

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 197
5516746

BETWEEN SONOKO GENTA
Applicant
AND RANDALL DIGGS
Respondent

Member of Authority: Christine Hickey

Representatives: Anna Oberndorfer, Advocate for the applicant
Randall Diggs was self-represented

Costs submissions received: From the applicant on 18 November 2015
From the respondent on 30 November 2015

Determination: 11 December 2015

COSTS DETERMINATION OF THE AUTHORITY

Orders

A. Randall Diggs must pay Sonoko Genta \$3,571.56 in costs by 31 January 2016.

[1] On 22 October 2015 I issued a determination that Ms Genta had been employed by Mr Diggs personally, and not a company with which he was associated. I also found that she had been unjustifiably dismissed and should be paid a total of \$6,647.93¹ by Mr Diggs and that Mr Diggs should pay a penalty of \$500 to the Crown.

[2] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. Costs are awarded at the discretion of the Authority.

¹ Being made up of s 23(1)(c)(i) of the Employment Relations Authority Act 2000 compensation and unpaid wages.

[3] The principles and the approach adopted by the Authority on which an award of costs is made are well settled. In exercising its discretion the Authority frequently judges costs against a notional daily rate, which is currently \$3,500. The successful party can usually expect a reasonable contribution to their legal costs to be made by the unsuccessful party.

[4] The investigation meeting took 4 hours, or a little over 1/2 a day. However, due to further documents being requested from Mr Diggs after the investigation meeting written submissions were filed later.

[5] Each case has to be considered on its merits and there are factors to be considered which may increase costs and those which may decrease the amount of costs to be paid.

Ms Genta's submissions

[6] Ms Oberndorfer submits that Ms Genta should receive a contribution to her legal costs moderately in excess of the daily tariff. She submits that Mr Diggs' approach to the matter increased Ms Genta's costs due to delays in dealing with the matter because of Mr Diggs' delay in responding to the application.

[7] Delays on Mr Diggs' part also led to mediation needing to be directed. Ms Oberndorfer submits that because of that and the amount of work she had to do to reach that point, costs leading up to mediation should be awarded.

[8] Ms Oberndorfer submits that Mr Diggs' behaviour leading up to the investigation meeting led to uncertainty and caused unnecessary preparation on Ms Oberndorfer's part because it was not clear how Mr Diggs would argue his case.

[9] Ms Oberndorfer's costs to Ms Genta are \$8,750 and she submits they are reasonable. She is not seeking indemnity costs. Instead, she submits that an uplift to the daily tariff by \$1,000 is a realistic increase and seeks \$4,500 in total plus the filing fee of \$71.56.

Mr Diggs' view

[10] Mr Diggs sent a one page letter to the Authority in response to the submissions claiming costs. He states that on the basis the investigation meeting took half a day the starting point for contribution to costs would be \$1,750. However, he asks me to

take into account his difficult financial circumstances. He says he is unable to pay much because he has a huge amount of debt and as a result was forced to sell his house, which he gave evidence of during the investigation meeting.

[11] Mr Diggs did not attach any financial information setting out his assets and liabilities and has not filed an affidavit setting out his financial situation.

Determination

[12] Given that the meeting took a little more than half a day I take the amount of \$2,100 as a starting point for a reasonable contribution to costs. I consider that an uplift is justified for the necessity to consider additional evidence and Mr Diggs' written submissions prepared and filed after the investigation meeting and the necessity for Ms Oberndorfer to make additional written submissions in response.

[13] In addition, I consider an uplift is justified for the lack of co-operation with the Authority's process from Mr Diggs in the initial stages of the proceedings. From the beginning Mr Diggs refused, more than once, to file a statement in reply or attend telephone directions conferences until his name was removed from the proceedings. Even when I suggested joining Adventure Holidays Limited and Road Runner Rentals Limited to the proceedings and determining which entity or who was the employer as part of the substantive investigation Mr Diggs continued to refuse to engage with the Authority. He then instructed counsel who made an application to strike out the proceedings against Mr Diggs, which Ms Oberndorfer was obliged to respond to in a telephone directions conference. Mr Diggs did not attend that telephone conference despite only instructing counsel to represent him personally and not the company he contended had been Ms Genta's employer. That company was unrepresented at that teleconference despite it having been joined to the proceedings. That meant a further teleconference had to be held to set down an investigation meeting and to set dates for provision and exchange of evidence. Mr Diggs behaviour increased the amount of work Ms Oberndorfer had to undertake on Ms Genta's behalf.

[14] Both the above factors justify an uplift to \$3,500 costs. I do not consider that a further uplift is reasonable.

[15] I now need to consider Mr Diggs' financial position. In *Merchant v Chief Executive of the Department of Corrections*², Judge Couch said:

The established principle is that ability to pay should be taken into account if payment of the sum which is otherwise appropriate would cause undue hardship to the plaintiff. Assessment requires consideration of the total financial position of the plaintiff including both assets and liabilities and income and necessary expenditure.

[16] In *Gates v Air New Zealand Ltd*³ Judge Couch held that causing hardship to the unsuccessful party in the imposition of costs which is excessive or disproportionate, entitles the Court or Authority to reduce a costs award that would otherwise be appropriate.

[17] However, in *Tomo v Checkmate Precision Cutting Tools Ltd*⁴ Judge Inglis observed while ability to pay is a relevant factor in consideration of costs, *it is not a trump card.*

[18] Mr Diggs has not filed any information about his assets and liabilities or his income and necessary expenditure. There is insufficient evidence for me to consider whether Mr Diggs financial position should decrease the amount of costs. Therefore, there is no reduction in costs payable.

[19] However, my determination does not preclude the parties working out a time payment arrangement that suits both Mr Diggs and Ms Genta.

[20] On that basis, Mr Diggs must make a contribution of \$3,500 to Sonoko Genta's costs of representation, plus reimburse the filing fee of \$71.56.

Christine Hickey
Member of the Employment Relations Authority

² [2009] ERNZ 108 at [29].

³ [2010] NZEmpC 26.

⁴ [2015] NZEmpC 2.