

[3] In the determination I found Mr Ellis had not raised a claim of constructive dismissal within the statutory 90 day timeframe and I lacked jurisdiction to investigate that matter. Costs were reserved.

[4] Mr Ellis now seeks an award of costs on a solicitor/client basis. Counsel for Mr Ellis, Mr Phil Mitchell, asserts that Mr Ellis incurred legal costs of \$11,702.04 inclusive of GST and accounting costs of \$1,437.50 inclusive of GST. In total he seeks costs of \$13,157.90, inclusive of GST. He has provided no evidence to verify these costs were incurred.

[5] In submissions occupying less than one page counsel for Mr Ellis submits he was successful in his claim against Crightons and notes the Authority's imposition of a penalty on the employer. I infer from this reference that counsel relies on the penalty imposed on Crightons as justification for an award of full costs. He provides no other justification for such an award.

[6] Crightons, through its advocate, Mr Darren Mitchell, submits costs should lie where they fall. Crightons' rationale is that Mr Ellis was entirely unsuccessful in his personal grievance claim. In its submission the Authority should take into consideration conduct by Mr Ellis and, if it awards costs to him, they should be modest.

Should costs be awarded and, if so, in what amount?

[7] I have considered the submissions of the parties, and the principles underlying awards of costs in the Authority. Those principles were confirmed by a Full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*² and reconfirmed 10 years later in *Fagotti v Acme & Co Ltd*.³ They are well-known and it is not necessary to repeat them all in this determination. I note, however, the principles include the following which are of relevance in this instance:

- There is a discretion as to whether costs would be awarded and what amount;
- The discretion is to be exercised in a principled manner and not arbitrarily;
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct that increased costs unnecessarily can be taken into account in inflating or reducing an award;

² [2005] ERNZ 808 (EmpC).

³ [2015] NZEmpC 135.

- Costs generally follow the event;
- Awards will be modest; and
- they are frequently judged against a notional daily tariff.

[8] I conclude that a modest award of costs to Mr Ellis is appropriate to recognise his success in establishing his employer had breached his IEA in failing to pay, throughout his employment, the commission to which he had a contractual entitlement.

[9] I do not find any justification for an award of full costs, which are rarely awarded in the Authority, and considered only when a party's behaviour has been particularly egregious. While it was appropriate for a penalty to be imposed on Crightons, and for Mr Ellis to receive a large proportion of that penalty, it would not be appropriate to use an award of full costs as a further punishment of the respondent. I find it more suitable to use the Authority's notional daily tariff as the starting point for an award of costs in favour of Mr Ellis.

[10] The tariff is currently \$4,500 for the first day of hearing. It is not the Authority's usual practice to increase this amount to encompass GST and I decline to do so in this instance. The investigation meeting into Mr Ellis' claims occupied the better part of one day so the starting point is \$4,500. I do not find, as submitted by Crightons, that any conduct by Mr Ellis merits any reduction in that sum.

[11] However, while most of the parties' efforts were focussed on the commission claim, I am cognisant that the claim of constructive dismissal remained live throughout the hearing. It is reasonable to take that factor into account in light of my finding that no personal grievance was raised within the statutory timeframe. I find a reduction of 30 percent of the daily tariff to be fair in the circumstances.

Orders

[12] W Crighton & Son Limited is ordered to pay \$3,150 to Mr Ellis as a contribution to the costs he incurred in bringing his claims to the Authority for determination.

Trish MacKinnon
Member of the Employment Relations Authority