

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 107
5527189

BETWEEN TATARI RAMEKA
 Applicant

AND GNOMEFARMER PAINTERS
 LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Bede Laracy, Advocate for the Applicant
 Philip Wilson, on behalf of the Respondent

Information received: On 6 and 27 October 2015 from the Applicant
 On 14 and 23 October 2015 from the Respondent

Determination: 6 November 2015

COSTS DETERMINATION OF THE AUTHORITY

[1] Following a determination¹ which found Mr Tatari Rameka had been unjustifiably dismissed, his advocate lodged an application seeking \$3,500 in costs from Gnomefarmer Painters Ltd (Gnomefarmer).

[2] Prior to the lodging of the application the parties engaged in negotiations to settle the matter of costs. On 24 September 2015 the applicant's representative sent an email to Gnomefarmer and advised:

"I intend to seek costs of \$3,500 (ex GST) which is the standard daily tariff at the Authority. In order to avoid further process, I would be willing to accept a contribution of \$3000 (ex GST). That amount would be payable within 7 days of invoice. If you are agreeable I will issue an invoice. If you are not agreeable I will file for costs in the Authority,"

[3] Gnomefarmer's accountant responded on the same date and advised the director of Gnomefarmer accepted the invoice. That information was reiterated later the day by the director of Gnomefarmer in an email to the applicant's representative as follows:

¹ dated 24 August 2015, *Rameka v Gnomefarmer Painters Limited* [2015] NZERA 81

“...We accept your offer of \$3,000 (ex GST) can you please send through the invoice to [the accountant] who is still in the process of finalising accounts.”

[4] A copy of the invoice was not provided to the Authority.

[5] On 6 October the respondent transferred the sum of \$1371.80 as a portion of the costs agreed, to the applicant's representative. The director of Gnomefarmer advised the applicant's representative by email that there was no further monies in the company's account. Concerns, foreshadowed during the Authority's investigation, about Gnomefarmer's finances were reiterated. Gnomefarmer's director advised that the company was closing down and asked the advocate if he was willing to discuss options.

[6] On 19 October Gnomefarmer's accountant advised the advocate that the company became insolvent at the end of September 2015, although that matter does not appear on the Companies Office register.

[7] On 27 October 2015 the costs application before the Authority was amended. The applicant reiterated his request for an order of \$3,500 as contribution to costs and sought also to have the director of Gnomefarmer joined as a respondent party to this application.

[8] The advocate says when he spoke to Gnomefarmer on 6 October 2015 he was advised that he [the director of Gnomefarmer] had not agreed to payment within 7 days. The advocate says in these circumstances there was no agreement on 24 August 2015 and therefore no contract formed as regards the payment of costs.

[9] I do not accept that proposition and am unwilling to ignore the correspondence exchanged between the parties. I am satisfied that the fundamental elements for the formation of a contract were completed on 24 August 2015. An offer was made by the applicant's representative and accepted by Gnomefarmer; the value or consideration for the arrangement was the benefit to both parties to avoid the cost of future legal action; there was a mutual intention to create legal relations, and certainty as to terms. Moreover I regard the payment made on 6 October (albeit partial) made precludes a successful argument by the advocate that Gnomefarmer did not intend to be bound by the arrangement.

[10] I consider the issue is not whether the parties have a binding agreement, which I find that they do, but rather that Gnomefarmer has not fulfilled its obligations. That is a matter for compliance.

[11] The Authority's powers are limited to those conferred by the Employment Relations Act. The Authority's ability to order compliance is set out at s 151 as regards settlement agreements that have been endorsed by a mediator² or s 137 in respect to employment agreements and various sections of the Employment Relations Act and other enactments expressly listed at s 137.

[12] The agreement between the parties as to payment of costs is not an employment agreement nor a s 149 settlement agreement. It follows that the Authority has no jurisdiction to order the respondent to comply with the contractual agreement between them. Any action that the applicant wishes to take in order to compel Gnomefarmer to honour their contractual agreement on 24 August 2015 will need to be progressed through the courts of ordinary jurisdiction.³

[13] This application is dismissed for lack of jurisdiction.

Michele Ryan
Member of the Employment Relations Authority

² Pursuant to s 149

³ I note that had the parties not reached agreement on the sum of costs I would have been unlikely to make an order of \$3,000. The investigation into the applicant's substantive was neither complex nor unusual. The length of the investigation was under four hours. It is likely in these circumstances that a half day tariff of \$1750 would have been ordered.