

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 107
5468668

BETWEEN SHAUN CHARLTON
Applicant

A N D SOUTHLAND LIGHTWEIGHT
CONCRETE LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Damien Pine, Counsel for the Applicant
Respondent not represented

Submissions Received: 1 July 2015 from the Applicant
None for the respondent

Date of Determination: 31 July 2015

COSTS DETERMINATION OF THE AUTHORITY

The respondent is ordered to make a contribution towards Mr Charlton's costs in the sum of \$6,900 together with reimbursement of the Authority's lodgement fee of \$71.56.

[1] By way of a determination of the Authority dated 28 May 2015,¹ the Authority found that Mr Charlton had been an employee of the respondent and was owed arrears of wages. Costs were reserved to give the parties the opportunity to agree how costs were to be dealt with.

[2] It is not known whether the respondent has engaged with Mr Charlton or his representatives about costs since the Authority's substantive determination was issued, but as no submissions have been received from the respondent in respect of the

¹ [2015] NZERA Christchurch 69

costs sought by Mr Charlton, I infer that it is unlikely. I base this determination on the submissions of Mr Charlton's counsel alone.

[3] Mr Charlton has incurred a total of \$8,139.99 in costs, including GST. Mr Pine submits that extra costs were incurred due to the respondent and its sole director, Mr Scobie, failing to take any steps in the proceedings. These extra costs included costs which had to be incurred because the respondent did not produce wage and time records, which had to be reproduced from records kept by Mr Charlton's partner. These records were essential in assisting the Authority determine the claim.

[4] In addition, because of the respondent's failure to attend the Authority's case management telephone conference call, Mr Charlton's representatives had to deliver correspondence to Mr Scobie to ensure he was aware of the evidence being relied upon.

Discussion

[5] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

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.

[6] The Authority is bound by the principles set out in *Da Cruz* when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[7] First, I accept that costs should follow the event.

[8] I also accept that the respondent's failure to take any part in the matter has increased Mr Charlton's costs. I also accept that it appears that the respondent did not dispute that Mr Charlton was owed the arrears awarded to him. If the respondent had taken an active part in addressing the claim, it is likely that Mr Charlton's costs would have been considerably less.

[9] I also accept that the costs incurred by Mr Charlton appear to have been reasonable. I note, for example, that two of the invoices were discounted by AWS Legal, quite substantially in one case.

[10] Mr Pine submits that the calculation of the respondent's contribution to his costs should not be done solely by reference to the Authority's usual daily tariff of \$3,500. I agree, as such an approach would result in an award of \$1,750, which

would be a unjust award in view of the circumstances leading to the costs incurred, caused by the respondent's failure to engage in any way during the process.

[11] The Authority may not use its power to award costs as a punishment or expression of disapproval of the losing party's conduct. However, accepting that the respondent's conduct caused extra costs to be incurred to a large degree, I am prepared to reflect that contribution by awarding a global costs award exceeding the usual daily tariff.

[12] I decline to award costs on an indemnity basis as Mr Charlton was still obliged to prove he was owed the sums he claimed. However, I accept the submission of Mr Pine that the award should be the sum of \$6,000 plus GST, which Mr Charlton would be unable to recover, not being GST registered.

Order

[13] I order the respondent to pay to Mr Charlton the sum of \$6,900 as a contribution to the costs incurred by him. I also order the respondent to reimburse Mr Charlton the cost of the Authority's lodgement fee in the sum of \$71.56.

David Appleton
Member of the Employment Relations Authority