

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 109
3005514

BETWEEN NICHOLAS JAMES DOWN
Applicant

AND WEB GENIUS CENTRAL NZ
LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Nicolas Down, on own behalf
Peter Cullen and Chris Scarrott, Counsel for Respondent

Submissions Received: 6 October 2017 from Respondent
20 October 2017 from Applicant

Determination: 30 October 2017

**COSTS DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

[1] On 4 August 2017 I issued a determination in which I dismissed Mr Down's claim he had been unjustifiably dismissed by the respondent, Web Genius Central NZ Limited (Web Genius).¹ I did so as Mr Down was not an employee and the Authority therefore lacked jurisdiction to consider his claim.

[2] Costs were reserved and Web Genius, as the successful party, now seeks a contribution toward those it incurred defending the claim.

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim.² The tariff might then be adjusted depending on the circumstances.

¹ [2017] NZERA Wellington 69

² refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

[4] The investigation took a day which would, applying the tariff, see a contribution in the order of \$4,500. Web Genius asks that an increase be applied and notwithstanding significantly greater costs seeks \$6,500.

[5] In doing so it notes the case law and the factors to be considered. In particular Web Genius emphasises the fact conduct which unnecessarily increases costs can be a factor which leads to an increased contribution. Web Genius asserts such conduct occurred and refers to Mr Down's attempts to introduce further evidence via submission which it felt necessitated the procurement of expert reply evidence. That meant costs additional to those already incurred in running the original case and it is submitted this should be recognised in the contribution awarded.

[6] In reply Mr Down advises he is currently on a benefit and impecunious. He notes he also incurred substantial costs and refers to the fact that as a result of my determination the substantive matter is now before the District Court.

[7] He asks that *...costs be ordered to lie where they fall for the moment, and to be dealt with in the substantive District Court hearing.*³

[8] I will deal with Mr Down's reply first. It faces some difficulty with the most significant issue being the request costs be held in abeyance and then dealt with by the District Court. That cannot occur as that Court lacks jurisdiction.

[9] The second problem is that while he asserts impecuniosity Mr Down failed to provide supporting documentation or evidence. That failure is, I consider, important given Web Genius' submission regarding its understanding Mr Down operates a number of other business interests which suggests he has the means to pay a costs contribution.⁴ There was, in the original hearing, evidence which supports Web Genius' understanding though that evidence also suggested some of those interests may be in the name of, and operated by, Mr Down's wife.

[10] I also note Mr Down could afford representation and appears able to still do so, or at least shoulder the possible consequences of non-success, given pursuit of his claims in the District Court.

³ Mr Down's reply at [10]

⁴ Web Genius' costs application at [20]

[11] The above leaves me in a position where I consider there is no reason I should not apply the well-established principle costs follow the event especially given the unequivocal finding Mr Down had no case in the employment jurisdiction. The issue of Mr Down's possible impecuniosity can then be revisited if compliance becomes an issue, though if that eventuates I strongly suggest he support his claim with evidence.

[12] Turning to Web Genius' request I increase the tariff. The answer is no. There is no evidence of the actual costs incurred but more importantly, and while I have some qualms about the manner in which this evidence was raised, the simple fact is it was not determinative and I question whether the response I received was necessary. The evidence that primarily determined this matter was that which confirmed Mr Down initially intended the arrangement be one of contract for services, as opposed to employment, and confirmed that by various subsequent actions.

[13] Having considered the submissions I conclude this is a situation in which the normal tariff should be applied.

[14] For the above reasons I order the applicant, Nicholas Down, pay the respondent, Web Genius Central NZ Limited, the sum of \$4,500.00 (four thousand, five hundred dollars) as a contribution toward the costs Web Genius incurred in successfully defending Mr Down's claim.

M B Loftus
Member of the Employment Relations Authority