

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 142
5384073

BETWEEN

JOHN DUNCAN
Applicant

A N D

TORCHLIGHT INVESTMENT
GROUP LIMITED
First Respondent

PYNE GOULD CORPORATION
LIMITED
Second Respondent

Member of Authority: T G Tetitaha

Representatives: P Skelton QC, Counsel for Applicant
N Crotty/G Service, Counsel for Respondents

Date of Determination: 11 April 2014

COSTS DETERMINATION OF THE AUTHORITY

- A. The respondents are to pay John Duncan the sum of \$5,000 as a contribution to his costs.**
- B. Mr John Duncan is to pay the respondents the sum of \$13,244.50 as a contribution to their costs.**

[1] Following the issue of the substantive determination¹, both parties now seek an award of costs to reflect their partial success.

[2] The applicant seeks a contribution towards his costs at the Authority's notional daily rate of \$3,500 per day. His actual costs were \$51,868. The respondents seek an increased costs award. Their actual costs were \$241,513.50.

¹ *John Duncan v. Torchlight Investment Group Ltd & Anor* [2013] NZERA Auckland 535

Issues

[3] The following issues are to be determined:

- (a) Should the indemnity costs be awarded?
- (b) If not, what is the starting point for assessing costs?
- (c) Are there any factors that warrant adjusting the notional daily tariff?

Should indemnity costs be awarded?

[4] Indemnity costs are exceptional. They require *exceptionally bad behaviour* or may be awarded where a party has behaved either badly or very unreasonably².

[5] This matter does not meet the very high threshold required before indemnity costs may be imposed.

What is the starting point for assessing costs?

[6] The starting point for assessing costs in the Authority is its usual notional daily tariff. The current notional daily tariff is \$3,500.

[7] This matter involved three days hearing time. Accordingly, the starting point for assessing costs is \$10,500.

Are there any factors that warrant adjusting the notional daily tariff?

Factors which warrant a reduction in the notional daily tariff

[8] Mr Duncan succeeded on one of his three claims, namely payment of his holiday and the imposition of a penalty.

[9] The principal wage arrears claims were wholly unsuccessful. This occupied the majority of the hearing time. A reduction of two-thirds of the notional daily tariff is appropriate in these circumstances. Accordingly, any award of costs in favour of Mr Duncan would be reduced by two thirds to reflect his partial success.

[10] The respondents were successful in defending the principal wage claims which occupied two thirds of the hearing time. It was unsuccessful in defending the holiday

² *Bradbury & Ors v. Westpact Banking Corporation* [2009] NZCA 234

pay claim. Accordingly, any award of costs in favour of the respondents would be reduced by one third to reflect their partial success.

Factors which warrant an increase in the notional daily tariff

[11] The applicant incurred actual costs of \$51,868 for the involvement of two counsel. The respondent's \$241,513.50 costs was made up of:

- (a) \$59,150 in relation to pre-hearing matters, case management conferences and preparation of pleadings;
- (b) \$32,038.50 in relation to discovery;
- (c) \$38,953 in relation to preparation of an agreed statement of facts and four briefs of evidence;
- (d) \$50,374 in relation to preparation of opening of submissions dated 17 September 2012, closing submissions dated 4 January 2013 and submissions regarding penalties and interest on holiday pay dated 17 April 2013;
- (e) \$3,244.50 for preparation of the common bundle of documents (two volumes); and
- (f) \$57,787 for counsels' attendances at the hearing on 17, 18 and 19 November 2012 at Auckland.

[12] Both parties submit its costs were reasonably incurred. The respondent submits this case involved significant involvement by counsel in preparing and defending Mr Duncan's claims. The legal arguments in this case were complex including the doctrine of election, estoppel and ostensible authority/agency as well as arguments regarding director's duties under the Companies Act 1993.

[13] Mr Duncan submits costs (if any) should be based on the notional daily tariff. Otherwise it would depart from the principle that costs awards in the Authority ought to be predictable and create a significant barrier to access to justice if individual litigants who chose to pursue genuine (albeit ultimately unsuccessful claims) are to be exposed to corporate law firm fee structures. He referred to the costs decision of

James West,³ an employee unsuccessful in his bonus claim against the respondent's. It was submitted the Authority ought to follow a similar approach to costs.

[14] Costs generally follow the event. Given both parties partial successes, an award of costs reflecting that should be made. As noted above the applicants costs shall be an award of one third of the costs tariff set. The respondent two thirds.

[15] Costs are not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable but awards will be modest. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.⁴

[16] While there is a desire for consistency, the costs decision of Mr West is not binding upon me. This is especially where I did not hear that matter and different factual matrix leading to the member's decision. Consistency can be achieved by a principled approach, taking into account the matters set out above.

[17] Although there were legal arguments about the doctrine of election, the issue of payment of the bonus shares was determined on credibility. It was of medium complexity in terms of the evidence required to enable an assessment of whether the parties had concluded an agreement to pay Mr Duncan the bonus shares. Similarly the holiday pay claim required examination of Mr Duncan's evidence he was working during this period.

[18] The majority of discovery related to the respondent's allegations Mr Duncan was not working during his alleged holiday pay claim period and the affirmative defence raised by the respondents of alleged misconduct. While the respondent may complain about the discovery required, it has to some extent brought that upon itself. It is not conduct by Mr Duncan necessitating an increase in costs against him.

³ *James West v Pyne Gould Guinness Corporation Limited* [2013] NZERA Christchurch 193 at [18]

⁴ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] ERNZ 808 (EmpC) at [35]

[19] There does not appear to be conduct by either party which unnecessarily protracted matters. Both parties were able to resolve discovery, an agreed bundle of documents and statement of facts.

[20] There were no pre-hearing matters. The two teleconferences primarily monitored the readiness for hearing. Mr Skelton attended to filing memoranda in preparation for both.

[21] The matter did require counsel of above average skill, with an understanding of the industry practice and company law. It did not require engaging two counsel for hearing. That was a choice made by the parties.

[22] The matter was of medium complexity indicative in the number of documents filed and legal arguments involving company law, the doctrine of election and counterclaims and/or affirmative defences. The wage arrears sought totalling the equivalent of \$2m worth of shares. The holiday pay claim totalled \$70,864.

[23] In matters of complexity, the Authority has increased the notional daily tariff in cases where there has been partial success⁵. Having regard to the complexity of this matter, an increase to the daily notional tariff to \$5,000 appears appropriate in these circumstances. Accordingly, the daily tariff is increased to \$5,000 for both parties. For a three day hearing, the total costs contribution would have been \$15,000 prior to any adjustments. The applicant shall receive one third and the respondent two thirds.

[24] The respondent's costs of preparing the bundle of documents are reasonable given the volume of documents filed. The majority of the documents were helpful and relevant to the determination. Accordingly, the respondent's actual costs in preparing the bundle of \$3,244.50 are reasonable and recoverable in the circumstances.

[25] Accordingly, the Authority makes the following orders:

- (a) The respondents are to pay John Duncan the sum of \$5,000 as a contribution to his costs.

⁵ *New Zealand Meat Workers & Related Trades Union Inc v. Affco New Zealand Ltd* [2012] NZERA Auckland 15

- (b) Mr John Duncan is to pay the respondents the sum of \$13,244.50 as a contribution to their costs.

T G Tetitaha
Member of the Employment Relations Authority