



[4] However, on behalf of Mr Parbhu it is suggested that the matter is such that the tariff should be uplifted to reflect a 66% contribution to costs incurred for preparation and attendance at mediation, and that full solicitor/client costs should be awarded to reflect the respondent's unreasonable behaviour in the way it dismissed Mr Parbhu and for the way it conducted itself during the investigation process. Two invoices were attached to Mr Parbhu's submissions which reflected actual costs totalling \$19,320 (GST inclusive). In total Mr Parbhu seeks costs of \$15,168.00 plus \$105.56 in disbursements associated with the filing fee and expenses for a summonsed witness.

[5] In contrast the respondent says the applicant was awarded less than 25% of the amount he had claimed and submits that there is no basis for an award of solicitor /client costs. It says that any additional time the applicant's representative was required to engage in and/or respond to further telephone conferences and/or directions made by the Authority amounted to no more than an hour. In this respect the respondent says the Authority should apply the notional daily tariff approach at the rate of \$3,500 plus \$250.00 as an appropriate hourly rate.

[6] I turn first to the issue of costs for preparing and attending mediation. Mr Parbhu relies on the recent decision of Inglis J in *RHB Accountants, Kenneth Brown and Steven Wilkins v Rawcliffe*<sup>1</sup> where the court ordered modest costs of \$1000.00 including those associated with attendance at mediation. However I consider the circumstances of that case to be quite different to those of Mr Parbhu's. In *Rawcliffe* the applicant pursued mediation against the respondents with full knowledge that they were not the employer. Whilst I accept that there was some delay ostensibly on the part of the respondent in reaching agreement as to a suitable date for mediation and that the Authority issued a direction to facilitate the parties' meeting, there is no evidence to suggest that the delay resulted in unreasonable and increased costs for Mr Parbhu. I consider there are good public policy reasons to have parties attend mediation before progressing legal proceedings and I am not prepared to award any contribution to costs associated with this aspect of Mr Parbhu's claim.

[7] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act.

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<sup>1</sup> [2012] NZEmpC 31

[8] With respect to the particular characteristics of this case I intend to apply the principles in *Da Cruz*<sup>2</sup> in exercising my discretion as to costs. The unique nature of the Authority was recognised by the Court in *Da Cruz* and it was recognised that costs principles are not necessarily as comprehensive or as prescriptive as those that may have applied in Employment Court judgments.

[9] I consider the application of the Authority's notional daily tariff exercised on a principled basis and with allowances for the arguments advanced by both parties is appropriate in this case. This notional daily tariff currently recognised in the Authority is set at \$3,500.00 although the Authority has the discretion to raise or lower the tariff depending on the circumstances of the matter. The Authority's investigation required a full day to conclude.

[10] Mr Parbhu was successful with his claims before the Authority. It is generally recognised that costs follow the event and that awards will be modest.

[11] There were no complex matters of law or procedural issues that arose in the investigation.

[12] Mr McBride cites the conduct of the respondent during the investigation including delays in providing ordered documents, its late application for adjournment and subsequent non-attendance of the respondent's primary witness at the investigation, as reason to increase an award to full solicitor/client costs.

[13] I find these matters did put Mr Parbhu to a moderate level of unnecessary cost and inconvenience in prosecuting his case and that these justify a commensurate increase in an award of costs but I do not consider these matters warrant an award for full solicitor/client costs.

[14] Mr McBride also seeks to rely on the decision of the Court of Appeal in *Binnie v Pacific Health Limited*<sup>3</sup> in support of the proposition that the "*losing parties conduct will be relevant overall...to the level at which costs should be awarded*". He

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<sup>2</sup> Ibid at [3]

<sup>3</sup> [2002] 1 ERNZ 438

says the respondent's conduct was clearly unlawful at the time Mr Parbhu was dismissed and refers to the Authority's award of a penalty for breach of good faith as evident of the respondent's unreasonable conduct. However it is also a principle in *Da Cruz* that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct. Mr Parbhu has already been compensated for the respondent's actions leading to his dismissal and I consider that setting an award at the level he seeks would be punitive.

### **Determination**

[15] I have considered the principles set out in *Da Cruz* including the time taken for the investigation meeting, and the conduct of the respondent during the investigation.

[16] I consider that the Authority's discretion to award costs should be exercised in this case by ordering the respondent to pay Mr Parbhu costs of \$5,500 plus disbursements of \$105.00. This higher than normal "daily rate" reflects the impact of delays caused by the respondent and the work that Mr Parbhu was put to, unnecessarily, in fully participating in the investigation

Michele Ryan  
Member of the Employment Relations Authority