

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 33
5415081

BETWEEN PETER JOHNSON
 Applicant

AND NZL MARQUIS LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Gerard Dewar, Counsel for the Applicant
 Alyn Higgins, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions: In writing by 13 March 2014

Determination: 15 April 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] Costs were reserved by the Authority in [2013] NZERA Wellington 12 (4 February 2014). Previously Mr Johnson was represented by another advocate. Since the above determination was delivered Mr Johnson has engaged a new representative for advice and his costs submissions.

[2] Mr Johnson has requested that costs follow the event and that the Authority's tariff be uplifted to \$4,500.

[3] The costs claim is denied by the respondent, who has requested that costs lie where they fall or be set at the daily tariff for a half day.

[4] Costs follow the event as Mr Johnson was successful in his claims. I am satisfied that he has incurred costs with a need to be represented in the Authority's investigation (Joe Richardson, advocate) and the submission on costs (Gerard Dewar, solicitor).

[5] Mr Johnson is entitled to get a lawyer given what he says were the arguments that have arisen over costs and the parties' conduct towards each other during the Authority's investigation, and to get the best outcome he is entitled to. However, the extra costs for that are not necessarily fully reimbursed. This is because he has engaged a lawyer of his own volition (for whatever reason). The principles on costs are straight forward for submissions, and costs submissions in writing are included as part of the tariff without any further adjustment to the tariff (including if there is any further expense from a lawyer).

[6] I hold that the tariff should be left at the daily tariff of \$3,500. I have considered the following factors:

- (a) That Mr Johnson should not be deprived of the fruits of his success, and that his remedies are eroded by the costs.
- (b) That the respondent denied throughout the claim that Mr Johnson had any case where the evidence clearly pointed to Mr Johnson's likely success at least on the preliminary point that he was an employee. The indicators for this were apparent before the investigation meeting. I am satisfied that even so there would have still been an issue on the amount of hours worked, even if the employer had conceded early that Mr Johnson was an employee. The hours of work was also a keenly argued matter and it had all the appearances of there being little compromise between the parties. As it was the Authority's investigation meeting was scheduled for one day and it was reasonably expected it could take that time. Any shortened investigation may not have saved much more in costs given the travel arrangements required and the commitment to the scheduled time.
- (c) Mr Richardson's travel to the Wairarapa beforehand to get information and to interview witnesses, including talking with his client, are all part of the preparation and recognised in the daily tariff. It is up to the parties and their representatives to make arrangements in regard to their resources and how to spend their money in the most cost effective way. This is especially so when other options are available for representation, in this case the Wairarapa. I found during the Authority's investigation meeting that notwithstanding any trips Mr

Richardson had to the Wairarapa to prepare, the information from Mr Johnson was not fully provided prior to the investigation meeting, as it should have been.

- (d) That the sum claimed for costs is below the amount of actual costs apparently incurred.
- (e) That Mr Johnson has modest means that I have adduced from his evidence during the investigation meeting.
- (f) That the respondent has put Mr Johnson to the cost of an investigation meeting, which needed to be held, because of its failure to keep any records, even if there had not been an employment relationship. However, the respondent usefully provided an alternative calculation of what the quantum might have been, given the difficulties that Mr Richardson had getting the information from Mr Johnson, whom I accept was reliant on Mr Richardson providing the calculations for his claim.
- (g) That there were delays during the meeting caused by Mr Johnson not having produced some documents prior to the investigation meeting that reasonably could have been expected to be produced in advance, and the delay did not unduly put the respondent to any extra cost given the investigation meeting was scheduled for the full day anyway. Indeed the investigation meeting started at 9 am and finished at approximately 4.30pm. The respondent had plenty of time to review the documents and rebut and respond to them at the investigation meeting. No more time beyond the time set down was required. Mr Johnson had to meet the costs of the request for the copies of the documents when they were photocopied during the investigation meeting. There can be no reimbursement for that, I hold.
- (h) The costs for mediation must be incurred by the parties and this is a separate matter to the costs of the Authority's investigation meeting. There is no reason for me to depart from the usual principle that the parties pay their own costs for mediation. There is no award for mediation costs in the sum awarded.

- (i) That both parties should have known that costs are based on a \$3,500 per day tariff in the Authority, but with the discretion for the sum to be either uplifted or reduced, and given the nature of the matter, any uplifting and or reducing the tariff was never likely to happen.
- (j) There are no details on the actual costs incurred and any of Mr Johnson's arrangements for costs involving Mr Richardson and Mr Dewar.

[7] Mr Johnson is entitled to \$3,500 costs. In addition, he is also entitled to the filing fee of \$71.56.

Order of the Authority on costs

[8] I order NZL Marquis Limited to pay Peter Johnson the sum of \$3,500 costs and \$71.56 filing fee.

P R Stapp
Member of the Authority