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Mr Afuie in person
 Jo Phipps for Respondent

Submissions received: 26 October from Respondent
 1 November from Applicant

Determination: 13 December 2007

DETERMINATION OF THE AUTHORITY AS TO COSTS

Employment Relationship Problem

[1] In a determination dated 1 October 2007 I found that Mr Afuie was not unjustifiably dismissed. I also concluded that there was insufficient evidence to support a separate claim he had made in relation to holiday pay, or a counter claim the respondent had made in relation to alleged over payment of holiday pay. I concluded with the following regarding costs:

“This matter is reserved. The parties have a period of 28 days in which to make submissions as to costs.”

[2] They have now done so and the matter of costs falls to be determined.

Submissions

[3] The respondent advised, through Ms Phipps, that the cost of representation in the Authority totalled \$10,283.93. Ms Phipps submitted that the Authority should use

its discretion to award costs, in favour of the respondent, at the higher end of the range usually awarded in matters of a similar nature. In support of this submission she made the following points:

- i. The decision of the Authority was “*firmly in favour of the respondent;*”
- ii. The applicant’s holiday pay claim was raised during the course of the investigation meeting, causing the respondent additional expense in preparing a response and extending the time spent at the Authority. The counter claim with which Fyran Marine Ltd responded had minimal impact on the overall costs;
- iii. “*The conduct exhibited by the applicant’s representative in challenging the nature of the Authority’s investigation process and by refusing to confirm or deny whether the applicant was in receipt of legal aid (having previously advised the Authority and the respondent that legal aid had been applied for) contributed to length [sic] of the investigation meeting including a call-back to a third day.*”

[4] Although Mr Afuie was represented by Counsel during my investigation he is now representing himself and has written to the Authority in response to Ms Phipps’ submission. He objects to the costs submission made by the respondent. The principal points he made are as follows:

- i. The respondent’s costs appear high;
- ii. His own legal costs amount to \$3,000.00;
- iii. The need for an investigation meeting could have been avoided if the respondent had tried to resolve the problem through mediation;

- iv. He has five children, two of whom are at university, and is consequently unable to meet a costs award;

Determination

[5] Costs normally follow the event and nothing about this case suggests that it should be an exception to that rule. The respondent was indeed wholly successful in defending Mr Afuie's claims against it. It is entitled to a contribution to its costs.

[6] As noted by Ms Phipps, this matter took two and a half days of investigation meeting. It should not have taken this long. Two factors extended the investigation unnecessarily.

[7] The first was the late notice of the claim for holiday pay. Once wage and time records and pay slips were made available it became readily apparent that neither claim nor counterclaim had substance. Had that claim come in at an earlier stage of the investigation those documents could have been produced with the rest of the respondent's documentary evidence. They could then have been examined by the Authority in advance of the meeting, saving considerable time for both parties and obviating the need for a third day of meeting.

[8] The second was the need of the Authority to respond by Minute¹ to Ms Sapolu's refusal to advise whether Mr Afuie was legally aided.

[9] The respondent's costs were therefore higher than they should have been, through no fault of the respondent.

[10] I must also take into consideration the unsuccessful party's ability to pay. I accept that as a father of five children on a modest income that ability to pay is limited.

[11] In summary, I accept that costs follow the event and that the respondent is entitled to a contribution to its costs. I also accept that some aspects of the applicant's conduct in the investigation process unnecessarily increased costs. However I balance

¹ Attachment to substantive determination.

those factors against what Mr Afuie has told me of his limited ability to meet an award of costs against him.

[12] Taking all these factors into consideration I order the applicant to pay to the respondent the sum of \$3,000.00 as contribution to costs.

Yvonne Oldfield

Member of the Employment Relations Authority