

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 283
5430608**

BETWEEN IGOR ARAKELIAN
Applicant

AND DVK GROUP LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Dave Vinnicombe, Advocate for Applicant
Evgeny Orlov, Advocate for Respondent
Submissions received: 2 July 2014 from Applicant
27 June 2014 from Respondent
Determination: 4 July 2014

SUPPLEMENTARY AND COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2014] NZERA Auckland 182 the Authority found that the Applicant, Mr Igor Arakelian, was an independent contractor to the Respondent, DVK Group Limited (DVK), and not an employee.

[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 one day of an Investigation Meeting. Ms Joo Yeon Leenoh, on behalf of DVK, is seeking a contributory award of \$10,000.00 towards the actual costs.

Submissions of the Respondent

[4] DVK in support of the level of the claim highlights as a significant factors for the consideration of the Authority that:

- DVK was required to incur various associated legal fees to support its defence, but is seeking only legal fees;

- The Applicant brought the case on no basis;
- The sum requested outlines the actual legal costs incurred, and \$250.00 per hour is a reasonable hourly rate in the Authority;
- Mediation was compulsory so costs relating to mediation could be applied for;
- The Applicant is not in financial difficulty and has the ability to pay the sum suggested; and
- There were a variety of aggravating factors involved.

Submissions of the Applicant

[5] Mr Vinnicombe, on behalf of Mr Arakelian, submits that:

- The costs of mediation should be excluded from a costs award in the Authority;
- The conduct of the Respondent should be taken into consideration as a factor in favour of reducing the costs award to the Respondent, in particular:
 - Mr Orlov, Counsel for DVK, arrived late at the Investigation Meeting without documents or witnesses;
 - The Investigation Meeting had to be adjourned in order that witnesses could be called and for the Authority to make copies of documents for DVK; and
 - Mr Orlov's unbecoming conduct during the Investigation Meeting, specifically that he was insulting towards Mr Arakelian.

Principles

[6] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

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.*

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

[8] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*².

[9] 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.*”

[10] It is also a principle that: “*Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful parties conduct, although conduct which has increased costs unnecessarily*” can be taken into consideration and thereby increase the notional daily tariff rate.

Determination

[11] The Authority is under a statutory imperative pursuant to s 159 of the Employment Relations Act 2000 (the Act) to direct the parties to mediation unless there are reasons as set out in s 159 (b) of the Act not to do so.

[12] Mediation is a confidential process and it a matter of public policy that the parties meet their own costs. I find that there are no circumstances in this case which persuade me that I should depart from the established principle of not awarding costs in respect of mediation.

[13] In respect of the submission that Mr Arakelian brought the case on no basis, I observe that a party is entitled to bring claims to the Authority and to have these claims investigated unless the claims are deemed to be frivolous or vexatious and dismissed pursuant to s 12A of Schedule 2 of the Act. Mr Arakelian’s claims were not deemed to be frivolous or vexatious.

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

[14] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a 1 day investigation meeting this would normally equate to \$3,500.00.

[15] Adopting the notional daily tariff rate of the Authority as \$3,500.00, I take that as the starting point for costs. From that point I take into consideration the following observation by the Employment Court:⁵

The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs.

[16] Taking the notional daily tariff figure as a starting point I take into consideration the conduct of DVK during the Investigation Meeting in assessing the appropriate level of costs. In particular the fact that Mr Orlov arrived unprepared which necessitated some delay in the smooth running of the Investigation Meeting; and that I found it necessary on more than one occasion to address his inappropriate manner of questioning of Mr Arakelian which further added to the delay in the proceedings.

[17] Accordingly, Mr Arakelian is ordered to pay DVK the sum of \$2,500.00 (incl GST) as costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority

⁵ Ibid at para [46]