

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 466
5467230

BETWEEN RICHARD STEWART
 NEWALL
 Applicant

A N D STEVEN PRESTAGE
 Respondent

Member of Authority: Rachel Larmer

Representatives: Helen Wendelborn, Advocate for Applicant
 Respondent in person

Submissions Received: 24 October 2014 from the Applicant
 No submissions from the Respondent

Date of Determination: 14 November 2014

COSTS DETERMINATION OF THE AUTHORITY

A. Within 28 days of the date of this determination Mr Steven Prestage is ordered to pay Mr Richard Newall:

(a) \$3,000 towards his actual legal costs; and

(b) \$1,067.96 towards his actual disbursements.

The application for costs

[1] In a determination dated 10 October 2014¹ the Authority imposed penalties on Mr Prestage for inciting, instigating, aiding or abetting various breaches of Mr Newall's employment agreement with Forte Alpha Operations Pty Limited (Forte Alpha) his then employer.

¹ [2014] NZERA Auckland 413

[2] Mr Newall as the successful party is entitled to a contribution towards his actual costs. The parties were encouraged to resolve costs by agreement. Although Mr Newall made a costs settlement offer to Mr Prestage the later did not respond to it.

[3] No agreement has been reached regarding costs and Mr Newall now seeks indemnity costs against Mr Prestage. His grounds for claiming an award of indemnity costs are:

- (a) Mr Prestage did not accept an offer that Mr Newall made on 16 October 2014 to settle costs in respect of the substantive proceeding for \$4,500 being much less than Mr Prestage's actual costs and disbursements which were \$7,809.26;
- (b) Mr Newall also relies on claims that Mr Prestage caused loss of time to the Authority and that he continued the proceedings for an "ulterior motive"², which were principles guiding imposition of indemnity costs in *Bradbury v. Westpac Banking Corporation*³.

Costs principles

[4] The principles relating to an award of costs in the Authority are so well established they do not need repeating here. Costs are discretionary and must not be used to punish an unsuccessful party.

[5] I decline to award indemnity costs. I consider the Authority's usual notional daily tariff based approach to costs is more appropriate. This still allows the Authority to fix costs at an appropriate level.

[6] In accordance with the usual notional daily tariff based approach, the starting point for assessing costs in respect of this matter is \$1,750⁴. I must now assess on a principled basis whether there are any factors which warrant adjusting the notional starting tariff.

² One of the grounds recognised in *Bradbury* for awarding indemnity costs.

³ [2009] 2 NZLR 400

⁴ Being half of the current notional daily tariff of \$3,500

Are there any factors which warrant increasing the notional starting tariff?

[7] I accept Mr Newall's submission that the manner in which Mr Prestage elected to conduct his case resulted in Mr Newall incurring additional unnecessary costs. I find that is a factor which warrants increasing the notional starting tariff.

[8] Mr Prestage did not file a Statement in Reply. He did not file a witness statement as directed. On the morning of the Authority's investigation meeting shortly before the investigation started Mr Prestage sought to file new information. This put Mr Newall at a disadvantage as he had no prior warning of any such information.

[9] Mr Prestage failed to comply with the Authority's directions which were issued to ensure the timely and efficient conduct of the investigation meeting. Nor did Mr Prestage seek leave to file a Statement in Reply out of time, as he was directed to do. Mr Prestage also failed to file evidence and witness statements in accordance with the Authority's timetable. No Statement in Reply was ever received.

[10] The investigation meeting for this matter was initially scheduled for 9 September 2014 but was adjourned at the parties' request until 29 September 2014 as Mr Prestage had led Mr Newall to believe the matter would be settled. After an adjournment was granted Mr Prestage had no further communications with Mr Newall.

[11] As a result of Mr Prestage's continued failure to file a Statement in Reply or a witness statement or any evidential documentation which addressed the substantive issues which were to be determined, I accept that Mr Newall had to anticipate what defences might possibly be raised.

[12] This involved his advocate considering and preparing further documentation and supplementary evidence at the last minute to ensure that all eventualities were adequately covered from Mr Newall's perspective. I accepted that this resulted in Mr Newall incurring further costs which would have been unnecessary had Mr Prestage complied with the Authority's directions.

[13] Mr Newall also incurred additional costs because he was required to serve Mr Prestage separately with this new evidence as well as incurring service fees in Australia each time he was required to serve Mr Prestage.

[14] The usual method of the Authority communicating with parties by email was insufficient in this case due to Mr Prestage's failure to make himself available to respond to communications from the Authority as and when they arose. This resulted in the necessity for Mr Newall to incur the not insignificant expense of personal service of all key documentation on Mr Prestage.

[15] Immediately before the Authority's investigation meeting Mr Prestage raised a new issue and new evidence for the first time. He provided information which purported to support his position but then gave conflicting evidence when being questioned about this by the Authority. Mr Prestage breached the Authority's directions (of which he was reminded subsequent to the Authority's investigation meeting) to provide supporting documentation regarding the new evidence he raised during the investigation meeting. This additional information has never been provided.

[16] Mr Newall also claims that Mr Prestage had an ulterior motive which should result in costs being increased above the notional daily tariff. Mr Newall again relies on Mr Prestage's sporadic contact with the Authority during the entire process and failure to respond to any of the Authority's reminders and directions regarding the filing of a Statement in Reply (and application for leave to file a statement in reply out of time) as well as filing evidence at the last minute. I do not consider that this is evidence of an "ulterior motive" as alleged but it is relevant in so far as Mr Prestage's actions and inactions that increased Mr Newall's actual costs.

[17] I do not accept Mr Newall's submission that Mr Prestage had an ulterior motive which should be reflected in the costs award. Whilst he was difficult to communicate with because he resides in Australia and did not always respond to the Authority's communications, this factor has already been adequately dealt with above.

[18] Mr Newall suggests that the fact that Mr Prestage apologised during the investigation meeting for Forte Alpha for not paying Mr Newall's salary is relevant to costs. I find it is not. Nor is Mr Newall's submission that the fact that he has still not been paid by Forte Alpha means Mr Prestage should reimburse Mr Newall for his actual costs in commencing his penalty action. These are entirely different issues.

[19] I do not accept that submission. The original proceedings were against Forte Alpha which is an entirely separate legal entity. Notwithstanding the fact that

Mr Prestage was the sole director and shareholder of Forte Alpha, its failure to pay Mr Newall his outstanding wages and the amounts awarded under the Authority's substantive determination is not a factor that should be reflected in the costs awarded in respect of this matter.

[20] I find that costs should be increased to \$3,000 to reflect the additional costs that Mr Newall has been put to as a result of the unsatisfactory manner in which Mr Prestage has elected to conduct his case.

Are there any factors which warrant a reduction in the notional starting tariff?

[21] I am not aware of any factors which would warrant a reduction to the notional starting tariff.

Should Mr Newall be awarded disbursements?

[22] Mr Newall is entitled to be reimbursed for his filing fee of \$71.56.

[23] I am satisfied that Mr Newall has incurred significant disbursements by way of the filing fee and the costs associated with overseas service on Mr Prestage. These service costs are recoverable because they could have been avoided had Mr Prestage been in reliable communication with the Authority. However given Mr Prestage's sporadic communication certainty of service of all key documentation was required.

[24] I am satisfied upon production of appropriate receipts that Mr Newall has incurred total service costs of \$996.40. This covers service of his Statement of Problem, his bundle of documents and witness statement, a new Notice of Investigation Meeting (after the first investigation meeting was rescheduled from 9 September until 29 September 2014 at the parties request to facilitate settlement) and service of Mr Newall's supplementary brief of evidence.

[25] Mr Prestage is ordered to reimburse Mr Newall \$1,067.96 to account for the filing fee and service costs he has incurred.

Orders

[26] Within 28 days of the date of this determination Mr Prestage is ordered to pay Mr Newall:

- (a) \$3,000 towards his actual legal costs; and

(b) \$1,067.96 towards his actual disbursements.

Rachel Larmer
Member of the Employment Relations Authority