

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 41
5408465

BETWEEN	ELIAS WYBER Applicant
AND	MIDAS INFOMEDIA LIMITED First Respondent
AND	AMARDEEP SANDHU Second Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Megan Richards and Amberley James, for the Applicant Mike Gould, for the Respondents
Submissions received:	5 February 2014 from the Applicant 21 January and 12 February 2014 from the Respondent
Determination:	28 April 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 11 November 2013 I found that Elias Wyber had been in a contract for services relationship with Midas Infomedia Limited (Midas). Mr Wyber was therefore unable to pursue a personal grievance against the respondents or seek remedies under the Employment Relations Act 2000. I reserved the issue of costs.

[2] The respondents now seek costs in the sum of \$6, 600 plus GST, as a contribution to their total GST inclusive costs of \$11,500. This is a higher award than one based on the Authority's notional daily tariff of \$3,500. They submit this is justified for the following reasons:

- Their entire success in defeating the applicant's claims;

- Costs based on the current daily tariff, for a one and a half day hearing, would be \$5,250, which is less than half of their actual costs;
- The additional work caused by the applicant's naming two parties as respondents despite the apparent lack of substance for issuing proceedings against the second respondent; and
- The time and additional effort involved in preparing for three issues in the proceedings, i.e. the applicant's status; his claim to have been unjustifiably dismissed or, in the alternative, to have been constructively dismissed

[3] Mr Wyber submits that costs should lie where they fall. In the alternative, he opposes any increase to the normal daily tariff approach adopted by the Authority and submits that a costs award of no more than \$3,500 - \$4,000 should be made. Counsel for Mr Wyber notes that, in the event the Authority makes an award of costs, Mr Wyber will seek an order that such costs be payable in instalments, and at a rate that would not cause him unreasonable hardship.

[4] Counsel for the applicant and the respondents have both cited the principles applicable to the award of costs by the Authority¹. These are well-known and need not be repeated here. Additionally, Ms Richards, on behalf of Mr Wyber, has referred to case law supporting the proposition that costs awards should take into account the ability to pay². She has cited further case law regarding the Authority's normal practice to exclude GST from consideration when setting costs³.

[5] Ms Richards submits that there is no good reason to increase the daily tariff, but a number of reasons to reduce it. These include:

- The respondents' failure to engage with Mr Wyber when he initially attempted to resolve their disagreement through correspondence and their refusal of mediation until directed by the Authority;
- The minimisation of the respondents' time and costs by the applicant's preparation of the bundle of documents;

¹ As outlined in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

² *Richard v Board of Governors of Wesley College* [1999] 2 ERNZ 199, referred to in *Wilton v Carter Holt Harvey Ltd* [2013] NZERA Auckland 468

³ *Hayter v Westbury Thoroughbreds t/a Westbury Stud* [2013] NZERA Auckland 509

- The personal financial circumstances of the applicant, as detailed in an affidavit supplied to the Authority;
- The respondents' failure to comply with the applicant's request for disclosure of relevant documents requiring the assistance of the Authority.

[6] Ms Richards submits that Mr Wyber had a legitimate claim as to his status and the Authority's findings indicated the claim was not completely clear cut or without merit.

[7] Mr Gould for the respondents accepts that ability to pay is a relevant factor in the consideration of a costs award, but submits that the applicant's affidavit discloses insufficient information to support his claim of inability to pay.

[8] I have considered the submissions of counsel carefully in relation to the principles applicable to an award of costs. I am not persuaded that it would be appropriate for costs to lie where they fall. Mr Wyber embarked on a process against two respondents that resulted in their incurring significant costs. He should have been aware of the risk that, in the event his claims failed, he would be asked to contribute to the costs of the respondents. Costs normally follow the event and there is no good reason that they should not do so in this instance.

[9] I agree with Mr Gould that an increase to the normal daily tariff is warranted by the applicant's proceeding against Amardeep Sandhu as second respondent. Mr Wyber claimed to be unclear at the outset whether he had worked for Mr Sandhu or Midas. However, he presented no cogent evidence to the Authority to support a belief that Mr Sandhu employed or engaged him in his personal capacity, rather than as the Chief Executive Officer of Midas.

[10] I note that Mr Sandhu, as the key person in Midas and, at the time of Mr Wyber's engagement, a Director of the company, would necessarily have been involved in the Authority's investigation as a witness. Any increase to the normal daily tariff in citing him as respondent would therefore be modest. That is the only ground put forward by the respondents that I find merits an increase to the tariff.

[11] I accept Ms Richards' submission regarding the inclusion of the applicant's personal financial circumstances as a relevant factor in determining the level of costs to be awarded. Unfortunately Mr Wyber's affidavit does not disclose detailed financial information but contains an offer to make that information available to the

Authority if required. Notwithstanding the lack of such information, I accept that the significant period of unemployment Mr Wyber experienced following his departure from Midas is likely to have had an adverse effect on his financial circumstances.

[12] I also accept the submission on behalf of the applicant regarding goods and services tax and decline to include GST in a costs award. I do not consider the other matters raised by the applicant to warrant adjustment to the daily tariff. With regard to the length of the investigation meeting, I reject Ms Richards' assertion that it "*only just went into a second day*". The investigation meeting concluded close to midday after a 9.30 am start. Costs will be calculated on the basis of one and a half days.

[13] I find the modest increase in a costs award that is warranted by the applicant including Mr Sandhu as second respondent, without evidence to support such inclusion, is offset by a consideration of Mr Wyber's financial circumstances which would affect his ability to pay costs. As those two matters effectively cancel each other out, I confirm the standard daily tariff approach will apply and find that Mr Wyber should pay costs in the sum of \$5,250 to the respondents.

[14] Ms Richards seeks an order that any costs award should payable in monthly instalments of no more than \$100. I recommend to the parties that they explore a mutually acceptable instalment arrangement but, in the absence of detailed financial information, I decline to make an order to that effect. Leave is reserved for the parties to revert to the Authority if they are unable to agree a suitable arrangement.

Order

[15] Mr Wyber is ordered to pay the total sum of \$5,250 in costs to the respondents, Midas Infomedia Limited and Mr Amardeep Sandhu.

Trish MacKinnon
Member of the Employment Relations Authority