

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 289
5440716

BETWEEN RICHARD STUART NEWALL
Applicant

A N D FORTE ALPHA OPERATIONS
PTY LIMITED
First Respondent

FORTE ALPHA PTY LIMITED
Second Respondent

Member of Authority: Rachel Larmer

Representatives: Helen Wendelborn, Advocate for Applicant
No appearance by Respondents

Investigation Meeting: On the papers

Submissions Received: 06 June 2014 from the Applicant
No submissions from the Respondent

Date of Determination: 07 July 2014

COSTS DETERMINATION OF THE AUTHORITY

**Fort Alpha Operations PTY Limited (Fort Alpha) is ordered to pay Mr
Richard Newall:**

- (a) \$7,000 towards his actual legal costs;**
- (b) \$71.56 to reimburse his filing fee.**

[1] In a determination dated 23 May 2014¹ the Authority held that Mr Newall was employed by the first respondent, Forte Alpha, against which remedies were awarded.²

[2] Forte Alpha received the Notice of Hearing but did not appear at the Authority's investigation meeting. It did not file a Statement in Reply until 09 May 2014 (one working day before the Authority's investigation). Forte Alpha also breached various Authority directions regarding the provision of a Statement in Reply, an application for leave to file a Statement of Reply out of time and the provision of information regarding the legal identity of Mr Newall's employer.

[3] Mr Newall incurred legal costs of \$9,192.56 and he seeks indemnity costs. Mr Newall relies on a without prejudice except as to costs offer made on 01 May 2014 which was rejected by Forte Alpha on 05 May. Mr Newall also relies on the manner in which Forte Alpha conducted itself in respect of his claims as giving rise to indemnity costs.

[4] This matter involved a half day investigation meeting. Although it is open to the Authority to award costs on an indemnity basis, I prefer instead to adopt the Authority's usual notional daily tariff based approach to costs. The current notional daily tariff is \$3,500. On a pro rata basis, the starting point for assessing costs is \$1,750.

[5] It is trite law to repeat that costs are discretionary and must not be used to punish an unsuccessful party. In accordance with the usual tariff approach I must now consider on a principle basis whether there are any factors which warrant making adjustments to the notional starting tariff of \$1,750.

Are there any factors which warrant a reduction to the notional starting tariff?

[6] I am not aware (and have not been advised) of any factors which would warrant a reduction to the notional starting tariff.

¹ [2014] NZERA Auckland 204

² Forte Alpha was ordered to pay Mr Newall \$103,099.57 plus interest at the rate of 5% on \$60,484.19 from 01 November 2013 until that amount had been repaid in full.

Are there any factors which warrant an increase to the notional starting tariff?

[7] I find that this is a matter in which an increase to the notional starting tariff is appropriate and necessary.

[8] It is relevant to an assessment of costs that Forte Alpha unreasonably rejected Mr Newall's settlement offer. Both parties would have saved considerable time and cost had Alpha Forte accepted the offer which was more than \$40,000 less than what Mr Newall actually received. Forte Alpha's unreasonable rejection of Mr Newall's settlement offer is a factor which should increase the costs he is awarded.

[9] I also accept Ms Wendelborn's submission that the manner in which Forte Alpha elected to conduct itself regarding this matter unnecessarily increased Mr Newall's costs. I consider it is also necessary and appropriate to reflect that in the level of costs that are awarded.

[10] Forte Alpha did not file a Statement of Reply on time, and it breached the Authority's directions regarding extensions to the time period for filing a Statement in Reply. It also failed to provide the Authority with information it had been directed to provide regarding the legal identity of Mr Newall's employer.

[11] These factors led to a situation where Mr Newall was not completely sure until the last minute about the basis on which Forte Alpha and the second respondent, Forte Alpha Pty Limited, would be defending his claims. Even then the information provided was limited and did not adequately cover what the Authority has specifically directed needed to be supplied.

[12] I also accept Ms Wendelborn's submission that Forte Alpha attempted to deny liability in respect of Mr Newall's claims in the face of documentation which established clear liability to pay him these amounts and in the face of undertakings given by Forte Alpha's Director, Mr Steven Prestage and Mr Andrew Retting, Forte Alpha's Finance Director that Mr Newall would be paid his salary arrears.

[13] I therefore consider that Mr Newall was unreasonably put to proof of each element of his various claims by Forte Alpha. While it is entitled to do so, Mr Newall should not be required to bear the additional unnecessary costs associated with that. That is therefore a factor which needs to be reflected in the level of costs awarded.

[14] I consider it appropriate for Mr Newall to receive a contribution of \$7,000 towards his actual legal costs together with reimbursement of his filing fee.

Outcome

[15] I order Forte Alpha within 28 days of the date of this determination to pay Mr Newall \$7,000 costs plus \$71.56 to reimburse his filing fee.

Rachel Larmer
Member of the Employment Relations Authority