

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 131A/09
5126315

BETWEEN A
 Applicant

AND Y LIMITED
 First Respondent

AND Z LIMITED
 Second Respondent

Member of Authority: Alastair Dumbleton

Submissions Received 8 and 22 May 2009

Determination: 20 July 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] An application for costs has been made following the determination of the Authority issued on 24 April 2009 under AA131/09.

[2] Mr A was successful in his claim, to the extent that he recovered a penalty against Y Limited and Z Limited under s 149(4) of the Employment Relations Act 2000, as a remedy for the respondents' breach of a mediated settlement.

[3] A penalty of \$3,000 was imposed against the respondents, half of which was ordered to be paid to Mr A.

[4] Mr A's claim that the respondents had breached the mediated settlement a second time was not upheld. His claim for compensatory damages for harm caused by the breach was also unsuccessful.

[5] Mr A's legal costs were in total \$28,624,96, which includes disbursements and GST.

[6] In submissions for him counsel has referred to relevant authorities including the leading decision on costs in the Authority's investigative jurisdiction, *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808. An order of full costs is

sought by Mr A, or alternatively, a reasonable contribution in such amount as the Authority sees to be appropriate in exercising its discretion under clause 15 of Schedule 2 of the Act.

[7] For the respondent companies it is submitted that in effect Mr A has sought to penalise or punish them a second time by having the Authority award costs, or at least by having them awarded at the solicitor-client level sought. It is submitted for the respondents that account should be taken particularly of the mixed success of both parties by letting costs lie where they fall. Alternatively if costs are to be awarded they should be at the lower end of the notional daily rate referred to in *Da Cruz*.

[8] Mr A sought a remedy provided in law for the circumstances he alleged had been brought about by the respondents. He was successful and recovered as a penalty an amount that was about a third of the maximum penalty, indicating that the breach was not to be regarded as a slight or trivial one. The case had a high level of both factual and legal complexity. Mr A's costs were always likely to exceed any penalty awarded, and *prima facie* penalties are paid to the Crown rather than the party applying for them.

[9] I do not consider costs should be awarded at the level of a full contribution, as the breach was more the product of misunderstanding by Mr D of his obligations than any blatant and malicious conduct carried on with intent to harm Mr A.

[10] The obligations were clear however and Mr D on behalf of his companies Y Ltd and Z Ltd should not have given restricted information to Mr M the private investigator.

[11] Although the investigation meeting itself was a relatively short one of less than a day, the case did require more time than perhaps is usual for preparation, because of its complexity.

[12] I consider that an award at the higher end of the notional daily rate is justified. In the exercise of its discretion the Authority orders Y Ltd and Z Ltd to pay \$3,500 to Mr A as a contribution to his legal costs.

[13] As to the Authority's order prohibiting publication and how it applies to the District Court criminal proceedings, in my view the parties should seek the leave of that Court before referring to the record of Settlement or identifying any persons

concerned in the Authority's investigation or in its determination. The need for the order arose from the suppression orders made by the Court and it is the appropriate forum for determining whether and how the Authority's order will be applied in its jurisdiction.

A Dumbleton
Member of the Employment Relations Authority