

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 65
5617059

BETWEEN TONY BRAD VICKERS
 Applicant

AND BURGESS CROWLEY CIVIL
 LIMITED
 Respondent

Member of Authority: M. B. Loftus

Representatives: Tony Vickers on own behalf
 Troy Wano, Counsel for Respondent

Submissions Received: 26 June 2017 from Respondent
 6 July 2017 from Applicant

Determination: 25 July 2017

**COSTS DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

[1] On 7 June 2017 I issued a determination in which I dismissed Mr Vickers' claim he had been unjustifiably dismissed by the respondent, Burgess Crowley Civil Limited (BCCL). I also dismissed a claim Mr Vickers had been underpaid by \$2 an hour for the entire period of his employment.¹

[2] Costs were reserved and BCCL, as the successful party, now seeks a contribution toward those it incurred defending the claims.

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim.² From there adjustments may be made depending on the circumstances.

[4] BCCL asks I exercise my discretion and increase the tariff. It seeks \$6,500.

¹ [2017] NZERA Wellington 47

² refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

[5] In doing so it relies on the daily tariff which it identifies as being \$4,500 a day along with an increase of \$2,000 attributable to Mr Vickers behaviour which, according to BCCL, unnecessarily increased its costs.

[6] Here I note the tariff cited by BCCL is that which applied to matters lodged in the Authority on or after 1 August 2016.³ The tariff applicable to matters lodged before 1 August 2016, of which this is one, was \$3,500 per day.

[7] The investigation went into the afternoon but did not take all thereof. Its duration could be said to be about three quarters of a day which would result in an award of less than the full daily tariff.

[8] The uplift sought by BCCL relies on the fact the investigation was originally scheduled for 22 November 2016 and while BCCL attended Mr Vickers did not. When contacted that morning it became apparent he had either failed to read the notice of investigation or if he had he failed to understand its significance. As he was then in Palmerston North attendance was impossible.

[9] I accept that as a result BCCL incurred costs related to its first attendance and those costs were attributable to a failure on Mr Vicker's part. To recognise the resulting costs would, in my view, be a legitimate acknowledgement of conduct which unreasonably increased the other party's costs.

[10] When I add the time spent on BCCL's two attendances I conclude the total amounts to a full day. That would, applying the applicable daily tariff, see an order Mr Vickers contribute \$3,500 toward BCCL's costs.

[11] By way of response Mr Vickers sent a short e-mail advising impecuniosity. It contains a breakdown of income and key items of expenditure which are supported by a copy of a recent bank statement. It would be fair to say they illustrate a fraught situation and one which leads me to question the sense of making an order that cannot be fulfilled.

[12] That said Mr Vickers also advises he has paid a significant legal bill incurred when commencing his claim. I also note he claims to have friends he can rely on to assist him and the assertion they have done so in order to fund a challenge to the Employment Court.

³ Practice Note 2 – Costs in the Employment Relations Authority dated 30 June 2016

[13] I conclude an applicant party should not be allowed to pursue an unsuccessful claim with impunity especially where that party can find money to fund the pursuit of its own interests.

[14] In the circumstances and notwithstanding evidence of a strained financial situation I consider this as situation where Mr Vickers should be required to indemnify BCCL at least to the extent he is willing to fund his own endeavours.

[15] For the above reasons and having considered the evidence I conclude \$2,000 an appropriate contribution Mr Vickers pay toward BCCL's costs.

Conclusion

[16] I therefore order the applicant, Tony Vickers, pay the respondent, Burgess Crowley Civil Limited, the sum of \$2,000.00 (two thousand dollars) as a contribution toward the costs BCCL incurred in successfully defending Mr Vickers' claims.

[17] Payment is to be made no later than 4.00pm on Wednesday 23 August 2017.

M B Loftus
Member of the Employment Relations Authority