

[5] Mr Lee alleges bad faith on the part of System Controls Limited including a failure to attend mediation in support of his claim for that quantum of costs.

The response

[6] The response from System Controls Limited is to repeat evidence it gave at the Authority's investigation meeting to the effect that the company is in "*a state of controlled wind down*" and as a consequence its revenue forecast "*is such that it is only able to pay its current debtors (as they fall due) and has no surplus revenue*".

Discussion

[7] The law on costs fixing in the Authority is now well settled and need not be recited again here. The principles that apply in a case of this sort can be enunciated as follows: costs usually follow the event (that is, the successful party can look to a contribution to its costs from the unsuccessful party), costs in the Authority are generally more modest than in a Court, costs are often fixed on a daily tariff approach in the Authority, the Authority has a discretion not to order costs and to consider factors such as the ability to pay and the behaviour of the parties before determining a costs award.

[8] Here, Mr Lee claims full indemnity costs but, with respect, there is nothing in this case which would suggest he is entitled to full indemnity costs. On the basis of the Authority's usual daily tariff approach, this matter was dealt with in significantly less than one hearing day and accordingly, the starting point for the determination of costs would be a figure less than the daily tariff of \$3,500.

[9] Considering the elapsed time the investigation meeting took, I am satisfied that the starting point for a consideration of costs using the daily tariff approach would be \$2,500. This is not a case where costs should lie where they fall. There is nothing in the evidence the Authority heard or the submissions received which would encourage me to depart from usual principles.

[10] The argument Mr Lee advances about the behaviour of System Controls Limited is well made; System Controls Limited has consistently failed to address matters appropriately, failed to be willing to contemplate a mediation, and as a consequence I am satisfied that Mr Lee's costs were increased because of System Control Limited's unwillingness to engage in appropriate dispute resolution.

[11] But it is not appropriate for there to effectively be a double jeopardy approach applied; the fact that System Controls Limited got the dismissal of Mr Lee wrong in its restructuring has already been dealt with by the Authority in its compensatory award and that fact cannot now be used to augment any claim for costs.

[12] I am satisfied that a proper award of costs must start with the daily tariff figure of \$2,500 (reduced from \$3,500 because of the time the investigation meeting took) and I increase that starting figure by a further \$1,000 because of the additional costs I am satisfied Mr Lee was put to by System Controls Limited's behaviour.

[13] System Controls Limited's attitude to the payment of its obligations to Mr Lee needs to be commented upon here. The company seems to rest on the premise that because it is in the process of winding down and can only meet its current debts as they fall due, it somehow has no obligation to Mr Lee. For the avoidance of doubt, System Controls Limited's obligations to Mr Lee are themselves debts of the company and they must be paid.

[14] There is nothing before the Authority to suggest that System Controls Limited is unable to meet its obligations and those obligations include the obligations it has to Mr Lee.

[15] I note that Mr Lee has foreshadowed a compliance order in relation to the compensatory sum I awarded in the substantive determination. If Mr Lee makes a formal application, it will be dealt with urgently by the Authority.

Determination

[16] System Controls Limited is to pay to Mr Lee the sum of \$3,500 as a contribution to Mr Lee's costs.

[17] System Controls Limited is reminded that it has legal obligations to Mr Lee now both in respect of the compensatory sum previously awarded and to this costs award and that those amounts constitute legal debts of System Controls Limited in favour of Mr Lee.

James Crichton
Member of the Employment Relations Authority

