

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 48
5432729

BETWEEN GLYNIS HARRIS
 Applicant

A N D FLETCHER DISTRIBUTION
 LIMITED trading as
 PLACEMAKERS CHRISTCHURCH
 SOUTH
 Respondent

Member of Authority: M B Loftus

Representatives: Paul Froggatt, Advocate for Applicant
 Penny Swarbrick, Counsel for Respondent

Submissions Received: 27 February 2014 from Respondent
 Nil from Applicant

Date of Determination: 1 April 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] On 14 January 2014 I issued a determination ([2014] NZERA Christchurch 6) concluding Ms Harris was estopped from pursuing her claims against Fletcher Distribution Limited (Fletchers).

[2] Costs were reserved and Fletchers, as the successful party, now seeks a contribution toward the costs it incurred in defending the claim.

[3] Ms Harris has failed to respond despite being given an opportunity to do so. In the circumstances I consider it appropriate to determine the issue of costs.

[4] Fletchers spent \$10,708 and seeks reimbursement in full. In the event I consider that excessive \$7,706 (including disbursements) is suggested as an alternate but less preferable option.

[5] Normally the Authority will use a daily tariff approach when addressing a costs claim (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[6] The hearing took just over an hour which, applying the above, would see a contribution of approximately \$550. It should be noted a longer duration was expected with the abbreviation being attributable to Ms Harris' decision to walk out (see paragraphs 5 to 9 of the substantive determination) but preparation had to be made on the basis the matter would run its full course and costs accrued accordingly.

[7] The claim for indemnity costs is supported with reference to the Court of Appeal's comment in *Bradbury v Westpac Banking Corporation* [2009] 3 NZCA 234 that *indemnity costs may be ordered where that party has behaved either badly or very unreasonably*.

[8] Five examples of circumstances in which indemnity costs had previously been ordered were cited in *Bradbury* and, it is submitted, three are present here. They are:

- (a) making an allegation of fraud knowing it to be false or irrelevant;
- (b) misconduct that causes loss of time to either the court (read Authority here) and/or other parties; and
- (c) the making of allegations which ought never have been made or unduly prolonging a case with groundless contentions.

[9] The argument in support of the alternate award is the matter should have taken about a day but a considerable *uplift*, namely a doubling, is warranted given the behaviours referred to in 8 above.

[10] There is considerable merit in Fletchers' submission. Ms Harris's claim relied on a finding she had not signed a settlement agreement. She tried to overcome the fact the agreement had her signature, or at least one that looked remarkably similar, affixed by claiming it was fraudulently penned by her former representative.

[11] I consider this case should never have been taken given Ms Harris's claim failed due to compelling contrary evidence; the fact she walked out and other events which occurred during the investigation such as her trying, at one point, to deny she

had made the allegation of fraud upon which her argument relied. The last suggestion, tendered in support of an attempt to have the investigation meeting adjourned, was doomed given the allegation was originally made in writing.

[12] There is then Ms Swarbrick's allegation of misconduct causing loss of time. Here reference is made to my finding Ms Harris failed to pursue her claim in good faith (paragraph 6 of the original determination). The finding speaks for itself and to it should be added various delays in preparing for the investigation attributable to Ms Harris. These included a lack of clarity in respect to the claim which Ms Harris failed to address. This, in turn, put the respondent to additional cost.

[13] As was said by Ms Swarbrick, Ms Harris's allegations were serious and had to be answered despite an apparent lack of foundation. Matters were not assisted by a repeat of her fraud claim to the police just before the investigation which was another alleged ground for adjournment.

[14] I conclude a strong case has been made for a large costs award, but I have one significant concern. Notwithstanding Ms Harris's failure to respond, I heard enough during the brief time she was present at the investigation to question whether she is capable of paying a significant sum. That must be taken into account and sways me from an indemnity award, as does the fact costs should not be used to punish and the lack of a detailed breakdown of the charges.

[15] However, and as already said, the argument supporting a significant award was persuasive. That will inevitably result in a significant uplift as sought in the alternate though I will not grant the disbursements. It was Fletchers' choice to engage Auckland counsel and they must accept the consequence of that decision. Airfares were a significant part of the disbursement claim. Something in the order of half the costs incurred is, I conclude, reasonable.

[16] For the above reasons I order the unsuccessful applicant, Ms Glynis Harris, to pay the respondent, Fletcher Distribution Limited, the sum of \$5,500 (five thousand, five hundred dollars) as a contribution toward costs.