

The application for costs

[4] By application dated 10 July 2013, Ms Hearn filed an application for costs to be fixed by the Authority. That application was made because the parties had been unable to resolve costs on their own terms.

[5] Total costs incurred by Ms Hearn in the successful prosecution of her claim amounted to \$5,175 and the Authority is advised in those submissions that Ms Hearn continues to be unemployed and has the care of a disabled child.

[6] Ms Hearn effectively seeks full indemnity costs on the footing that the costs she incurred were modest, and that the difficulties that Cable Bay put in the way of resolving her employment relationship problem materially added to the costs that she incurred. Further, Ms Hearn seeks an order that those costs be paid within seven days.

The application for a compliance order

[7] Almost contemporaneously with the filing of the costs submissions just referred to, Ms Hearn filed an application in the Authority for compliance in respect to the orders made in the substantive determination.

[8] That application is accompanied by a copy of the Authority's substantive determination in the matter, a copy of the written demand for settlement of the judgment sum, together with a copy of the tax invoice rendered to Ms Hearn by her advocate for the preparation of the compliance order.

[9] Ms Hearn seeks compliance with the Authority's substantive determination, the costs she incurred in filing the compliance order application, and the reimbursement of the Authority's filing fee for the compliance order application.

The response from Cable Bay

[10] By email dated 12 July 2013, Cable Bay indicated to the Authority support officer that while it objected to the decision made by the Authority in the substantive determination, it had no funds to challenge it and was therefore going to pay the sum awarded but sought an agreement to pay it over time.

[11] The Authority support officer advised Cable Bay that it needed to reach an agreement with the advocate for Ms Hearn in order to progress that matter. A proposal to pay over time was forwarded electronically on 23 July 2013 to the advocate for Ms Hearn. That particular proposal was rejected the following day on Ms Hearn's behalf but Ms Hearn advanced a different proposal instead. The effect of that was to amalgamate compensation and costs and propose repayment of the aggregate sum in equal weekly instalments over a six week period.

[12] That proposal in turn was promptly rejected by Cable Bay in its email of 24 July 2013 wherein, amongst other things, Cable Bay observed that it was not required to make payment until 28 days after the original determination issued and that time period had yet to expire. Further, it observed that it had made it clear that it would pay the awards made by the Authority.

[13] However, nothing precludes Ms Hearn applying to the Authority for compliance of the substantive decision as she has done and it is conceivable that if the Authority's workload had allowed it, the compliance order application could have been brought on to be dealt with during the 28 days immediately following the issue of the Authority's substantive determination.

[14] In pursuit of that entitlement, Ms Hearn instructed her advocate to file further submissions supporting her application for a compliance order and this happened on 26 July 2013. Cable Bay responded by email of 5 August 2013 again confirming its intention of paying the compensatory sum, and indicating that it had paid that sum into the *"bank account that we held for Dianne [Ms Hearn] when she was an employee of Cable Bay"*.

[15] On 12 August 2013, the Authority proposed to the parties that it deal with the compliance order application on the papers and that was consented to by Ms Hearn the same day and by Cable Bay on 15 August 2013 in which email Cable Bay also repeated that it had paid the compensatory sum in full. By email dated 15 August 2013, the Authority was advised that Ms Hearn's earnings from 1 January 2013 down to 31 July 2013 were \$3,522.21. The advocate for Ms Hearn also indicated to the Authority that a breakdown of those earnings could be provided if that was necessary.

[16] By email dated 15 August 2013, Cable Bay set out its response to the submissions made on Ms Hearn's behalf in relation to the costs application. The

essence of Cable Bay's submission is that it thinks costs should lie where they fall and it rejects the allegations variously made by Ms Hearn that it was responsible for her incurring additional costs. Indeed, Cable Bay maintains that the boot was on the other foot and that it was Ms Hearn who caused it to incur additional costs.

The costs matter

[17] While Ms Hearn seeks full indemnity costs in the sum of \$5,175, Cable Bay indicates that costs should lie where they fall. Each party blames the other for the increase (if any) in the costs that would otherwise have been incurred.

[18] The law on costs fixing in the Authority is well settled and need not be recited again here. In essence, the Authority has judicial support for the view that costs in the Authority ought to be modest, that the Authority retains a discretion in respect of the fixing of costs but that discretion must be exercised in accordance with principle, that the Authority typically fixes costs on the basis of a notional daily rate and that the behaviour of the parties may impact on the awarding of costs.

[19] Here, this matter was dealt with in less than a half day's hearing time and on that basis alone, an award of \$1,750 would be the starting point.

[20] Both parties seek to impel the Authority to move from that departure point, one up, one down. Cable Bay blames Ms Hearn for the costs incurred and thinks costs should lie where they fall while Ms Hearn blames Cable Bay for additional cost in mounting her claim against it and so seeks an uplift on the daily tariff approach.

[21] The reality is that the Authority would very seldom award full indemnity costs as Ms Hearn is proposing here. This is particularly the case where the evidence of difficulties being put in the way of resolution are resisted by the other side with countervailing arguments.

[22] On the basis of the submissions before the Authority, there is neither evidence for full indemnity costs being payable nor justification for costs to lie where they fall. The establishing of a middle ground must begin with the daily tariff approach which produces a figure of \$1,750.

[23] To address to some extent the contention that Ms Hearn had difficulty in engaging with her former employer, some uplift is appropriate. Certainly Ms Hearn is

entitled to the representation she chooses and the suggestion made by Cable Bay that Ms Hearn was using family friends rather than professional advisers does not resonate with the Authority; presumably even family friends, if indeed that is the position, are still entitled to payment for services.

[24] A further aspect of the matter which requires comment from the Authority is that the fees charged to Ms Hearn and claimed by her on a full indemnity cost basis includes the fee for attendance at mediation and the preparation for that fixture together with the GST component of the professional time, neither of which are typically recoverable in a costs setting in the Authority.

[25] In all the circumstances then, the Authority is persuaded that the appropriate award to make is one of \$2,000. Cable Bay is ordered to make a contribution to Ms Hearn's costs in the sum of \$2,000 such payment to be made within 28 days of the date of this determination.

The compliance order

[26] As the Authority has already noted, Ms Hearn proactively sought agreement in respect of costs and immediate payment of her compensation award on the issue of the Authority's substantive determination. Having failed to obtain any agreement about costs or be paid the compensation ordered, Ms Hearn then promptly filed her application for a compliance order. The issue of costs in respect of the substantive determination has been dealt with above.

[27] As a matter of fact, the Authority is advised that Cable Bay has paid the compensation amount in full. That leaves the filing fee for the original matter still unpaid together with the filing fee for the compliance order application, the costs of the compliance order application and a claim for interest.

[28] The question is whether the justice of the case requires Cable Bay to make a further contribution to Ms Hearn's costs. Cable Bay's position, as the Authority is able to discern it, is that it has paid the compensatory award which was the principal amount outstanding in the substantive determination and that as it was not required to pay that amount until 28 days after the Authority's determination issued, the issue of the compliance order application was premature.

[29] Certainly, the Authority's support staff habitually tell unsuccessful parties that they have 28 days to meet awards made against them by the Authority and that seems to have been the message that Cable Bay was given as well.

[30] On that basis then, it could be said that if Ms Hearn had simply waited until the expiry of 28 days after the date of the substantive determination, Cable Bay might have fulfilled its obligations. Conversely, it may be that Cable Bay paid the compensation in full when it did, entirely because of the pressure exerted in relation to the compliance order application. Certainly, Cable Bay had sought time to pay initially but once the compliance order application was notified to it, full payment followed reasonably soon thereafter.

Determination

[31] In all the circumstances, the Authority is persuaded that Cable Bay would not have paid in full if it had not been for the compliance order application being made by Ms Hearn and on that basis, it is appropriate for Cable Bay to be required to meet the costs of Ms Hearn's application in full. In addition, Cable Bay has yet to pay for the filing fee for the original matter and the Authority determines that that item as should also be satisfied.

[32] Accordingly, Cable Bay is to pay to Ms Hearn within 14 days of the date of this determination the sum of \$523.12 being the cost of the fees incurred by Ms Hearn in filing her application for compliance (less the GST component) together with full reimbursement of the two Authority filing fees.

[33] Given the relative promptness of these payments being made or to be made, the Authority is not persuaded it should use its discretion to require the payment of interest.

James Crichton
Member of the Employment Relations Authority