

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 103
5552926

BETWEEN DEAN TAYLOR
 Applicant

AND FIRST AID SPECIALISTS
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Quentin Haines, Counsel for Applicant
 Coral Stuart, for Respondent

Investigation Meeting: On the papers

Determination: 22 August 2016

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In my determination of 22 October 2015 I ordered First Aid Specialists Limited to comply in full with the payment to Dean Taylor of sums specified in a record of settlement the parties had entered into in June 2012. Those payments that were outstanding from the record of settlement were to be paid to Mr Taylor by 6 November 2015. Additionally I imposed a penalty of \$500 on First Aid Specialists Limited under s 149(4) of the Employment Relations Act 2000 (the Act) to be paid in full to Mr Taylor.¹

[2] Mr Taylor now seeks to recover the costs incurred in bringing his claim to the Authority. His costs totalled \$2,549.56. Counsel for Mr Taylor has supplied a copy of the itemised list of fees charged to his client.

¹ [2015] NZERA Wellington 103

[3] First Aid Specialists Limited opposes the application. Through its director, Coral Stuart, the respondent says the company has been insolvent since year end 2012. She says it had been struck off from the Companies Register and reinstated on the application of Mr Taylor's solicitor. Ms Stuart submits the legal costs sought are excessive in the circumstances.

[4] The Authority derives its power to award costs from clause 15 of Schedule 2 to the Act, which provides:

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[5] Underpinning the award of costs are principles that have been developed and applied over many years. Those principles were referred to with approval by the Full Court of the Employment Court in *Da Cruz*² and more recently confirmed by the Full Court in *Fagotti*³.

[6] Costs are discretionary and it is up to the Authority to decide whether they should be awarded and, if so, in what amount. They should be modest; will normally follow the event; and are considered in the light of the particular circumstances. They are frequently judged against a notional daily tariff but the tariff should not be applied rigidly without regard to the particular characteristics of the case. Where a party's conduct has unnecessarily increased costs, that may be taken into account in the award that is made, but costs are not to be used as a punishment.

[7] Counsel for Mr Taylor noted that the award he was seeking for full solicitor-client costs was less than the Authority's daily tariff.

[8] In my determination of the substantive matter I noted the inconvenience to which Mr Taylor had been put, and the expense of obtaining legal representation to obtain monies that should have been paid to him on a regular basis over the past three years and four months.

² *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC)

³ *Fagotti v Acme & Co Ltd* [2015] EmpC 135

[9] I also noted that Ms Stuart had neither acknowledged Mr Taylor's situation nor shown regret over the failure of the company of which she was sole director to honour the record of settlement entered into with him.

[10] The Court of Appeal in *Bradbury v Westpac*⁴ referred to indemnity costs as being “*exceptional*” and requiring “*exceptionally bad behaviour*” and misconduct that was “*flagrant*”.⁵ I find First Aid Specialists Limited's behaviour, while blameworthy, falls short of that description and I decline to award full solicitor-client costs as sought by Mr Taylor.

[11] I do find, however, that it is appropriate to award costs in favour of Mr Taylor. His application was determined on the papers, after the parties had provided their views by way of affidavits and accompanying documentation. The costs have been kept to a reasonable and modest level. Taking all the circumstances into account I find it appropriate to award a Mr Taylor a significant contribution to the costs he incurred.

Determination

[12] First Aid Specialists Limited is ordered to contribute \$2,100 to Mr Taylor's costs.

Trish MacKinnon
Member of the Employment Relations Authority

⁴ [2009] 3 NZLR 400 (CA).

⁵ Ibid at [28].