

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 83
5357529

BETWEEN

ALAN BREEN
Applicant

A N D

ADAMS PLUMBING AND
DRAINAGE (2010) LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Brett Gray, Counsel for Applicant
Pieter Brits, Counsel for Respondent

Submissions Received 12 March 2012 from Applicant
23 March 2012 from Respondent

Date of Determination: 4 May 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 27 February 2012 I found in favour of the applicant that the respondent had breached clause 6 of the settlement agreement signed by a mediator from the Department of Labour under ss.149(1) and (3) of the Employment Relations Act 2000.

[2] I did not exercise my discretion and make a compliance order as the items in dispute could not be found. I did award a penalty payable to the applicant and I reserved the issue of costs.

[3] I suggested that the parties attempt to reach an agreement as to costs in my determination, failing which a timetable was set for submissions to be lodged and served. The submissions have now been received on behalf of both the applicant and the respondent.

The applicant's submissions

[4] Mr Gray on behalf of the applicant submits that the applicant has incurred costs in excess of \$10,000 in this matter and seeks an award of full indemnity costs and disbursements in the applicant's favour.

[5] Whilst Mr Gray accepts that costs are not to be used as a punishment he submits that costs should be paid on a full indemnity basis consistent with equity and good conscious jurisdiction of the Authority and the conduct of the respondent that he says increased the applicant's costs unnecessarily.

[6] Mr Gray refers to the leading Employment Court judgment on costs in the Authority; *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808. He also refers to the non-exhaustive categories of cases where indemnity costs may be awarded as set out by the Court of Appeal in *Bradbury v. Westpac Banking Corporation* [2009] NZCA 234. He submits that the Authority should award indemnity costs to the applicant for the following reasons:

- The respondent was placed on notice that the applicant would seek full indemnity costs when the personal grievance was raised;
- The applicant advised the respondent that the matter could be easily and cost effectively resolved;
- That the applicant was successful in his claim;
- The respondent by failing to facilitate the return of the applicant's tools upon settlement resulted in the proceedings being filed;
- The respondent failed to complete the mediation process;
- The respondent only reluctantly complied with another clause in the settlement agreement after correspondence with the applicant's counsel;
- The breach was deliberate.

[7] Mr Gray attached two invoices to his submissions; the first submission was dated 28 February 2011 and the second 29 February 2012. The two invoices do not

add up to the total costs claimed as actual costs of \$10,479 even with the inclusion of disbursements. Mr Gray has added a further \$1,500 to the amount of costs for preparation of the cost submissions.

[8] Mr Gray submits that if the Authority was not minded to award indemnity costs, then the award would be appropriate in any event following the daily tariff based approach of \$3,000 for each day and adding to that two days preparation and one full day for mediation and a day attendance at the Authority.

The respondent's submission

[9] Mr Brits submits that the applicant was only partially successful at the investigation meeting. The applicant's costs he submits are very high and that cases such as *PBO Ltd* clearly require proportionality and restraint in terms of incurring costs. He further submits that the respondent offered the return of all the tools the applicant claimed were his and that was better than the result the applicant achieved at the investigation meeting.

[10] Mr Brits submits the investigation meeting on 20 February 2012 was only half a day and that the appropriate starting point for costs would be half the usual daily rate, being \$1,500.

Determination

[11] The principles set out in *PBO Ltd* as appropriate to the Authority in the exercise of its discretion as to costs recognise the functions and powers of the Authority. They recognise that awards of costs in the Authority will be modest, although each case is to be considered in light of its own circumstances.

[12] In *PBO Ltd* it was held there was nothing wrong in principle with the Authority's tariff approach so long as it is not applied in a rigid manner without having regard to the particular characteristics of the case. Any dangers with such an approach were expressed in *PBO Ltd* to be avoided by adjustment either up or down in a principled way without compromising the Authority's modest approach to costs.

[13] I find that this is a matter where costs should follow the event but I do not find that there should be an award of indemnity costs, the circumstances falling well short of those referred to in *Bradbury*.

[14] I accept Mr Brits' submission that the applicant was not completely successful. The applicant wanted remedies that the Authority did not have jurisdiction to award and I also accept the submissions made as to the return of the tools. This was a relatively straightforward matter. I will set out the length of the investigation meeting from the times I recorded in my minute book.

[15] The meeting started at 10.30am, not 10.00am as Mr Gray submits. It concluded, according to the Authority's notes, at 2.40pm. Mr Gray must have been mistaken about the reason there were no significant breaks. It was not, as Mr Gray recalled in his submissions, for the member to take an earlier flight to Christchurch. The Authority was in fact sitting in Dunedin the following day. Perhaps the confusion arose because the meeting started a little later than the usual 9.30am to enable the Authority member to travel from Christchurch to Dunedin. The meeting, therefore, took just over 4 hours.

[16] I turn now to consider costs and whether they were reasonably incurred. The settlement agreement in this matter was signed on 16 February 2011. The statement of problem was not lodged until 20 September 2011. The Authority has been asked to take into account costs incurred by the applicant in an invoice dated 28 February 2011 in the sum of \$2,300 together with disbursements.

[17] I do not find that any of the costs in this invoice relate to the employment relationship problem as they were costs incurred by the applicant before any legal proceedings were lodged in the Authority, or indeed before there was any suggestion of a breach. Those costs from the invoice clearly related to attendance with respect to matters that became the subject of settlement and included negotiations for the settlement agreement itself. That settlement, clause 6, and for a short period clause 4, aside, was complied with. I do not, therefore, take that invoice into account in considering the reasonableness of costs.

[18] That, therefore, leaves the other invoice dated 29 February 2012. That invoice is in the sum of \$6,256 inclusive of GST, together with disbursements in the sum of \$109.44. That invoice includes an attendance at mediation. In this case, at a telephone conference with the Authority after the statement of problem and statement in reply had been lodged, the parties were directed to participate in mediation. The settlement agreement, while certified by a mediator under the Employment Relations

Act 2000, did not originate as a result of mediation, the parties having reached agreement privately. The parties therefore had not previously attended mediation.

[19] The Authority noted in its directions notice issued at the time that:

The parties are directed to participate in mediation and attempt in good faith to reach a resolution of their differences. This is a matter which should be capable of resolution if the parties make a practical attempt to identify the tools in dispute and to this end would be assisted by the provision of the stock take or similar document which was prepared at the time the business was sold.

[20] I am not minded to award costs with respect to mediation. I am satisfied that both parties attended mediation willingly, had not previously attended mediation, and that mediation was a very necessary step and did assist the investigation process.

[21] I then turn to the additional \$1,500 for costs submissions. I am not prepared to make an allowance for preparation of costs submissions of \$1,500 in a straightforward matter such as this. The Authority would be prepared to make an allowance for one hour costs at a charge out rate of \$250 for the submission.

[22] I turn finally in the exercise of my discretion to the question of the daily tariff. The daily tariff in the Authority is now recognised as \$3,500. The daily tariff is not then increased with an allowance for preparation. The daily tariff of \$3,500 includes preparation for a one day matter. I consider in this case, because it was a straightforward matter, that there should be an adjustment made to the daily tariff to fairly reflect the nature of the case.

[23] In all the circumstances of this case, I am of the view that an adjustment of \$800 should be made to reflect the reasonably straightforward nature of the case but then I increase the amount arrived at by \$250 for the costs submissions. A fair award of costs would be the sum of \$2,950. I do not find that \$1,500 proposed by Mr Brits for costs would have adequately reflected the work that had to be undertaken by the applicant in this case. In terms of disbursements, I note that the Employment Court has held that these claims should be limited to disbursements in the true sense involving the payment of money to a third party as opposed to normal office overheads such as telephone, facsimile and photocopying – *Oldco PTI New Zealand Ltd v. Houston EmpC* Auckland AC18A/06, 6 June 2006. I do not make allowance

then for disbursements of that nature. It is fair though that the applicant be reimbursed for the filing fee in the sum of \$71.56.

[24] I order Adams Plumbing and Draining (2010) Limited to pay to Alan Breen the sum of \$3021.56 being costs and disbursements.

Helen Doyle
Member of the Employment Relations Authority