IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2016] NZERA Wellington 46
5547283

	BETWEEN	DONALD JEFFERY FALCONER Applicant
	AND	TARANAKI PROPERTY SPECIALISTS LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Cara Gelston, Counsel for Applicant Shane Herbert, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	26 February 2016 from the Respondent 11 March 2016 from the Applicant
Determination:	11 April 2016

COSTS DETERMINATION OF THE AUTHORITY

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[1] In my determination of 14 December 2015 I found that Mr Falconer was not employed by Taranaki Property Specialists Limited (TPSL) and he was therefore unable to progress his personal grievance claims against that company.[1] I reserved the issue of costs and have now received submissions from both parties on that matter.

[2] TPSL seeks an award of indemnity costs of $19,070.26 against Mr Falconer. It says he alleged the existence of an employment relationship with TPSL despite knowing the allegation to be untrue.

[3] Counsel for TPSL submits Mr Falconer did this with the ulterior motive of exploiting an opportunity to bring pressure to bear on his business partners' separate commercial activities, and that he did so in wilful disregard of the real situation, which was that he was employed by his own company.

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[1] [2015] NZERA Wellington 121

[4] Mr Herbert says Mr Falconer's case was "*always hopeless because of his disingenuity*". He further submits Mr Falconer's actions were vexatious, frivolous and improper in commencing and continuing with his claim.

[5] Mr Falconer opposes TPSL's application for indemnity costs. He denies any grounds exist for the imposition of an award of indemnity costs and says he acted from a genuine belief that he was an employee of TPSL. Counsel for Mr Falconer, Ms Gelston, cites the principles applicable to the award of costs in the Authority as explained in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.[2] The principles were reconfirmed by the Full Court of the Employment Court in *Fagotti v Acme & Co Limited.*[3]

[6] The *Da Cruz* principles include the discretionary nature of costs awards, a discretion that is to be exercised in accordance with principle rather than arbitrarily. Costs generally follow the event, which normally results in the successful party being entitled to a reasonable contribution to its actual costs from the unsuccessful party. Costs awards are modest and are considered in the light of the particular circumstances of each case. They are not to be used to punish or express disapproval of a party's conduct, although conduct that has unnecessarily increased costs can be taken into account in the award made. Costs are frequently judged against a notional daily tariff.

[7] Ms Gelston submits that the costs submitted by TPSL are excessive and unreasonable. She notes that counsel for TPSL did not submit any breakdown of time spent and fees incurred. It is her submission that no cost order should be made and costs should lie where they fall.

[8] I disagree with that submission. Mr Falconer failed in his claim to have been employed by TPSL, and that company was put to the expense of responding to the claim through an Authority investigation. It is entitled to recover a contribution to the costs it incurred in the process.

[9] However, I am not persuaded by Mr Herbert's submission regarding Mr Falconer's motivation for bringing the claim or by his descriptions of Mr Falconer's conduct. I made no such adverse findings in my determination of the preliminary

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[2] [2005] ERNZ 808 (EmpC)
[3] [2015] EmpC 135

issue of whether or not Mr Falconer was an employee of TPSL and have seen no evidence that would support Mr Herbert's submission.

[1] That being so, I find there is no justification for an award of indemnity costs as sought by TPSL. The Court of Appeal in *Bradbury v. Westpac Banking Corp*[4] held that indemnity costs were *"exceptional and require exceptionally bad behaviour"* in litigation. Mr Falconer was mistaken about his employee status but did not exhibit any of the behaviour that would bring him close to the threshold for an award of indemnity costs against him.

[10] The costs incurred by TPSL appear to be unreasonably high for a one day investigation into the identity of the employer. The information Mr Herbert furnished regarding TPSL's costs comprised a summary of dates, invoice numbers and amounts under the heading "*Summary of costs incurred dealing with DJ Falconer*". I note the date of the first invoice predates by more than three months the lodging of Mr Falconer's statement of problem in the Authority.

[11] In the circumstances I find no reason to depart from the Authority's current daily tariff of $3,500.

Determination

[12] Donald Jeffery Falconer is ordered to pay $3,500 to Taranaki Property Specialists Limited as a contribution to its costs.

Trish MacKinnon
Member of the Employment Relations Authority

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4 [2009] NZCA 234