

on a nominal daily tariff of \$3,500 per full hearing day should not apply in this case. That amount is exclusive of GST¹.

[4] Ms Maclean for Mr Natalenko opposes the costs application and submits that as the matter took from 10 am until 3 pm the starting point for a consideration of costs should be approximately \$2,300 as opposed to the usual full daily tariff of \$3,500. However, Ms Maclean submits that Mr Natalenko's financial position makes it inequitable for him to pay the pro-rated daily tariff. She submits that costs should lie where they fall or Mr Natalenko should be expected to contribute less than \$2,300.

Determination

[5] The principles the Authority follows in considering costs applications are as set out in *PBO Limited v Da Cruz*². These principles include:

- a. A discretion on whether to award costs and if so what amount.
- b. The discretion must be exercised in accordance with principle and not arbitrarily.
- c. The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- d. Equity and good conscience must be considered on a case by case basis.
- e. Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. Without prejudice offers can be taken into account.

¹ See the recent Employment Court case of *Lean Meats Oamaru Limited v New Zealand Meat Workers and Related Trades Union Incorporated* [2015] NZEmpC 227 in which Judge Corkill refers to *Wills v Goodman Fielder New Zealand Ltd* [2015] NZEmpC 30 at [23]-[24] and *Burrows v Rental Space Ltd* (2001) 15 PRNZ 298 (HC) at [14] as authority for the position that costs between parties should be awarded on a GST neutral basis because an unsuccessful party making contribution to costs is not paying for a service provided to it by the successful party.

² [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

- h. Awards of costs will be modest.
- i. Frequently costs are judged against a notional daily rate, which is currently \$3,500.00.
- j. Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.

[6] The appropriateness of that approach and of the daily tariff were recently considered and endorsed by Judge Inglis in the Employment Court case of *Mattingly v Strata Title Management Limited*³.

[7] I agree with Ms Maclean's submission that applying the daily tariff approach of \$2,300 is the appropriate starting point for costs.

[8] This is not an appropriate case for costs to lie where they fall. Mr Natalenko was wholly unsuccessful in his claims. Mr Hogg and Ms Griffin were well advised to engage legal representation to defend the claims. There is no reason of principle to overturn the usual principle of costs following the event. Therefore, Mr Natalenko should pay a reasonable contribution to the respondent's costs.

[9] In response to Mr Carruthers' submissions I do not consider that there are any factors in this case that warrant an uplift from the daily tariff starting point of \$2,300. The case was an average one of no legal complexity and the daily tariff already includes the reasonable costs of preparation of a case as well as the time spent in the investigation meeting. Therefore, \$2,300 remains the starting point.

[10] I need to consider Ms Maclean's submissions that Mr Natalenko's financial position means that I should rely on my equity and good conscience jurisdiction to reduce the amount he should contribute to the respondents' costs.

[11] Mr Natalenko has submitted an affidavit of his assets and liabilities. His assets are modest. However, he does not have any financial liabilities. He has a joint savings account with his wife with over \$13,000 in it and has ongoing employment.

³ [2014] ERNZ 1

[12] Mr Natalenko's financial position and the family's ongoing costs associated with treatment in Christchurch for his daughter's health problems are relevant to the assessment of the equity of the case. However, I need to balance those against the reality that Mr Hogg and Ms Griffin are out of pocket in defending Mr Natalenko's claims and I also need to consider the public interest⁴ which is reflected in the usual practice of costs following the event. It is not in the public interest that an impecunious unsuccessful party's difficulty in paying costs should over-ride the interests of the successful party and leave them out of pocket despite being wholly successful.

[13] In this case Mr Natalenko's financial situation does not reflect the kind of hardship that in previous cases has acted to reduce the amount of costs payable. Therefore, I decline to reduce the costs from \$2,300.

[14] Taras Natalenko must pay \$2,300 towards the respondents' legal costs. The parties are free to come to their own arrangements for payment in instalments if they wish.

Christine Hickey
Member of the Employment Relations Authority

⁴ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2