

Issues

[2] The following issues are to be determined:

- (a) Should an unsuccessful party be entitled to costs?
- (b) Should there be an award of indemnity costs?
- (c) If not, what is the starting point for assessing costs?
- (d) Are there any factors that warrant adjusting costs?

Should an unsuccessful party be entitled to costs?

[3] Ms Bracewell submits she is entitled to costs because the motive for Richmond's application for injunction was to retrieve and conceal the evidence of alleged incompetent management and possible criminal neglect of its clients.

[4] The Authority may order any party to pay such costs and expenses as the Authority thinks reasonable.² Costs in favour of the successful party would usually be granted. Costs are not to be used as a punishment, although conduct that unnecessarily increases costs may be taken into account.³

[5] Richmond's alleged motive for bringing their successful application is not a relevant conduct for granting costs in favour of an unsuccessful party.

Should there be an award of indemnity costs?

[6] An award of indemnity costs is exceptional. It requires *exceptionally bad behaviour* or may be awarded where a party has behaved either badly or very unreasonably.⁴

[7] In this matter neither party's behaviour meets the very high threshold required before indemnity costs may be imposed.

What is the starting point for assessing costs?

[8] The starting point for assessing costs in the Authority is its notional daily tariff of \$3,500.

² Clause 15, Schedule 2, Employment Relations Act 2000

³ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2055] 1 ERNZ 808 (EmpC) at [35]

⁴ *Bradbury & Ors v. Westpac Banking Corporation* [2009] NZCA 234

[9] The Authority must assess the reasonableness of the successful party's invoices. On perusal of Richmond's invoices \$2,500 relates to an unsuccessful interim injunction. Given the lack of success, the amount of their invoices ought to be reduced by \$2,500 to reflect this. Accordingly, reasonable costs to be recovered by Richmond would be \$3,000 plus GST.

[10] It is an established principle costs should not exceed the costs incurred.⁵ Therefore the starting point shall be reduced to \$3,375.00.

Are there any factors that warrant adjusting the starting point for assessing costs?

[11] Richmond submits it was put to unnecessary expense by Ms Bracewell's breaches of her employment agreement and *difficult attitude* requiring additional teleconferences that took longer than necessary.

[12] Conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.⁶

[13] There were evidential difficulties about what information Ms Bracewell had removed from Richmond, if it was confidential or not and whose possession it was in. It was accepted Ms Bracewell had given information to her previous advocate Ms Rachel Rolston and client A's whanau. She also retained some information.

[14] Ms Bracewell and Ms Rolston were directed to file an affidavit listing what confidential information each had by 3pm, 7 June 2013. Ms Rolston complied. Ms Bracewell did not.

[15] At a second teleconference, Ms Bracewell's non-compliance was raised. Ms Bracewell advised she would not comply with the Authority's direction. This was because she did not wish to prejudice her chances of getting her information back from her solicitor, Ms Rolston. She was firmly advised by the Authority member of the impact upon the ability to make a decision and the effect upon costs of her non-compliance. After some discussion, Ms Bracewell agreed to a direction that she file her affidavit by 12 June 2013, which she complied with. Her affidavit formed the basis for the orders made.

⁵ Rule 14.2(f) High Court Rules

⁶ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808 (EmpC) at [35]

[16] Non-compliance with a timetable direction can be a basis for an increased award of costs. However, given the second teleconference had already been directed for 10 June 2013 for the purposes of timetabling matters to hearing, Ms Bracewell's subsequent capitulation and the minimal delay in her filing of her affidavit, the Authority declines to increase costs.

[17] Taking into account the above matters, Ms Bracewell is ordered to pay costs to Richmond Services Limited of \$3,375.00. No award of costs in Ms Bracewell's favour is made.

T G Tetitaha
Member of the Employment Relations Authority