

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 159
5422017

BETWEEN CRAIG DAVID GORDON
 Applicant

A N D ADSHEL NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Robbie Bryant, Counsel for Applicant
 Stephen Langton, Counsel for Respondent

Submissions Received: 17 April 2014 from Applicant
 24 April 2014 from Respondent

Date of Determination: 28 April 2014

COSTS DETERMINATION OF THE AUTHORITY

**A. Adshel New Zealand Limited is ordered to contribute \$1750
 towards Mr Gordon's costs.**

The substantive determination

[1] In a determination of the Authority dated 11 April 2014¹ the Authority determined as follows:

- Under the terms of an individual employment agreement between the applicant, Mr Craig Gordon and the respondent, Adshel New Zealand Limited (Adshel), Adshel had a discretion whether to pay commission to Mr Gordon and the amount of such commission on sales generated in April 2013 (April commission).

¹ [2014] NZERA Auckland 141

- The exercise by Adshel of its discretion not to pay Mr Gordon the April commission was not the action of a fair and reasonable employer in the circumstances.
- Adshel was ordered to pay Mr Gordon the April commission together with interest at the rate of 5% from 3 May 2013 down to the date of payment, within 14 days of the date of the determination.
- Holiday pay was not payable on the April commission which as a discretionary payment is excluded from the definition of ‘gross earnings’ under the Holidays Act 2003.

[2] The parties were encouraged to agree costs between themselves. This was not possible and so memoranda as to costs were exchanged.

[3] A memorandum of costs was filed on behalf of Mr Gordon seeking a contribution of \$5,175 (including GST) towards his costs. This amount was discounted. It was submitted on behalf of Mr Gordon that all costs incurred by him were reasonable because the arguments were legal and required the assistance of legal counsel. It was further submitted that as Mr Gordon had withdrawn claims before the Authority which were “*arguable*” because of the risk of pursuing these he should be credited for taking this approach. Further it was submitted that Mr Gordon was entitled to costs incurred because Adshel had been given the opportunity to rectify its erroneous view of Mr Gordon’s claim to the commission, but failed to alter its position.

[4] Mr Langton opposed the costs sought on the basis both parties had achieved some level of success and the costs claimed on behalf of Mr Gordon were not reasonable.

[5] The Authority’s power to award costs arises from Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act). This confers a wide discretion on the Authority to award costs, on a principled basis.

[6] The principles guiding the Authority's approach to costs are set out by the full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*². Those principles are so well recognised I do not need to restate them.

[7] The general principle is that costs follow the event, and I see no reason to depart from that in this case. Mr Gordon was largely successful in his claim and should be awarded costs. Total costs incurred by Mr Gordon were \$6,396.60 (including GST) which were discounted. This sum comprised attendances by Mr Bryant, Ms Aishleen Sluiters, Barrister who assisted and Mr Blair Edwards, Barrister who supervised.

[8] In my view the dispute before the Authority was a reasonably straightforward matter concerning the interpretation, application and operation of an employment agreement. While it was necessary for both Counsel to undertake a legal analysis of relevant case law, in my view the matter did not justify the level of attendances and associated costs sought on behalf of Mr Gordon.

[9] I do not accept the argument advanced on behalf of Mr Gordon that Adshel's failure to alter its "erroneous" position that commission was payable to Mr Gordon justifies an increase in costs. The interpretation issue was of importance to both parties and was the issue for determination by the Authority.

[10] The Employment Court in *Carter Holt Harvey v. Eastern Bays Independent Industrial Workers Union and Ors*³ observed that a notional daily tariff approach, which was to be adjusted in a principled way, was best suited to the Authority's unique jurisdiction. I adopt that approach.

[11] The normal starting point for costs in the Authority is \$3,500 per day, *Fifita (aka Bloomfield) v. Dunedin Casinos Limited*⁴. This matter involved an investigation meeting of half a day. Mr Gordon seeks \$5,175 including GST towards his costs. For the above reasons I do not accept an *uplift* in the normal daily rate is warranted in the circumstances. Accordingly, I order Adshel to contribute \$1,750 towards the costs of Mr Gordon.

Anna Fitzgibbon
Member of the Employment Relations Authority

² [2005] 1 ERNZ 808

³ [2011] NZEmpC

⁴ [2012] NZERA Christchurch 219