

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 391
3004138

BETWEEN ROGER CROSS
 Applicant

AND D BELL DISTRIBUTORS
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Max Whitehead, Advocate for the Applicant
 Nikkii Flint, Counsel for the Respondent

Submissions: 9 October 2017 from the Applicant and 16 October 2017
 from the Respondent

Determination: 18 December 2017

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] An Authority determination made orally on 21 September 2017 ordered D Bell Distributors Limited (DBD) to pay Roger Cross holiday pay of \$8,229.66, with interest on the sum due from 17 December 2016 until it was paid.¹ It also ordered DBD to pay a penalty of \$3,000 for breaching s 28 of the Holidays Act 2003.

[2] Costs were reserved with the parties directed to lodge memoranda if they were not able to resolve that issue themselves and an Authority determination of costs was needed. Those directions included this observation:

Costs, which are a contribution to reasonably incurred costs of representation, are typically awarded on the basis of a notional daily tariff.² In this case Mr Cross had some limited assistance from an advocate in lodging his claim in the Authority but represented himself at the investigation meeting. He is therefore not entitled to costs for the meeting but he may have incurred some for earlier advice and assistance. If so, and he seeks a

¹ *Cross v D Bell Distributors Limited* [2017] NZERA Auckland 295.

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820.

contribution to those costs, any costs memorandum from him should attach the invoice and confirm he has or intends to pay it.

The claim for costs

[3] Max Whitehead of Whitehead Group Employment Solutions subsequently lodged a memorandum on costs on behalf of Mr Cross. Mr Whitehead had lodged Mr Cross' statement of problem on 1 March 2017 and also represented him at the Authority's case management conference held by telephone on 31 July 2017. Mr Whitehead later advised the Authority, by email on 15 August 2017, that Mr Cross would endeavour to represent himself for the remainder of the Authority's investigation but would seek the guidance of Mr Whitehead from time to time. This was said to be because Mr Cross was unable to fund the "full professional services" of Mr Whitehead as Mr Cross had already incurred a substantial debt for representation in this matter. Mr Whitehead was involved in further correspondence with the Authority and DBD during the remainder of August and in September. The costs memoranda of both parties attached copies of correspondence about various offers to settle the matter before the Authority investigation meeting was held on 21 September. Mr Whitehead did attend the investigation meeting but said at its outset that he happened to be on holiday with his family in Tauranga on that day and had come along only to personally support Mr Cross, not as his representative.

[4] Invoices attached to the cost memoranda lodged on behalf of Mr Cross showed he was billed a total of \$7,788.38 (including GST) by Mr Whitehead's company for representation in his claim against DBD. The time involved was charged at the rate of \$350 an hour plus GST.

[5] Mr Cross sought an order requiring DBD to pay at least \$3,500 towards the fees incurred for advice and representation in pursuing his claim, plus reimbursement of the Authority's filing fee of \$71.56.

[6] Mr Whitehead submitted this amount of costs should be awarded because Mr Cross had offered in the week before the Authority investigation meeting was held to settle the matter for a payment of \$4000 for his fees and \$6500 to Mr Cross. DBD had earlier offered a single payment of \$5000 which was less than the amount of holiday pay eventually awarded at the investigation meeting.

Respondent's position

[7] DBD accepted an obligation to contribute to Mr Cross' costs. It had offered \$1250 to settle the costs issue and proposed the Authority's assessment start at one half of the daily tariff, that is \$2250, on the basis that the investigation meeting took a half day. It proposed further deductions from that amount for what was said to be Mr Cross' unnecessary pursuit of some points. It also said Mr Cross's settlement offer should be ignored because the eventual award, less PAYE, made to him by the Authority was for a lesser amount. It did not state what that post-PAYE amount was.

Assessment of costs

[8] Costs follow the event. Mr Cross was entitled to a reasonable contribution to his reasonably incurred costs in successfully establishing DBD had not paid him more than \$8000 holiday pay and should be penalised for its breach of the Holidays Act.

[9] The scope of Mr Cross' original claim in the Authority was difficult to establish because there were initial disputes about what years might be covered, who the relevant employer entities were and whether relevant records had been provided. The Authority case management conference however resulted in a focus on a single employer entity and a single period of employment for which holiday pay was said to be due.

[10] Mr Cross had reasonably incurred costs in having Mr Whitehead's assistance to that point and as his representative at the case management conference. Mr Whitehead's role in subsequent settlement attempts and preparation for the investigation meeting also resulted in reasonably incurred costs. I have taken that time to total, over various days, 12 hours. Mr Whitehead's charge-out rate of \$350 plus GST was not reasonable for an advocate providing services to a truck driver on modest wages.

[11] Costs awards are meant to allow for a modest contribution to reasonably incurred costs. An hourly rate of \$350 would be high for a lawyer operating with the additional duties of the regulatory regime for client care and conduct and the expenses of professional indemnity insurance. A June 2016 survey by the New Zealand Law Society

found the average hourly charge-out rate for a lawyer was \$292.70 (exclusive of GST).³ For a small legal practice the average was less than \$250. In the case of an unregulated advocate, without the expenses and obligations carried by qualified and registered professionals, a rate of \$350 was not reasonable for the purposes of the Authority's assessment of costs.

[12] Applying a still relatively generous rate of \$250 (plus GST) to the 12 hours identified earlier as reasonably incurred for Mr Whitehead's representation and assistance gave a total of \$3450 as the starting point for the assessment of what reasonably incurred costs should be contributed to by DBD.

[13] Two factors might warrant an upward or downward assessment.

[14] Firstly, DBD submitted Mr Cross had unnecessarily incurred costs by lodging a claim against two employer entities, not just his actual employer DBD. Time was wasted, for the parties and the Authority, clarifying this point. However the responsibility for that state of affairs lay with DBD and its somewhat irregular drafting of Mr Cross' employment agreement and a statement he signed about his final pay in 2012. The latter document, for example, referred to "D Bell Distributors Ltd or Botanical Laundry Ltd & or Associated Companies". In that light it was little wonder there was confusion over which legal entity was the employer and some additional costs were incurred in sorting out that DBD was the true employer and should be the sole respondent.

[15] The other factor concerned the effect, if any, of settlement offers made.

[16] On 11 September DBD made a 'without prejudice save as to costs' offer to settle Mr Cross' claim by paying him \$6500. Although that offer did not say so, it was part of a chain of correspondence that suggested the amount offered would be a tax free compensation payment under s 123(1)(c)(i) of the Act. DBD said the offered amount was what Mr Cross could expect to receive if his claim succeeded in the Authority, once PAYE was deducted from the holiday pay amount.

[17] Mr Cross did not accept that offer. He counteroffered seeking \$6,500 for him and \$4000 for his legal costs. DBD did not accept that offer.

[18] DBD submitted Mr Cross' settlement offer could not be taken into account. It said he was awarded around \$9,000 (holiday pay plus interest) less PAYE which was

³ <http://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-893/charge-out-rates-information-released> (28 July 2016, retrieved 16 December 2017).

significantly less either in the hand or in total than the \$10,500 he sought in his last counteroffer to settle. One problem with that submission was that it wrongly factored in the \$4000 he sought as a contribution to his costs as part of the comparison of the substantive outcome with his settlement offer. The other problem was ignoring the value of the penalty DBD was ordered to pay. DBD submitted this was not part of the award against which the effect of the settlement offer was measured as the penalty was paid to the Crown, not Mr Cross. This overlooked the value of vindication to Mr Cross in successfully pursuing his claim and seeing DBD have to pay a penalty for the wrong done to him.

[19] In this case DBD would have been better off if it had accepted Mr Cross' offer to settle on 11 September. His settlement offer would have been effective for the purposes of an uplift in the assessment of costs. However, in the particular circumstances of this case, as Mr Cross represented himself at the investigation meeting, he had not incurred further costs after that offer was rejected. The costs already accepted as reasonable had already been incurred before then. No upward adjustment of the assessed amount was required to take further account of the settlement offer. However, the reasonable nature of his counteroffer, which DBD had not accepted, also confirmed that no downward adjustment need be made to the level of costs that would ordinarily apply by bald application of the daily tariff to a half-day investigation meeting.

[20] The amount of \$3,450 was sufficiently modest in the circumstances. No further adjustment of that amount was required on the basis of any other principles typically applied in assessing costs. Mr Cross was also entitled to be reimbursed for the \$71.56 fee charged to lodge his claim in the Authority.

Order

[21] Within 28 days of the date of this determination DBD must pay Mr Cross \$3,450 as a reasonable contribution to his reasonably incurred costs and \$71.56 in reimbursement of the Authority filing fee.

Robin Arthur
Member of the Employment Relations Authority