

ought to be fixed at the higher end of the range rather than the lower. This is because of Well Dunedin's claim that it was put to particular trouble in defending an extensive claim from Ms Horn which the Authority found on investigation was without merit.

[4] By contrast, Ms Horn's submissions, while quite properly accepting that costs typically follow the event, argues that this is not a case where full indemnity costs or anything approaching that level, should be fixed and notes that, while she was unsuccessful, there was no suggestion in the determination that Ms Horn's actions were somehow illegal or improper.

[5] I must say that I agree with Ms Horn's submission on this point. Ms Horn had a perfect right to bring her personal grievance and she exercised that right properly. That she was unsuccessful is itself unremarkable; in litigation, or Authority investigation, it is a truism that one party is always unsuccessful. Having said that, I understand Well Dunedin's enthusiasm to deal thoroughly and efficiently with Ms Horn's claim and to take all reasonable steps to defeat it. In doing so, it incurred significant cost, but I do not think this is a case where the punitive effect of indemnity costs ought to apply. There is nothing in my opinion that Ms Horn advanced in her claim which added to the complexity of the work Well Dunedin needed to do to rebut it, nor was Ms Horn's claim marked by inappropriate allegations which simply wasted time or occupied unnecessary resource in defeating. This was, as Ms Horn submits, a straightforward personal grievance decided on its facts after investigation by the Authority and in those circumstances, full indemnity costs are not an appropriate exercise of the Authority's discretion.

[6] Both parties refer me to case law but each accepts that the leading case in costs fixing in the Authority's jurisprudence is that of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. Amongst other things, that decision of Her Honour Judge Shaw for the Full Court enumerates the various factors which the Authority will want to consider in costs fixing and approves the daily tariff approach typically used by the Authority, provided that it is applied having regard to principle and not arbitrarily.

[7] Of particular importance in the present case is that it is not in accordance with the Authority's jurisprudence for successful parties to expect anything more than a contribution to their costs. That is the Authority's common practice, and I do not propose to depart from it here. As Ms Beck correctly observes in her submissions: "If the Respondent seeks to multiply the established Authority daily rates by 3 to account

for the preparation time, there is no precedent in law for doing so. The daily tariffs are to be applied in and of themselves”.

Determination

[8] It seems to be accepted by both parties that the investigation took the best part of two hearing days. I consider that the appropriate daily tariff to work from is \$3,500 per day which sits squarely within the range of rates identified from contemporary decided cases. I note that costs trend upwards over time with the increase in fees charged by representatives.

[9] Had this been two complete hearing days, the Authority would have fixed costs at \$7,000 and directed that that sum be paid to Well Dunedin by Ms Horn. Because the matter effectively concluded early on the final half day, I determine that the costs be fixed at the lower figure of \$6,500 and direct that that sum be paid by Ms Horn to Well Dunedin as a contribution to the latter’s costs in its successful defence of its position.

[10] I accept Ms Horn’s submission that she is not in a financial position which would enable her to deal with this obligation as promptly as she might wish. Accordingly she is to have reasonable opportunity to pay this sum over time.

James Crichton
Member of the Employment Relations Authority