

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 102
5388378

BETWEEN NICHOLAS CAIRNS
 Applicant

A N D THE TRUSTY DELIVERY
 COMPANY LIMITED
 First Respondent

A N D GRAEME BROWN
 Second Respondent

Member of Authority: Helen Doyle

Representatives: Peter Churchman, Queens Counsel for Applicant
 Graeme Brown, Advocate First and Second Respondent

Submissions Received: 22 May 2013 from Applicant
 28 May 2013 from Respondent

Date of Determination: 6 June 2013

COSTS DETERMINATION OF THE AUTHORITY

- A. The Trusty Delivery Company Limited is to pay Nicholas Cairns the sum of \$1071.56 being costs and the filing fee.**
- B. Graeme Brown is to pay Nicholas Cairns the sum of \$750 costs.**

[1] The Authority in its determination dated 7 May 2012 found the applicant was entitled to an order for payment of holiday pay and interest from the first respondent and ordered a penalty payable by the second respondent for aiding and abetting the breach by the first respondent. Costs were reserved.

[2] The Authority has now received submissions from the applicant and the second respondent. Mr Brown's submissions address cost issues for both the first and second respondents.

The applicant's submissions

[3] Mr Churchman refers the Authority to the leading Employment Court judgment on costs in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808 and the principles that are relevant to the exercise of the discretion as to costs.

[4] He submits that the applicant has incurred actual costs in relation to the matter in the sum of \$10,585.00. Counsel's charge out rate is \$350 per hour. The applicant seeks a contribution of \$2,500 from the first respondent and \$3,500 together with disbursements of \$528.97 against the second respondent being the filing fee, counsel's flights and travel expenses.

[5] The costs were incurred it is set out in the submissions for preparation of proceedings against the first and second respondent and attendances thereafter.

The respondents' submission

[6] The first and second respondents in their submission submit that the costs sought by the applicant are excessive and not reasonable under the circumstances. Mr Brown refers to the actual investigation meeting lasting approximately two hours and submits that preparation for that meeting would have been minimal. The first respondent did not appear at that meeting. Mr Brown advised that he was not representing the company.

[7] Mr Brown submits that the matter was not complex and that the applicant's submissions were brief. Mr Brown refers to the statement in *PBO Ltd* that representatives ensure that cases are approached economically and for parties to be aware of the costs accumulating as a matter proceeds. Mr Brown attaches to his submissions a letter dated 14 November 2012 headed *Without Prejudice save as to costs* and submits it is in the nature of a *Calderbank* offer and that had that offer been accepted then the applicant would have been in a better position than he is now.

[8] Mr Brown submits that the applicant incurred fees which were almost double what the applicant could be expected to recover. He accepts the applicant is the successful party and that costs should follow the event but says that the first respondent should be responsible for all of the costs and should be liable for a payment of \$750.00 and the second respondent should not be responsible for costs.

Determination

[9] The Authority in exercising its discretion as to whether costs should be awarded and in what amount is required to do so in accordance with principle and not arbitrarily – *PBO Ltd*. It is recognised in the Authority that generally costs follow the event and there is no good reason in this case for that principle not to be applied.

[10] It is also recognised that frequently costs are judged against the notional daily rate which is now recognised in the Authority as \$3,500 and that they are modest. The nature of the case can also influence costs.

[11] The investigation meeting was approximately two hours duration. The matter was not a complex one although as the first respondent maintained that there had been an agreement to offset holiday pay the Authority was provided with reasonably detailed evidence from the applicant about that matter and the history of dealings between the parties. I accept Mr Brown's submission that the issues around holiday pay took more time in written and oral evidence and submissions than the issue of the penalty. Submissions were given on the day.

[12] I am not satisfied that the *Calderbank* offer in the 14 November 2012 letter would have resulted in the applicant being in a better position than he was in after the Authority determination. The letter was written on the basis that the applicant was a guarantor under a franchise agreement. That was not correct. There was an offer in the letter of a contribution towards Mr Cairns's costs in the sum of \$1000 but the main component of the offer was that the gross amount of the applicant's holiday pay would be used for payment of a loan between the first respondent and a company Madicait Limited. That was the very issue that was in dispute between the applicant and the first respondent at that time. The applicant wanted payment made to him of his holiday pay and that was the effect of the Authority determination. I therefore do not take into account in the exercise of my discretion the *Calderbank* offer.

[13] I am not of the view that there should be a separate award of costs made in this matter in addition to an assessment on the notional daily tariff as proposed by Mr Churchman. I intend to approach the issue of costs for both the first and second respondents on the basis of a one day notional daily tariff making any suitable adjustments.

[14] The investigation meeting was not a full day. It would be fair in all the circumstances of this case to take the daily tariff of \$3500 and reduce it by half to \$1750.

[15] I am not satisfied that the first and second respondents should be required to meet the cost of travel for out of town counsel in this relatively straightforward matter. The applicant is entitled to reimbursement of his filing fee of \$71.56. That is a total sum of \$1,821.56.

[16] I find that the first respondent should be liable for a greater portion of the costs than the second respondent.

[17] I order that The Trusty Delivery Company Limited is to pay Nicholas Cairns the sum of \$1071.56 being costs and the filing fee.

[18] I order that Graeme Brown is to pay Nicholas Cairns the sum of \$750 costs.

Helen Doyle
Member of the Employment Relations Authority