

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 117
3020555

BETWEEN BARRY SEXTON
 Applicant

A N D PHILLIP LOWE AND PASMR
 (NZ) PTY. LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
 Gregory Denholm, Counsel for Respondent

Submissions Received: 9 April 2018 from Respondent
 11 April 2018 from Applicant

Date of Determination: 12 April 2018

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS
AUTHORITY**

A. The Applicant is to pay a contribution towards the Respondent’s costs in the sum of \$850 within fourteen days of the date of this determination.

The substantive determination

[1] By way of a determination dated 27 March 2018¹, the Authority found that the underlying and true nature of the relationship between the applicant, Mr Barry Sexton and the respondents, Phillip Lowe and Pasmr (NZ) Pty. Limited (Lowe and Pasmr) was a contract of services, not employment. Accordingly, the Authority did not have jurisdiction to investigate Mr Sexton’s claims.

[2] Costs were reserved. The parties were invited to exchange memoranda as to costs.

¹ [2018] NZERA Auckland 99.

Submissions as to costs

[3] On behalf of Lowe and Pasmr, a memorandum was filed by Mr Denholm detailing his attendances. Mr Denholm's fees amount to \$8,613.50 including GST. No invoices were attached to the memorandum. There were no submissions made in support of an "uplift" in the Authority's daily tariff.

[4] In his memorandum in reply, Mr Sexton submitted that he was owed wages which Lowe and Pasmr had refused to pay. This appears to be a failure to accept the Authority's substantive determination that he was not an employee. Mr Sexton claims the costs sought against him to be unjust.

Costs determination

[5] The Authority's power to award costs against a party is set out in clause 15 of schedule 2 of the Employment Relations Act 2000 (the Act) which provides as follows:

15. **Power to award costs**
 - (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
 - (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such a manner as it thinks reasonable.

[6] The Authority is bound by the principles set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*² when setting costs awards. These include:

- There is discretion as to whether cost would be awarded and in what amount;
- The discretion is to be exercised in accordance with principle and not arbitrarily;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience are to be considered on a case by case basis;
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;

² [2005] 1 ERNZ 808.

- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;
- That frequently costs are judged against a notional daily rate;
- The nature of the case can also influence costs, and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[7] First, I accept that it is appropriate for Mr Sexton to make a contribution towards Lowe and Pasmr's costs on the basis that costs follow the event. Lowe and Pasmr successfully resisted Mr Sexton's claim that he was an employee.

[8] The starting point in awarding costs in the Authority where an investigation meeting has taken place is the daily tariff, which stands at \$4,500 for the first day and \$3,500 for each subsequent day. The investigation meeting lasted just over one and a half hours. Based on an 8 hour day this amounts to just over \$843.50.

[9] Counsel for Lowe and Pasmr has provided a narrative of his attendances. The amount of time spent on each attendance is not provided.

[10] I consider the amount being sought on behalf of Lowe and Pasmr to be too high. The case was reasonably straightforward. The facts were not complicated and the legal issues not complex. The issue was whether Mr Sexton was employed by or contracting his services to Lowe and Pasmr. I found that Mr Sexton had not been employed and was a contractor.

[11] Costs should be reasonable and awards modest. Costs are not to be used as a punishment. Taking into account the above factors and the principles that guide the Authority when assessing costs, I consider a contribution by Mr Sexton to Lowe and Pasmr of \$850 towards their costs, appropriate.

[12] I order Mr Sexton to pay Lowe and Pasmr the sum of \$850 towards Lowe and Pasmr's costs. These costs are to be paid by Mr Sexton within fourteen days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority