

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 143
5405772

BETWEEN J C CONTRACTING (NZ)
LIMITED
Applicant

A N D BRADLEY SMART
Respondent

Member of Authority: M B Loftus

Representatives: Shayne Boyce, Advocate for Applicant
Bradley Smart on his own behalf

Submissions Received: 19 June 2013 from the Applicant
4 July 2013 from the Respondent

Date of Determination: 10 July 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] On 6 June 2013 I issued a determination concluding Mr Smart had breached a term contained in a mediated settlement to which he was a party.

[2] He was ordered to pay a penalty to the Crown but the applicant was unsuccessful in respect to a number of other remedies it sought and, in particular, to have the effect of the agreement nullified by the return of moneys previously paid to Mr Smart. Costs were reserved.

[3] 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.

[4] The hearing took less than half a day and its length would, applying the above formula, result in a contribution in the order of \$1,000.

[5] JC Contracting seeks a greater amount and asks that I recompense its costs of \$2,691.00 plus disbursements of \$71.56 (the Authority's filing fee) in full. The justification for the claim is *the Authority cannot condone flagrant and wilful breaches of confidentiality which have an ability to undermine the financial stability of an Employer*

[6] While there is no suggestion the amount charged was unreasonable for a case of this length and nature that does not mean it will be granted.

[7] A costs award is a contribution and not full indemnification except in exceptional circumstances and where the type of behaviours discussed in *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 are present. There was no evidence of such behaviour on Mr Smart's part, or anything close. Furthermore the argument used to justify the claim lacks merit. Ms Smart's actions have been addressed through the substantive determination and there is no evidence the financial instability of the employer has been undermined. The claim appears punitive and such an approach is precluded by the principles enunciated in *PBO Ltd v Da Cruz*.

[8] Turning to Mr Smart's response which comes in two parts; dissatisfaction with the original determination and an inability to pay should an order be made.

[9] The dissatisfaction is irrelevant. There are other avenues through which that can be addressed but it does not influence a costs determination or justify a lower contribution. Inability to pay is, however, another matter and there is no sense in making an order that cannot be complied with.

[10] Mr Smart and his wife make a number of claims which portray a difficult situation but failed to support this with documentary or other evidence. That said, they offered similar evidence during the investigation meeting which went unchallenged.

[11] Having considered the evidence I consider there is a justification for reducing the contribution and order Mr Smart pay J C Contracting Limited the sum of \$500 (five hundred dollars) as a contribution toward costs.

[12] I also remind the parties that should this lead to undue hardship for Mr Smart the order can be amended to allow instalment payments should the parties be unable to agree a schedule. Mr Smart will, however, be required to support any such with evidence of his situation.

M B Loftus
Member of the Employment Relations Authority