

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 173  
5520852

BETWEEN            PAUL FRANK BAINES  
Applicant

A N D                DANIEL SMITH INDUSTRIES  
LIMITED  
Respondent

Member of Authority:    Helen Doyle

Representatives:        Tim Mackenzie and Charlene Sell, Counsel for the  
Applicant  
Daniel Smith, Advocate for the Respondent

Submissions Received:    9 September 2015 on behalf of the Applicant  
5 November 2015 on behalf of the Respondent

Date of Determination:    16 November 2015

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A    I order Daniel Smith Industries Limited to pay to Paul Baines costs in the sum of \$2250 together with \$71.56 being reimbursement of the filing fee.**

**The substantive determination**

[1]    In my determination dated 26 August 2015, I found the applicant was unjustifiably dismissed and made orders for reimbursement of lost wages and payment of compensation.

[2]    Costs were reserved and a timetable set for submissions. Submissions as to costs have now been received from both parties.

### **The applicant's submissions**

[3] Ms Sell on behalf of the applicant sets out in submissions that the awards for lost wages and compensation total \$10,035.23 and the applicant's total invoiced costs including GST and disbursements are \$9,639.56.

[4] The investigation meeting lasted approximately half a day. Ms Sell stated in her submissions that counsel however put a full day aside for the investigation meeting.

[5] Ms Sell sets out in her submissions the basic tenets the Authority has held to when considering costs in *PBO Ltd (formerly Rush Security) v. Da Cruz*<sup>1</sup>.

[6] These principles were held by the full Court of the Employment Court to be appropriate to the Authority and consistent with its functions and powers.

[7] Ms Sell accepts that the matter was straightforward and neither complex nor involving extensive documentation. She refers to the respondent not obtaining representation and that preventing the matter settling at an early stage. There is a submission that the daily tariff should be increased to \$4,500 for that and other reasons as follows:

- (a) Legal advice was sought at a very early stage by the applicant;
- (b) The respondent requested that the matter go directly to the Authority for determination and refused to engage in mediation;
- (c) The respondent was overdue in filing a statement in reply to the statement of problem;
- (d) The statement in reply failed to deal with the procedural issues and contained irrelevant and unsubstantiated details;
- (e) It was only following a telephone conference with the Authority on 6 November 2014 that the parties were directed to attend mediation;
- (f) After mediation the matter then proceeded to an investigation meeting.

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<sup>1</sup> [2005] 1 ERNZ 808

[8] The applicant further submits that the respondent should pay his costs relating to mediation in the sum of \$2,451.80 including GST because a direction to mediation was required. A costs award in the total sum of \$6,951.80 is sought.

### **The respondent's submissions**

[9] Mr Smith submits that costs to date incurred by the respondent include his time and that of his personnel, although he has taken that this is an administrative cost of owning and managing a business.

[10] Mr Smith makes some other comments although they do not seem to be directly applicable to the issue of costs that the Authority is required to determine.

### **Determination**

[11] The full Court of the Employment Court in *Fagotti v Acme & Co Limited*<sup>2</sup> at [108] agreed that there is significant value in a commonly applied and well publicised notional daily rate for costs in the Authority which is currently \$3,500 per day. The full Court was not persuaded that the broad principles stated by the full Court in *Da Cruz* should be departed from or even altered.<sup>3</sup> Reference was made in *Fagotti* to the costs judgment in *Booth v Big Kahuna Holdings Limited*<sup>4</sup> where it was said that parties who elect to incur costs that are likely to exceed the Authority's notional daily rate *are entitled to do so but cannot confidently expect to recoup any additional sums.*

[12] The Authority exercises a discretion as to whether costs are awarded and if so in what amount. That discretion must be exercised in accordance with principle and not arbitrarily.

[13] The starting point is that costs generally follow the event. The applicant in this case was successful and there is no good reason to depart from the usual principle that he is entitled to costs.

[14] The investigation meeting occupied half a day. It was a straightforward personal grievance, statements of evidence were appropriately brief and submissions were made orally. Although the respondent focussed on some matters that were less

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<sup>2</sup> [2015] NZEmpC 135

<sup>3</sup> At [114]

<sup>4</sup> [2015] NZEmpC 4 at [17]

relevant at times I do not find the effect of that on the day of the investigation meeting was such that it increased costs measurably.

[15] I find the appropriate starting point for costs is half the daily tariff of \$3500, being \$1750.00.

[16] There were several matters put forward by the applicant to support an increase to the tariff. Legal representation of the respondent may have been desirable from the perspective of the applicant but it is not required. That is not a factor for which there should be an increase to the tariff.

[17] I do not find that the fact counsel set aside a full day for the investigation meeting when it only took half a day requires an increase in the daily tariff as counsel is based in Christchurch where the investigation meeting took place and could have undertaken other matters in the afternoon.

[18] The statement in reply was lodged out of time but the Authority had set the matter down for a telephone conference by which time the statement in reply had been received. Mediation was then discussed. There was no discernible increase in the applicant's costs for the reason that the statement in reply was late in the circumstances.

[19] The statement in reply did not deal with the procedural issues which were a fundamental element in this case. The statement in reply focussed on matters that the respondent wanted the Authority to take into account. The main procedural issues were not really disputed so although they were not addressed directly in the statement in reply that did not I find materially impact on costs for the applicant.

[20] The main matter to be considered in any adjustment to the daily tariff is that the respondent would not agree to attend mediation before proceedings were filed and a telephone conference was held with the Authority on 6 November 2014. During that telephone conference a direction was made that the parties participate in good faith in mediation.

[21] I accept that some additional costs were incurred by the applicant because mediation was not simply agreed by the respondent before proceedings were lodged. In the exercise of my discretion I do not make allowance for the attendance at

mediation which would be a cost incurred in any event. Rather I limit consideration to costs incurred in obtaining a direction to mediation.

[22] I assess these additional costs on the basis of two hours work at an hourly rate of \$250. In doing so I take into account that there may have still been a need to prepare and lodge a statement of problem if mediation had proceeded at an early stage as the applicant requested. However in this case the applicant was required to prepare and lodge a statement of problem at an earlier stage without the benefit of face to face discussion at mediation about the employment relationship problem. The applicant was then required to incur the additional cost of having his counsel attend at two telephone conferences, rather than the usual one in straight forward cases. Accordingly there should be uplift to the daily tariff assessed at \$1750 of \$500. There should also be reimbursement of the filing fee of \$71.56.

[23] I order Daniel Smith Industries Limited to pay to Paul Baines costs in the sum of \$2250 together with \$71.56 being reimbursement of the filing fee.

Helen Doyle  
Member of the Employment Relations Authority