

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 312
5320617

BETWEEN ALI MUSTAFA RATHORE
Applicant

AND KIWITAX CONSULTANTS
LIMITED
First Respondent

BASIT ACCOUNTS AND
TAX CONSULTANTS
LIMITED
Second Respondent

Member of Authority: R A Monaghan

Representatives: Ali Mustafa Rathore in person
Mir Ikram Ul Haq and Kishwar Ikram, advocates for
respondents

Memoranda received: 29 June 2011

Determination: 15 July 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 2 June 2011 I found Ali Mustafa Rathore failed to commence an employment relationship which had been agreed with Kiwitax. Accordingly there was no dismissal. I also found there was never any agreement to enter into an employment relationship with Basit, and that neither Kiwitax nor Basit owed unpaid wages to Mr Rathore.

[2] Costs were reserved. An application for costs was received on behalf of the companies. Mr Rathore did not reply.

Determination

[3] Mr Ikram sought costs calculated as follows:

- . \$2,242 for mediation;
- . \$3,241.15 incurred by Kiwitax in respect of the investigation in the Authority;
- . \$3,405 incurred by Basit in respect of the investigation in the Authority; and
- . a witness fee of \$50 in respect of Mr Zhang.

[4] Mr Ikram did not cite the principles set out in *PBO Limited v da Cruz*.¹ Those are the principles which guide the Authority's (although not the Employment Court's) approach to costs. I summarise them as follows:

- . the Authority has a discretion as to whether costs should be awarded, and in what amount;
- . the discretion must be exercised in accordance with principle;
- . costs can be approached on a case by case basis;
- . costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct, although conduct which increases costs unnecessarily can be taken into account;
- . it is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- . costs generally follow the event;
- . awards will be modest;
- . frequently costs are judged against a notional daily rate; and
- . the nature of the case can influence costs.

[5] I add that an order for the full reimbursement of costs incurred is rare, and is usually considered in the context of solicitor and client costs. In general costs are addressed with reference to a contribution to the costs of the successful party. As Kiwitax and Basit were entirely successful here, they are entitled to a contribution to their costs.

[6] The notional daily rate referred to above is currently \$3,000 - \$3,500. Since the investigation meeting took a little over half a day on the first day, and half a day on the second, I assess a total notional rate for the combined meetings as \$3,500.

¹ [2005] ERNZ 808

[7] The calculations provided in support include a component in respect of mediation. Mr Ikram cited observations of the Employment Court in *Waugh v Commissioner of Police*² regarding the incorporation of mediation in a proceeding, and hence the potential for costs of mediation to be taken into account when considering costs of a proceeding in the Court. However the question of whether the costs of mediation can be incorporated in an order for costs is not free from doubt. It has been commented on in other decisions since *Waugh*, and is yet to be resolved by the Court. The inclusion of a mediation component in costs awards is not currently a practice in the Authority.

[8] The calculations also include a notional chargeout rate of \$80 per hour for time spent by Mr Ikram for Kiwitax, and Mrs Ikram for Basit respectively, being the time they spent in preparing for and attending the investigation meeting. However as well as being advocates they were also litigants, in that their companies were the respondents. They would have been obliged to spend time on the matter in any event, and in that capacity are not in principle entitled to a contribution to costs.

[9] It is open to the Authority to consider claims on a case by case basis, and the nature of the case is a relevant consideration. Here there was a high degree of vagueness Mr Rathore's claim, which forced Mr and Mrs Ikram to expend unnecessary amounts of what I consider to be executive time in attempting to address it as the details were ascertained. Secondly, the claim was particularly unmeritorious. In those circumstances I consider it fair and reasonable to find Mr and Mrs Ikram incurred costs more than as litigants, and to apply the notional daily rate without deduction.

[10] Mr Rathore is therefore ordered to contribute to the costs of Kiwitax and Basit in the sum of \$3,500.

[11] I further order Mr Rathore to pay a witness' fee in the sum of \$50.

R A Monaghan

Member of the Employment Relations Authority

² [2004] 1 ERNZ 450