



# New Zealand Employment Relations Authority Decisions

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## Diesel Doctor Limited v Wessels CA165/10 (Christchurch) [2010] NZERA 710 (23 August 2010)

Last Updated: 10 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 165/10 5308647

BETWEEN DIESEL DOCTOR LIMITED

Applicant

AND NIKKI WESSELS

Respondent

Member of Authority: Representatives:

Submissions received:

M B Loftus

Tim McGinn, Counsel for Applicant Nikki Wessels, on her own behalf

9 August 2010 from Applicant 18 August 2010 from Respondent

Determination:

23 August 2010

### COSTS DETERMINATION OF THE AUTHORITY

[1] This matter has its origins in an application from the current respondent, Ms Nikki Wessels, for unpaid holiday pay and redundancy compensation. On 24 March 2010 that claim was settled in mediation, with the agreement requiring action by both parties. Ms Wessels failed to perform her agreed obligations which resulted in the present applicant, Diesel Doctor Ltd, applying for an order that Ms Wessels comply with the terms of settlement.

[2] An investigation meeting was scheduled for 5 August 2010. The meeting did not, however, proceed as Ms Wessels finally fulfilled her obligations the preceding afternoon. The applicant states it was not made aware of that fact until around 5.10pm and the nature of the transaction was such that it had to seek confirmation from the third party (an accountant's office) through which Ms Wessels completed the transaction. The applicant says that the late notification meant that it could not do so until the accountant's office opened on the morning upon which the investigation was scheduled. By that time Counsel had prepared for the meeting and incurred costs that the applicant now seeks to recoup.

[3] Mr McGinn advises that his client incurred costs of \$1113.75 and seeks \$835.31 as a contribution. That is 75% of the total and Mr McGinn justifies the claim by referring to the matters history and the fact that the failure to settle until so close to the scheduled hearing obligated him to prepare. Mr McGinn cites various actions of the respondent that, he contends, show that the failure to settle promptly was deliberate. He also refers to a letter dated 30 July 2010 (and well after the present proceedings were filed) in which he advised Ms Wessels that he would pursue the issue of costs on the basis that "*You have sought to delay and avoid your obligations...*" and forced his client to incur costs for "*... a proceeding that should not have been necessary*".

[4] In her response Ms Wessels refers to a reluctance to conclude the agreed settlement and the fact that she considers there

was an unresolved matter. She then refers to a threat of compliance action issued by Mr McGinn on 28 April and attributes her failure to act then to Mr McGinn's alleged refusal to answer a question about that remaining issue. Ms Wessels denies that she has deliberately delayed compliance and adds *"I was on sick leave for the week prior to the hearing and subsequently it was my decision not to further this matter any further as there was obviously not going to be any resolution. I took the necessary steps to resolve."* She accepts that the applicant was not made aware for her actions until 5.10pm but claims that that left sufficient time for it to confirm that evening. She closes by contending that it was the applicant's "... decision to reappoint his lawyer which was unduly necessary. These costs I feel are his bearing".

[5] It is normal that costs follow the event and whilst the event did not actually occur, I agree with Mr McGinn's submission that the late compliance necessitated preparation.

[6] I must say that I am not impressed by Ms Wessels' arguments. Reluctantly or not, she did enter into the settlement and I must assume that she knew the ramifications given she was accompanied by counsel at the mediation. She was obliged to comply. Nor do I accept the idea that her illness necessitated the late compliance. Over four months had passed since the settlement was entered into and Ms Wessels was clearly advised of the consequences of continued non-compliance through Mr McGinn's letter of 30 July.

[7] The simple fact is that she delayed until the last moment and the way in which she approached her obligations was, from the Authority's perspective, illustrated by her refusal to participate in a telephone conference scheduled to meet her needs. She was "too busy".

[8] This is, in my view, an instance where a contribution toward the applicants costs is justified.

[9] The Authority often considers awards of around \$3,000 for each day of an investigation meeting. The amount sought, \$835.31, can not, therefore, be considered excessive given that this meeting could well have taken a half day and includes the costs incurred in trying to entice Ms Wessels to honour her obligations. I therefore consider it appropriate to award the full amount sought.

## **Orders**

[10] Ms Wessels is ordered to pay the respondent, Diesel Doctor Limited, the sum of \$835.31 (eight hundred and thirty five dollars and thirty one cents) as a contribution toward costs incurred in obtaining her compliance with the mediated settlement of 24 March 2010.

Mike Loftus

Member of the Employment Relations Authority

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