

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 63
5311081

BETWEEN

BRIAN ARROWSMITH
STUART ARROWSMITH
ANDREW DOOCEY
MICHAEL COLQUHOUN
Applicants

A N D

BRIGHTWATER ENGINEERS
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Anjela Sharma, Counsel for Applicants
Phil Butler, Advocate for Respondent

Submissions Received: 22 February 2013 from Applicants
22 March 2013 from Respondent

Date of Determination: 3 April 2013

COSTS DETERMINATION OF THE AUTHORITY

A I have ordered Brightwater Engineers Limited to pay to the applicants' costs in the sum of \$12428 and disbursements in the sum of \$378.22.

[1] In my determination dated 17 December 2012 I found in favour of the applicants' that they each had a personal grievance and awarded remedies. I reserved the issue of costs. Submissions have now been received from both parties.

The applicants' submissions

[2] Ms Sharma refers the Authority to the leading Employment Court judgment on costs in the Authority; *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808. The Full Court of the Employment Court in *PBO* stated at para [44] that the Authority is able to set its own procedure and has since its inception held

to some basic tenets when considering costs which were then set out. Ms Sharma referred to the discretionary power the Authority has to award costs and that such discretion is to be exercised in accordance with principle and not arbitrarily. She refers to the general rule that costs follow the event and that frequently costs are judged against the notional daily tariff. She submits that the applicants' are seeking to be indemnified for a significantly high contribution towards their joint costs although later in her submission states that the applicants' are claiming their full costs.

[3] The costs that have been incurred are set out by Ms Sharma at paragraph 61 of her submission in the sum of \$33,000 plus retrievals in the sum of \$603.80 both amounts, GST exclusive which add to \$38,644.37 GST inclusive. In addition Ms Sharma seeks a filing fee of \$71.56 and a hearing fee in the sum of \$306.66. She refers in her submission to additional costs incurred by the applicants' with respect to two urgent applications received from the respondent to stay payment of remedies and in relation to both these applications, submits the applicants' incurred costs in the sum of \$1,224 plus GST for which she seeks reimbursement.

[4] Ms Sharma submits that the Authority should take into account a letter she sent to the respondent's then advocate, Mr Webster, headed without prejudice except as to costs. The date of the letter was 30 September 2011. The offer was not accepted. Ms Sharma submits that the applicants' offer to settle was made in a timely fashion and that the reasonableness of it was such that it should have been viewed as a real opportunity to resolve the issue.

[5] Ms Sharma then addresses an argument she anticipates the respondent making about its ability to pay. She sets out a variety of exchanges and other information before making a concluding submission that any claim by the respondent that it has an inability to pay has not been properly evidenced and therefore has no sound basis.

The respondent's submission

[6] Mr Butler submits there is some confusion about what the applicants' fees comprise. He sets out his understanding that the applicants' costs comprise fees of \$33,000 plus retrieval in the sum of \$603.80 exclusive of GST. He says it is unclear if the indemnity costs are sought when he compares two different paragraphs of Ms Sharma's submissions. In any event, he submits that both parties had their wins and losses and it was not the sort of circumstances in which an award of indemnity

costs is called for. He referred to *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] NZLR 400, (2009) 19 PRNZ 385 at [28].

[7] Mr Butler further submits that the costs sought are not reasonable and notes that while a time disbursement report has been produced there are no invoices generated in the names of the applicants'. Mr Butler submits that doing an assessment on the time records and based on provided examples, the amount of time for preparation was excessive and not reasonable in circumstances where the case was not complicated and the length of the investigation, including closing submissions, not long. He submits that 75% or \$24,750 of the costs claimed should be seen as reasonable using the general rule of thumb guide of two days preparation time for every day of hearing. He submits, based on the time record and Ms Sharma's charge out rate of \$240 per hour, there is preparation of 15 days for the two days hearing that is excessive.

[8] With respect to the *Calderbank* offer, Mr Butler submits that the offer of \$15,000 for each applicant and \$1,500 toward each applicant's costs was made. The result of the Authority decision was that two of the applicants' received more than the *Calderbank* offer, one received less and another came close. He accepts the Authority will need to factor this into the decision in exercising its discretion as to costs, as to whether it should result in a higher award, and if so, how much. Mr Butler then refers to a particular but later letter in the correspondence between the representatives at the time that he submits reveals an underlying tension between the parties. He submits it is the respondent's view that the applicants' were not truly disposed to resolving the matter and were primarily responsible for the underlying tension.

[9] Mr Butler submits that the respondent's financial position is very tight and that its concerns with its financial position were raised during the investigation meeting and that is a factor to be taken into account.

[10] Finally, Mr Butler submits that the daily tariff should be as follows:

- \$3,500
- \$800 in recognition of the *Calderbank* and other factors
- \$1,000 in recognition of four applicants'

- Total daily tariff of \$5,300

[1] On the basis there were two days for hearing, including the delivery of submissions, he submits the Authority should set costs at \$10,600 plus filing and hearing fees. In relation to the urgent application, Mr Butler submits costs should lie where they fall because the applicants' refused to enter into constructive dialogue that would have seen them paid without undue delay, leaving the respondent with little choice but to seek relief from the Authority.

Determination

[11] This is a case where the applicants' were successful and there is no reason to depart from the usual principle that costs follow the event.

[12] The case was not a factually or legally complex matter. The applicants' were not completely successful and in particular, the redundancy was found to be genuine. Part of the evidence and submissions was directed toward the issue of the genuineness of a redundancy as well as to the selection of the applicants' and the process undertaken to implement the redundancies. The case was important to both parties.

[13] There was a sensible cost saving that was agreed to. It was agreed to have the four applicants' personal grievances heard together as the evidence overlapped significantly in the factual background leading to the redundancies. As Mr Butler has set out in his submission, had the matter proceeded as four separate one day investigation meetings, then the starting point for costs would be \$3,500 for each applicant. The point however of having the personal grievances heard together was to save costs by way of reducing hearing time. There will have to be recognition of four rather than one applicant in assessing the daily tariff.

[14] I am not satisfied that this is the sort of case where there should be an award of indemnity costs. In sharp contrast with the non-exhaustive categories of circumstances in which indemnity costs have been ordered in *Bradbury* the parties and representatives did not engage in any behaviour during the investigation meeting or otherwise that caused loss of time to the Authority or to the parties. The applicants' case and the defence put forward by the respondent were not without merit and the case was not pursued in a manner that could be described as reprehensible.

[15] Cost awards in the Authority are usually modest and often determined on the basis of a daily tariff. I intend to start in this case with the daily tariff now recognised as \$3500 and make adjustments up or down as required. If costs are assessed on a daily tariff basis it is not necessary to apply the same scrutiny to the reasonableness of the overall costs incurred by the applicants' as actual costs in this case will exceed by a considerable margin the daily tariff even with adjustments.

[16] I intend to take a different approach with the costs incurred on the urgent applications to stay payment of the awards. I accept Mr Butler's submission that some dialogue may have prevented the applications but the applicants' had a determination in their favour that they were entitled to enforce. What I cannot conclude with any degree of certainty is that the applicants' would have agreed with the proposal in the correspondence negating the need for any later application. I intend to consider costs incurred by the applicants' as a result of the two urgent applications.

[17] Ms Sharma submits that the applicants' incurred costs in the sum of \$1224 plus GST for these later applications and that they are seeking to be fully indemnified. Whilst the financial position of the respondent did improve with the award of contracts I am not in a position to conclude that the applications were so completely without merit at the time they were made that I should approach the matter on the basis of indemnity costs. The Chief Financial Officer, Campbell Smith, in his affidavit sworn on 11 February 2013 deposed to at the time stretched cash flow position and the need to manage outflows until the next project deposit was received.

[18] I intend to assess costs on the basis not of an indemnity award but on the basis of reasonableness. I find that reasonable costs would amount to three hours work in circumstances where Ms Sharma made no formal written response to the applications lodged with the Authority. This is assessed on the following basis. One hour for attendance on a telephone conference with the Authority and any subsequent telephone contact with support officers. One hour for perusal of documents and correspondence with to the Authority and perusal of correspondence sent from the Authority. One hour for discussions with the applicants'' and the Registrar of the District Court. On the basis of Ms Sharma's reasonable \$240 hourly rate that is the sum of \$720. I find that a fair award of costs for the urgent applications would be \$720.00. As I have assessed costs on a reasonable as opposed to a daily tariff basis it

is fair to include GST on that sum as the applicants' are unlikely to be registered for GST to be able to claim it back. A final amount arrived at therefore including GST is \$828.

[19] In respect of the adjustments to the daily tariff I find Mr Butler's submission and approach as to what a daily tariff should be on the whole sensible. I do though make an additional upward adjustment of \$500 to the amount allowed by him each day for the four applicants' to properly reflect the additional work required primarily with respect to remedies. I agree with Mr Butler's assessment of an appropriate adjustment upwards to take into account the offer in the nature of a Calderbank offer and other matters of \$800 per day.

[20] A daily tariff of \$5,800 is fair and reasonable which would for a two day investigation meeting amount to costs of \$11,600. There are also disbursements of \$71.56 for a filing fee and hearing fees of \$306.66. I note in respect of the retrievals that claims for disbursements are limited to disbursements in the true sense of payment of money to a third party rather than normal office overheads – *Oldco PTI New Zealand Ltd v Houston EmpC* Auckland AC 18A/06, 6 June 2006. I make no award with respect to the retrievals.

[21] I order Brightwater Engineers Limited to pay to Brian Arrowsmith, Stuart Arrowsmith, Andrew Doocey and Michael Colquhoun the sum of \$12428 costs and disbursements in the sum of \$378.22. The Authority was not advised as to whether any award of costs was on the basis of equal division between the applicants'. Ms Sharma should advise Mr Butler as to how payment is to be made.

Helen Doyle
Member of the Employment Relations Authority