

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 129
5430690

BETWEEN

NATHAN GUNNING
Applicant

AND

BLIGHS ROAD SERVICE
STATION (1989) LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Mark Henderson, counsel for the applicant
Jeff Goldstein, counsel for the respondent

Costs submissions received: From the applicant on 1 August 2014
From the respondent on 18 August 2014

Determination: 25 August 2014

COSTS DETERMINATION OF THE AUTHORITY

Blighs Road Service Station Limited must pay a contribution to Mr Gunning's legal costs in the amount of \$1,512.80 plus the filing fee of \$71.56.

[1] In 4 July 2014 I issued a determination finding that Mr Gunning had been unjustifiably disadvantaged and unjustifiably dismissed. I awarded unpaid wages and other unpaid monetary amounts, reimbursement for lost wages and compensation as well as imposing a penalty on Blighs Road Service Station Limited (BRSS). I reserved the issue of legal costs.

[2] The Authority's jurisdiction to make costs orders is found in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Costs are at the discretion of the Authority.

[3] Each case is to be treated in light of its own circumstances. The primary purpose of costs is to compensate the successful party. Mr Gunning was successful in his claims.

[4] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and were outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹ a judgment of the Full Court of the Employment Court. The Court in the *Da Cruz* case also noted that in exercising its discretion the Authority frequently judges costs against a notional daily hearing rate. That notional rate is currently \$3,500 per day.

[5] Costs must be reasonable and costs awards are generally modest. Another principle set out in *Da Cruz* is that without prejudice offers can be taken into account in setting the amount of costs.

[6] Mr Gunning was legally aided after the mediation and through Mr Henderson has applied for actual legal costs and disbursements incurred of \$3,137.84, which includes work done before mediation in February 2014. The hourly rates that have been charged to Mr Gunning are extremely reasonable.

[7] Counsel for BRSS submits that the applicant cannot be awarded any legal costs for work undertaken leading up to mediation. Mr Gunning was not represented at mediation and it is not the Authority's practice to award costs incurred up to or including mediation.

[8] Mr Goldstein submits that the applicant is in effect seeking indemnity costs since the amount sought is lower than the Authority's notional daily rate. Indemnity costs are an exception and are only awarded when a party has behaved either badly or very unreasonably.² I agree that this matter does not meet the very high threshold required before indemnity costs would be imposed.

[9] Having taken into account the submissions of both parties, the principles in *da Cruz*, and the very reasonable offer to settle Mr Gunning made at an early stage in the

¹ [2005] ERNZ 808

² *Bradbury & Ors v Westpac Banking Corporation* [2009] NZCA 234

process, I consider that \$1,512.80 is the amount that BRSS should pay to Mr Gunning by way of contribution to his legal costs. That is the total of legal fees incurred after mediation excluding GST and disbursements. Mr Gunning should also be reimbursed for the Authority filing fee of \$71.56.

Christine Hickey

Member of the Employment Relations Authority