

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 402
5335470

BETWEEN KEITH KING
 Applicant

AND WASTE TYRE SOLUTIONS
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: James Parlane, Advocate for Applicant
 Kate Sullivan, Counsel for Respondent

Submissions received: None from Applicant
 31 August 2011 from Respondent

Determination: 16 September 2011

COSTS DETERMINATION OF THE AUTHORITY

A Mr Keith King is ordered to pay Waste Tyre Solutions Limited \$4,500 towards it legal costs.

[1] In a determination dated 23 August 2011 all of the applicant's claims against the respondent were dismissed.¹ Costs were reserved and a timetable was set for costs to be dealt with by exchange of memoranda.

[2] The respondent applied for costs by memorandum dated 31 August 2011. This was copied to Mr Parlane on 31 August 2011 and he was reminded (as per paragraph 69 of the substantive determination) that Mr King had 14 days within which to respond.

[3] No submissions were received from the applicant. Costs therefore fall to be determined in light of the information currently before the Authority.

¹ *King v Waste Tyre Solutions Limited* [2011] NZERA Auckland 369

Submissions

[4] The respondent said it incurred costs of \$19,394.06 inclusive of GST and disbursements. It also claimed expenses of \$2,450. The respondent sought an order for 66% of its actual costs, i.e. \$12,800.

[5] The respondent also asked the Authority to impose a penalty on the applicant and/or his representative Mr Parlane of \$10,000 pursuant to s134A of the Employment Relations Act 2000 (“the Act”) for delaying or obstructing the Authority’s investigation.

Penalty

[6] I decline to award a penalty against the applicant or his representative because they had not been put on notice by the respondent that it would be seeking a s134A penalty against one or both of them. Because of the punitive nature of a penalty I consider the party against who a penalty may be awarded should have advance warning of that. I do not consider it is fair or appropriate for a claim for a penalty to be raised for the first time in a party’s costs’ submissions.

Approach to costs

[7] The Authority’s approach to costs is as per the full Court’s decision in *PBO Ltd (formerly Rush Security) v Da Cruz*². Those principles are so well known I do not need to set them out again here. I decline to adopt the *Binnie v Pacific Health Limited*’s³ approach to costs as advocated by the respondent on the basis the Employment Court in *Carter Holt Harvey v Eastern Bays Independent Industrial Workers Union & Others*⁴ considered a notional daily tariff approach, which is to be adjusted in a principled way, was best suited to the Authority’s unique jurisdiction.

² [2005] ERNZ 808

³ [2002] 1 ERNZ 438 (CA)

⁴ [2011] NZEMPC 13

[8] I have therefore decided to adopt the Authority's usual tariff based approach to costs in respect of this matter. I have adopted a notional starting point of \$1,500 for the half day investigation meeting and will then consider whether there are factors which warrant an adjustment of that notional tariff.

[9] I am not aware of any factors which would warrant a decrease in the notional daily tariff. I do not have any information about the applicant's means, but note that some hardship as a result of a costs award is an expected and acceptable consequence of a decision to engage in unsuccessful litigation.⁵

[10] I find that there are two factors which warrant an increase to the notional daily tariff. First, the manner in which the applicant conducted his case unnecessarily increased the respondents' costs. Second, neither the applicant or his representative appeared at the investigation meeting despite confirming prior to the meeting that they would be attending.

[11] The applicant filed three statements of problem. The second was extremely lengthy and made wide ranging allegations which were not particularised and which did not appear to relate to any of the claims made by the applicant. The respondent says it spend considerable time trying to work out what the applicant was referring to in order to respond to the matters he raised.

[12] The applicant ignored three requests from the Authority to explain whether the third statement of problem contained any new claims, and if so what those were because this was not evident from a perusal of the document.

[13] The applicant's wide ranging claims regarding his holiday pay entitlements, driving log books, daily timesheets, and payroll issues put the respondent to considerable unnecessary extra expense because it had to examine all of this information in detail to determine whether there was any merit to the matters raised. No discrepancies were found and the applicant failed to produce any evidence to support his claims.

⁵ Gates v Air New Zealand Limited [2010] EMPC 26

[14] The applicant failed to comply with the Authority's direction to provide a written statement which set out his evidence in support of his claim. When the applicant breached the first direction he was given a further six weeks within which to provide his evidence in support of his claim. He was also warned that failure to do so could undermine his claims.

[15] The applicant still did not provide the information directed of him which meant the respondent was left in a position where it was unclear about the nature of the claims it had to respond to or the evidence the applicant was relying on. When it became clear the applicant was not going to provide the information sought by the Authority it scheduled a two stage investigation meeting so that it could first obtain clarity about the applicant's evidence at a first investigation meeting and then give the respondent an opportunity to respond to that evidence at a second investigation meeting.

[16] The applicant's delays and failure to comply with directions put the respondent to unnecessary additional cost because its representative had to continue to liaise with the Authority and the applicant's representative over these matters. The respondent was required to produce a bundle of documents which resulted in a waste of its time and costs when the applicant did not provide any evidence in support of his claims.

[17] The non attendance at the investigation meeting by the applicant and his representative, with no explanation for the failure to attend either before or subsequent to the meeting, was particularly egregious because the meeting had been arranged to give him an opportunity to present oral evidence in support of his claims because he had failed to provide sufficient written evidence or to respond to the Authority's requests for information about his claims.

[18] Prior to the investigation meeting the respondent had expressed concern about whether the applicant would attend the meeting given his history of breaching timetable directions and not providing information sought by the Authority. Mr Parlane assured the Authority he and the applicant would be attending. The respondent therefore incurred unnecessary costs because its counsel prepared for the

investigation meeting. She also had to travel from Hamilton to Tauranga for the hearing.

Outcome

[19] I consider that the notional tariff of \$1,500 should be tripled to \$4,500 for the half day investigation. The applicant is ordered to pay the respondent \$4,500 towards its actual legal costs.

[20] I decline to award any amount towards the expenses the respondent has claimed on the basis I am not satisfied these were actually incurred. For example, the respondent has claimed \$150 for “*accountant’s time*” but admitted when questioned about that by the Authority that was a notional amount only and the respondent had not actually been invoiced for any accountant fees. Likewise \$300 was claimed for “*office assistant’s time*” and for Mr Linthwaite’s time when these were not expenses actually incurred by the respondent.

Rachel Larmer
Member of the Employment Relations Authority