

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 193
5447585

BETWEEN

KEITH SMITH
Applicant

A N D

ULTIMATE RESORTS &
PROPERTIES LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: J Baguley, Counsel for the Applicant
W Bennetti, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions: 6 May 2015 from the Applicant
8 April 2015 from the Respondent

Date of Determination: 26 June 2015

COSTS DETERMINATION OF THE AUTHORITY

- A. Kevin Smith is ordered to pay Ultimate Resorts and Properties Limited \$7,000 towards its actual legal costs.**

Employment relationship problem

[1] The Authority in its substantive determination dated 25 March 2015¹ held that the applicant was not employed by the respondent. The application for personal grievance was dismissed.

[2] The respondent now applies for costs. The respondent has incurred legal costs totalling \$17,349.85.

Issues

[3] The following issues are to be determined:

¹ *Smith v. Ultimate Resorts & Properties Ltd* [2015] NZERA Auckland 92

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

Should the respondent be awarded indemnity costs?

[4] The leading case on indemnity costs is the Court of Appeal decision in *Bradbury & Ors v. Westpac Banking Corporation*². Indemnity costs are exceptional so require “*exceptionally bad behaviour*” or may be awarded where a party has behaved either badly or very unreasonably³.

[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 correct approach to assessing costs in this matter is for the Authority to adopt its usual notional daily tariff based approach to costs⁴. The current notional daily tariff is \$3,500. This matter involved a two day investigation meeting. The starting point for assessing costs is therefore \$7,000.

[7] It is difficult to assess the reasonableness of the respondent costs as there is no breakdown of what those costs pertain to. From my knowledge of actual costs from other firms, the invoices are within similar range for a two day hearing.

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

Factors which warrant a reduction in the notional daily tariff

[8] The applicant submits that he had a genuine issue regarding the way in which his role had been terminated causing him considerable financial loss, stress and anxiety. There was a genuine dispute because there was an absence of clear documentation and he was entitled to pursue this application to determine his entitlements. He disputes any entitlement to pay for the travel and accommodation costs of counsel travelling from Hamilton and submits he should not be penalised

² [2009] NZCA 234.

³ See above n 2.

⁴ *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [16]

because the respondent chose to instruct out of town counsel. The applicant also disputes being made liable to pay for the costs of binding the evidence given the respondent did it at its own request. He submits he was unable to pay for counsel to represent him at hearing and has suffered financially and continues to pay moneys due to the respondent. Any award costs should therefore be nominal.

[9] None of these factors warrant a reduction in the notional daily tariff. I will consider them in respect of any increase.

Factors which warrant an increase to the notional daily tariff

[10] The respondent submits it was required to travel some distance to attend the hearing including two nights' accommodation. The applicant's decision to pursue his personal grievance claim was flawed and led to the respondent incurring unnecessary costs. The applicant failed in his grievance claim and the respondent has not been held to be in error in any way.

[11] Costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award. Costs generally follow the event and awards will be modest⁵.

[12] In my view, there was a genuine dispute about the applicant's employment status given the absence of documentation clarifying this. Given the genuineness of the dispute, I do not consider there was conduct which unnecessarily increased costs.

[13] I agree instruction of out of town counsel is the choice of the respondent. The additional costs of doing so do not warrant any increase in costs.

[14] In the circumstances, I decline to make any increase in an award of costs.

[15] Kevin Smith is ordered to pay Ultimate Resorts and Properties Limited \$7,000 towards its actual legal costs.

TG Tetitaha
Member of the Employment Relations Authority

⁵ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808 (EmpC) at [35]