

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 68
5504659

BETWEEN FRASER THOMSON
Applicant

A N D DIANE McCAULEY
First Respondent

A N D HEALTHY BUSINESS
INVESTMENTS LIMITED
trading as PURE KITCHEN
Second Respondent

Member of Authority: Helen Doyle

Representatives: No appearance for the Applicant
Diane McCauley, Respondent and advocate for Second
Respondent

Submissions Received: 30 April 2015 from the Respondents

Date of Determination: 22 May 2015

COSTS DETERMINATION OF THE AUTHORITY

A. I order Fraser Thomson to pay to Healthy Business Investments Limited the sum of \$483.33 being costs.

The substantive determination

[1] In my determination dated 9 April 2015,¹ I ordered the second respondent to pay to the applicant unpaid wages in the sum of \$1,350 gross. I did not find the claim for damages was made out and I ordered the applicant to pay a penalty to the second respondent in the sum of \$1,500 for breaching his employment agreement. The claim

¹ [2015] NZERA Christchurch 45

against the first respondent was struck out as the second respondent employed the applicant.

[2] I reserved the issue of costs and asked that submissions be lodged and served by 30 April 2015.

The application for costs

[3] The Authority has received submissions on behalf of the second respondent only. The second respondent seeks full indemnity costs it has incurred in the sum of \$5,023.75. Invoices are attached. If the Authority is not minded to award full indemnity costs, then the second respondent seeks uplift from the usual daily tariff now recognised in the Authority of \$3500.

Discussion

[4] The leading judgment on costs in the Authority is that of the full Court in *PBO Ltd (formerly Rush Security) v. Da Cruz*.² The Court set out principles that were appropriate to the Authority in the exercise of the discretion as to costs and consistent with its functions and powers. These include that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing awards. Costs normally follow the event and awards will be modest and frequently judged against the notional daily rate.

[5] In this matter, both parties had a measure of success. The applicant was largely successful with his claim for unpaid wages and the second respondent was successful with a claim for a penalty.

[6] I do not find that this is a suitable case for an award of indemnity costs. Indemnity costs are only awarded in certain circumstances. These can include where there is misconduct that causes loss of time to the Authority and the other party, commencing or continuing proceedings for some ulterior motive or making of allegations of fraud knowing them to be false.³

² [2005] 1 ERNZ 808

³ *Bradbury v Westbank Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400.

[7] Although the second respondent considered the applicant should have discontinued his claim for unpaid wages that is not a basis for indemnity costs and particularly not when he was successful in his claim for payment.

[8] Costs normally follow the event. Both parties had a measure of success although the applicant did not attend the investigation meeting. I will proceed to consider the claim for costs by the second respondent. The second respondent was represented until just before the investigation meeting by a solicitor and incurred costs in the sum of \$5023.75.

[9] As I have not found this to be a case for indemnity costs the starting point must be the daily tariff which currently in the Authority is \$3,500. The investigation meeting took just over one hour. Although there was some complexity in relation to the damages claim in this case, that was unsuccessful and I am not minded to increase the tariff on that basis. Costs in the Authority are usually modest.

[10] The investigation meeting only took one hour. That is one sixth of a full day. On that basis, I find the starting point for an assessment of appropriate costs is \$583.33. I have then considered whether there is good reason to increase that. This was a relatively straightforward matter about which the parties held strong views. It was complicated by the claim for damages and the basis used to justify withholding wages which was not upheld by the Authority. A penalty was awarded and there was evidence about the basis for that provided in a reasonably detailed statement that also dealt with damages. I am not satisfied in this case there are factors to support an increase. I am not minded to increase the daily tariff in all the circumstances.

[11] I do have to take into account in the exercise of my discretion as to costs that part of the investigation meeting occupied the applicant's claim and he was largely successful. Considerably more time was spent on the second respondent's claim but I find that there should be a reduction from \$583.33 of \$100 to reflect the applicant's success. A fair and reasonable award to the second respondent in the circumstances of this case would be the sum of \$483.33.

Determination

[12] I order Fraser Thomson to pay to Healthy Business Investments Limited the sum of \$483.33 being costs.

Helen Doyle
Member of the Employment Relations Authority