

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 23
5467150

BETWEEN TYRONE FOSTER
 Applicant

A N D TWO DEGREES MOBILE
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Robert Morgan, Advocate for the Applicant
 Penny Swarbrick, Counsel for the Respondent

Submissions Received: 10 February 2015 from Respondent
 19 February 2015 from Applicant

Date of Determination: 25 February 2015

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 30 January 2015 I issued a determination rejecting Mr Fosters claim he had been constructively dismissed. Costs were reserved.

[2] 2 Degrees, as the successful party now seeks \$3,500 as a contribution toward the costs it incurred in defending the application.

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[4] In this instance the investigation took approximately half a day so, applying the above formula, 2 Degrees could, in the normal course of events, expect around \$1,750.

[5] 2 Degrees seeks a greater sum. In support of its claim it notes the approach referred to in 3 above and submits the tariff should be increased as a result of four factors which unreasonably and unnecessarily added to its costs. They were:

- a. Failing to adhere to the agreed timetable;
- b. Giving evidence on new matters not heralded and which required effort and cost to address;
- c. Providing briefs for two witnesses who, it is asserted, had no intention of appearing at the investigation. Responses, however, had to be prepared and this incurred cost; and
- d. Bringing an unmeritorious claim.

[6] Travel costs for Auckland based counsel were not sought.

[7] In reply Mr Foster refers to a strained financial position brought about by recent changes to his personal situation. These have increased his living costs and while seeing a reduction in income.

[8] He also asserts that 2 Degrees could have been avoided the cost of an investigation had it agreed to attend mediation.

[9] Having considered the submissions I conclude neither argument convinces me I should depart from the tariff. There is no evidence the failure to adhere to the timetable increased costs and the new issues were addressed expediently in the investigation. I agree it appears the two witnesses had no real intention of appearing but their evidence bore little relevance and that was why I did not pursue their absence. The lack of relevance leads me to conclude the additional preparation was minimal.

[10] There is no evidence tendered in support of the claim Mr Foster faces fiscal hardship and while mediation is a preferred means of resolving issues, there is nothing to say it is compulsory though efforts to resolve a dispute are something to consider in

making a costs award. Here I balance 2 Degrees failure to attend against its assessment the claim lacked merit and did not justify the cost of attending mediation in Christchurch which would, in itself, have been significant. As events transpired that assessment was correct but that was for the investigation to determine. Ultimately there had to be some consideration of the claim whether it be by mediation or investigation and either would have incurred cost.

[11] For the above reasons I consider it appropriate I apply the daily tariff. I therefore order Mr Foster pay Two Degrees Mobile Limited the sum of \$1,750 (one thousand, seven hundred and fifty dollars), as contribution toward the cost of defending this claim.

M B Loftus
Member of the Employment Relations Authority