IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 269
3014671

BETWEEN	X First Applicant
A N D	Y Second Applicant
A N D	Z Respondent

Member of Authority:	Rachel Larmer
Representatives:	Susan Hornsby-Geluk, Counsel for Applicants No appearance by or for Respondent
Submissions Received:	25 August 2017 from Applicants No submissions from Respondent
Date of Determination:	05 September 2017

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Substantive determination

[1] On 18 August 2017 the Authority issued a substantive determination[1] in which held that the respondent had breached a Record of Settlement entered into by the parties. Penalties were imposed on the respondent for his breaches.

[2] The issue of costs was reserved. The parties have been unable to resolve costs by agreement so the applicants now seek a costs order in their favour. A timetable for costs submission was set. The applicants filed costs submission. The respondent did not file submissions but instead emailed the Authority stating he would not pay costs.

[1] [2017] NZERA Auckland 244.

Costs application

[3] The applicants say that their combined costs were almost $7,500 of which $152.50 was disbursements. They do not specify what those disbursements relate to. I have assumed they include the $71.56 filing fee.

[4] The applicants seek indemnity costs. They submit the respondent engaged in flagrant breaches of the Record of Settlement, that he unreasonably refused to provide the undertakings sought by the applicants that he would not engage in ongoing breaches of the Record of Settlement, that after the breaches of the Record of Settlement were first brought to his attention and again after proceedings had been commenced, he engaged in further deliberate breaches of the Record of Settlement.

[5] Ms Hornsby-Geluk submits that the applicants took reasonable and pre-emptive steps to prevent the conduct which led to the current proceedings from occurring because it included an express prohibition on disparagement in the Record of Settlement.

[6] The applicants also made the respondent aware of the seriousness with which any breach of the post-settlement disparagement clause would be regarded by including a clause in the Record of Settlement that any breach of the non-disparagement clause would be viewed as *"a serious and material breach of this Record of Settlement"*.

[7] Ms Hornsby-Geluk says that after the first breaches occurred the applicants sought further undertakings which, if provided, would have avoided the need for these proceedings and therefore the costs incurred by the applicants.

[8] Ms Hornsby-Geluk submits that it is solely the respondent's actions that have resulted in the need for enforcement action so it would be unjust for the applicants to have to bear the costs associated with taking action necessary to punish the respondent for his breaches and to protect the applicants against ongoing breaches of the Record of Settlement which was entered into voluntarily by the parties with the assistance of a mediator from the Ministry of Business Innovation and Employment, Mediation Services.

[9] Ms Hornsby-Geluk submits that if the Authority is not minded to award indemnity costs, then the matter should be dealt with as having involved a half day of

investigation meeting time. She further submits that there should be a significant uplift to the notional daily tariff for the reasons set out above which she identified as supporting the claim for indemnity costs.

Respondent's position

[10] The respondent was given an opportunity to provide submissions on costs issues but did not do so by the scheduled date.

[11] The respondent asked for a further week of time to file submissions on the day his submissions were due. He did not provide any explanation of why he had not complied with the specified timetable and he failed to provide the information that the Authority asked him to provide about his request.

[12] The extension of a previously specified deadline is a discretionary matter for the Authority. It involves the granting of an indulgence so the party seeking such an indulgence is expected to fully and promptly respond to the Authority's questions, about the extension application because the requested information is relevant to its assessment of whether or not to grant the extension.

[13] Failure by the party requesting the indulgence to co-operate or communicate appropriately with the Authority in my view tends to undermine the likelihood of an extension being granted. Why should an indulgence be extended to a party that is not fully co-operating with the Authority's investigation, which also involves the posing of questions for a party to respond to as part of an ongoing investigation.

[14] In this case I consider there are compelling reasons for the outstanding Authority matters to be resolved in a timely manner, namely those discussed in the telephone conference.

[15] I am aware that the respondent has previously expressed to the Authority a desire to "*punish*" the applicants, so I am concerned that the late request for an adjournment and the failure to provide the information the Authority sought from him about his request creates a legitimate concern that the respondent may wish to draw the Authority's process out.

[16] I consider the interest of justice are best served by determining costs so that the parties can put these problems behind them and make a fresh start getting on with

their respective lives in a more constructive manner, if only for the sake of the minor third parties who are affected by the issues between these parties.

[17] The respondent also advised the Authority on the date his submissions were due that *"I refuse to pay costs"*.

[18] The respondent has already advised the Authority of his financial situation during the telephone conference for the substantive matter. He also placed his financial information before the Authority as part of the information he filed in response to the applicant's substantive claims against him.

[19] The respondent has failed to explain what new financial information is likely to become available, why it was not filed by the due date or in response to the substantive matter, as directed by the Authority. For these reasons the Authority declines the respondent's request for an adjournment.

[20] The Authority advised the respondent on 4 September 2017 that because he had not responded to its queries it intended to determine costs on that day. That communication did not result in any response from the respondent.

[21] The Authority has therefore determined costs based on the information currently available to it, which includes all of the financial information the respondent previously referred to and subsequently filed.

Approach to costs

[22] I am not satisfied that this is an appropriate case in which to award indemnity costs. I instead prefer to adopt the Authority's usual notional daily tariff-based approach to costs. I consider the notional starting tariff can be appropriately adjusted to reflect the particular circumstances of this case.

[23] I find that the preventative steps taken by the applicants by recording an express non-disparagement clause in the Record of Settlement and an express warning within the Record of Settlement that any breach of the disparagement clause would be seen as *"a serious and material breach"* put the respondent on notice of the need to strictly comply with that obligation.

[24] I also find that the applicants gave the respondent an opportunity to provide undertakings that he would comply with his obligations s set out in the Record of

Settlement and in particular the non-disparagement and confidentiality provisions of the Record of Settlement. It was only after he refused to do so that the applicants filed Authority proceedings.

[25] Notwithstanding that, after the breaches were brought to the respondent's attention and after proceedings had been commenced, he engaged in further breaches of the Record of Settlement.

[26] The applicants as the successful parties are entitled to a contribution towards their actual costs. It is important that a costs award must not be used as another avenue to punish an unsuccessful respondent. Penalties imposed on him in respect of the substantive determination of the applicants' claims have already done that.

[27] However, there is a need to achieve justice between the parties and I do consider that the factors identified by Ms Hornsby-Geluk (which I have already referred to in this determination) support an uplift being made to the notional starting tariff.

[28] The notional starting tariff for assessing costs is $1,200 (2 hours @ $600 per hour). I now must consider whether that notional starting tariff should be adjusted.

[29] I do not consider there is any information available to the Authority that supports the notional starting tariff being decreased. The parties did not identify any reasons that would support the notional starting tariff being decreased.

[30] I have regard to the financial information about the respondent that he filed in respect of the substantive matter. He received a not insignificant amount of money earlier this year and has not accounted for that in the financial information he filed. He is also self-employed and has the ability to increase his income by undertaking more work.

[31] No evidence of hardship was before the Authority. Even if it had been, the Courts recognise that some level of financial hardship is often inevitable for an unsuccessful litigant who is required to contribute to the successful party's actual costs, so that is not in itself reason to reduce the tariff.

[32] I consider that the notional starting tariff should be uplifted by a factor of three to reflect the particular circumstances of this case. I find that all of the factors

identified by Ms Hornsby-Geluk as supporting an award of indemnity costs support an increase being made to the notional starting tariff.

Orders

[33] For the purposes of apportioning costs I have assumed that the both applicants equally contributed to the actual costs incurred by Ms Hornsby-Geluk, in the absence of evidence to the contrary. The apportionment of costs has therefore been allocated equally between the parties.

[34] The respondent is ordered to pay the first respondent $1,800 towards its actual legal costs plus $35.78 being half of the $71.56 filing fee.

[35] The respondent is also ordered to pay the second applicant the sum of $1,800 towards his actual legal costs plus $35.78 being half of the $71.56 filing fee.

[36] I decline to award any other disbursements on the basis I have insufficient information to assess whether or not the remaining $80.94 attributed to disbursements was properly incurred and if so should be borne by the respondent.

[37] The respondent is ordered to pay the costs awarded to the applicants within 28 days of the date of this determination.

Rachel Larmer
Member of the Employment Relations Authority