

[4] Schedule 2, clause 15 of the Employment Relations Act 2000 provides the Authority with a discretionary power to award costs and expenses incurred in pursuing or defending an application to the Authority.

[5] The respondent's costs total \$16,752.00 (excluding GST) plus disbursements of \$70.00. I am satisfied these are the respondent's actual costs. Detailed worksheets have been provided.

[6] Mr Faltaus submits this is a case where it is appropriate for the Authority to make an order for full indemnity costs on the following grounds:

(i) the conduct of the applicant and his advocate was reprehensible and improper (referring to the Authority's minute 8 October 2008)

- The applicant deliberately altered at least two documents filed during the proceedings with the intention to mislead the Authority;
- Mr Bailey was aware of the fabrication and took no steps to bring the matter to the attention of the Authority;
- Intimidated and threatened the respondent's family in China with the intention of procuring unjust enrichment;
- The applicant continued with his unmeritorious claim notwithstanding a clear warning from the Authority that his action would sound in costs.

(ii) the unmeritorious nature of the applicant's claim

- the applicant's claim was without merit and misconceived from the start;
- the Statement of Problem lacked clarity;
- there was no comprehensive witness statement or relevant evidence advanced by the applicant;
- the case lacked credibility and was devoid of merit;
- the applicant and his advocate relied on fabricated evidence;
- the conduct of the applicant and his advocate was morally blameworthy and caused a gross waste of public costs and judicial resources.

(iii) the applicant's conduct unnecessarily prolonged the length of the investigation meeting because

- much time was spent dealing with fabricated evidence, Mr Bailey's threatening and intimidating conduct towards the respondent's family in China, the evasive approach adopted by the applicant in giving his evidence;
- the applicant's briefs of evidence and written submissions were haphazard, vague and complicated by a lack of cross reference to the large volumes of attached documents, leading to inordinate amount of preparation time necessary on the part of respondent's counsel.

[7] It is usual that costs follow the event. The respondent was wholly successful in its defence of the applicant's claim and is entitled to an award of costs in its favour.

[8] The first issue to determine is a reasonable level of costs. The starting point in this assessment is actual costs incurred. The supporting work sheet shows \$1000 in fees were incurred in relation to mediation. Such costs do not usually fall within the ambit of Authority costs awards. Also relevant is the first investigation meeting date which was adjourned due to the respondent's availability, incurring costs of \$300. I set actual, assessable costs at \$15,452.00 (excluding GST).

[9] The next step is an assessment of what are reasonable costs. Mr Faltus' submissions accurately record the extraordinary events which occurred during the course of the investigation of this employment relationship problem. Those events are set out in my minute dated 8 October 2008 (attached to the determination AA 179/08).

[10] I am satisfied that the applicant and his advocate's conduct during the course of the investigation unnecessarily increased costs and that that conduct should be taken into account in inflating an award of costs.

[11] Notwithstanding, an award of indemnity costs would mean an uncritical acceptance of the respondent's total costs and that does not sit comfortably with the principles guiding the Authority's exercise of its costs discretion¹.

[12] **Eric Henry Clifford Dittmer is ordered to pay Progressive Investment Enterprises Limited \$10,000 plus disbursements of \$70 pursuant to schedule 2, clause 15 Employment Relations Act 2000.**

Marija Urlich

Member of the Employment Relations Authority

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