

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 78  
5289236

BETWEEN                      DAVID BATEMAN  
   Applicant  
  
AND                                RUSH SECURITY SERVICES  
   LIMITED T/A DARIEN RUSH  
   SECURITY  
   Respondent

Member of Authority:        Robin Arthur  
  
Representatives:              Lorne Campbell for Applicant  
   Alison Maelzer for Respondent  
  
Submissions received:        15 February 2011 from Applicant  
   24 February 2011 from Respondent  
  
Determination:                1 March 2011

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     By determination AA 526/10 (23 December 2010) the Authority found David Bateman had a personal grievance arising from how Rush Security Services Limited (RSSL) decided and carried his dismissal for redundancy. A remedy of \$6000 was awarded as compensation under s123(1)(c)(i) of the Employment Relations Act 2000. Findings were also made that RSSL had wrongly deducted \$2000 from his wages with an order made for reimbursement of that amount.

[2]     The parties were encouraged to agree any issue of costs between themselves but were unable to do so. By memorandum Mr Bateman sought the Authority's determination of costs and RSSL lodged a memorandum in reply.

[3]     Both parties addressed the issue on the basis of the approach and principles

generally applied by the Authority in determining costs as described in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808. Under that approach a daily tariff is taken as the starting point for setting costs followed by considering whether any factors in the particular circumstances of the case require an adjustment up or down of that rate.

[4] Mr Bateman sought an order for \$7500 as a contribution to what were said to be actually incurred costs of \$11,730, disbursements of \$190 and \$155, reimbursement of the \$70 lodgement fee and further costs of \$500 for preparing his costs memorandum. In doing so he sought an uplift of the Authority's typical daily tariff of \$3000 for a one-day investigation meeting. It was sought to take account of the following factors:

- (i) without prejudice offers to settle the matter prior to the Authority investigation meeting but not accepted by RSSL; and
- (ii) adjournments and delays in mediation and investigation sought by RSSL; and
- (iii) Mr Bateman's success in establishing a personal grievance; and
- (iv) extra work required on the issue of wages deducted to offset an insurance excess paid by RSSL in relation to a claim for damage to a company vehicle used by Mr Bateman.

[5] RSSL, in reply, sought an order that costs lie where they fell or, in the alternative, a costs award of less than \$2000 to Mr Bateman. It submitted such an outcome was appropriate for the following reasons:

- (i) Mr Bateman was found to have been unfairly treated in how the redundancy was carried out but he was unsuccessful in a time-consuming argument on whether there were genuine business reasons justifying the decision to make his position redundant; and
- (ii) The investigation meeting was straightforward and completed within one day, including presentation of closing submissions; and
- (iii) RSSL denied receiving a 'without prejudice' offer to settle said to have been sent on 13 May 2010 while a further such offer, dated 12 July 2010, was for the sum of \$10,000, more than the remedies subsequently ordered by the Authority; and

- (iv) delays in the investigation meeting were for good reasons and Mr Bateman's memorandum gave no detail on how the delay increased his costs; and
- (v) some of Mr Bateman's costs appeared to be related to mediation which are not generally included in awards by the Authority.

[6] In exercising the discretion to award costs I exclude fees relating to attendances for the purpose of preparing for and attending mediation and paid to Mr Bateman's solicitor rather than the barrister who later represented him, on instructions, in the investigation meeting. I take those mediation-related costs to be included in the total of \$11,730 of actually incurred costs but not in the \$7500 sought as an award. The latter figure is close to the \$7200 invoiced by Mr Campbell – being 36 hours at \$200 an hour – for attendances related to preparing for and attending the Authority investigation. I accept those costs as reasonably incurred for advice given to Mr Bateman, preparing his witness statement, attending case management conferences by telephone with the Authority, preparing questions and submissions for the investigation meeting, and attending that meeting.

[7] In terms of a reasonable contribution towards those costs, the starting point is the notional daily rate of \$3000. I see no reason to reduce that amount as costs follow the event of Mr Bateman being successful in his application by establishing a personal grievance and an order regarding the illegitimate deductions from his wages. That success is not diminished by the failure of his claim that the redundancy was not for genuine business reasons.

[8] I do not consider the rate should be increased in recognition of Mr Bateman's attempt to have the matter settled on the basis of the 'without prejudice save as to costs' letter of 12 July 2010. While it would have produced a result which was economically more efficient for all parties overall (including their legal fees and time spent), the global sum proposed was more than he achieved in remedies through the Authority's determination and included an amount for lost wages which he was not awarded.

[9] However two other factors do support an increase in the rate.

[10] Firstly, RSSL unnecessarily increased costs by insisting it was entitled to deduct wages for an insurance excess. While it attempted to partly resolve that issue by paying a partial refund prior to the hearing, it was an issue which was still necessary to deal with in the investigation and determination, where RSSL's action were found to be illegal.

[11] Secondly, Mr Bateman incurred some additional costs as a result of an RSSL request to delay the investigation meeting. That request, to postpone a meeting notified for 22 July, was made on 20 July. It resulted from the illness of one RSSL witness and the illness of the wife of another. While I accepted the request was made for legitimate reasons, RSSL rather than Mr Bateman should bear the additional costs he incurred through no fault of his own. Those costs are a result of his counsel having to repeat aspects of preparation for the case when the hearing went ahead some three weeks later.

[12] Taking those factors into account I consider the notional daily rate should be lifted and an award of \$5000 be made as a modest and reasonable contribution towards Mr Bateman's costs.

[13] RSSL is to pay that amount to him as well as \$345 for disbursements and a further \$70 in reimbursement of the fee for lodging this matter in the Authority.

[14] RSSL is also ordered to pay Mr Bateman a further \$300 as a contribution to his costs to lodge a memorandum on costs.

Robin Arthur  
Member of the Employment Relations Authority