

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 212/09
5125799

BETWEEN DES MCINTOSH AND
 OTHERS
 Applicant

AND JOHN OWENS TRADING AS
 KIWI SECURITY
 Respondent

Member of Authority: Philip Cheyne

Representatives: Des McIntosh, Representative for the Applicants
 Janet Marquet, Counsel for the Respondent

Submissions Received: Nothing received from the Applicants
 30 November 2009 from the Respondent

Determination: 11 December 2009

DETERMINATION OF THE AUTHORITY

[1] This is a respondent's claim for costs against applicants who withdrew their proceedings shortly before a scheduled investigation meeting. In accordance with leave granted for the purpose I received submissions on costs from counsel for the respondent. A copy was sent to the applicants' representative with the stipulation that any response should be provided within 7 days. Nothing has been received and the indicated time has now elapsed.

[2] Last year, after the proceedings were lodged, Mr McIntosh sought time to consult with the others about whether to proceed in light of the statement in reply. Eventually there was a phone conference in March this year when there was a direction to mediation at the respondent's initiative. Arrangements were made for mediation but Mr McIntosh advised of his unavailability at the last minute and none of the other applicants attended although the respondent and counsel apparently did appear briefly.

[3] In September this year the respondent wrote to the Authority asking for the matter to be struck out. There is no express power for the Authority to do that so I scheduled an investigation meeting for the purpose of advancing the applicants' claims or bringing the matter to an end if they did not attend. Nothing was required from the respondent other than an appearance. It was shortly before this meeting that Mr McIntosh wrote to the Authority to withdraw the proceedings.

[4] Against that background there is a claim for indemnity costs or a reasonable contribution. There are several invoices that show charges totalling \$4,855.00 (excluding GST) but there is no information about the time involved or counsel's rate. There are also several disbursements. I am referred to *PBO Ltd (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808 for the relevant principles and several Authority determinations as examples.

[5] The general approach of the Authority is to disregard legal costs incurred as a result of participation in mediation. I see no reason to depart from that approach here.

[6] The respondent must be treated as the successful party and there is no reason why he should not have the benefit of a costs order. A daily tariff approach does not help since there was no investigation meeting. I will consider the costs reasonably incurred by the respondent's participation in the Authority's investigation. They are limited to receiving and considering the statement of problem, preparing the statement in reply, participating in two phone conferences, writing to the Authority asking for the proceedings to be struck out and preparing submissions on costs. There will be attendances incidental to these steps as well. It is difficult to see that anything more than 5 hours work would be required for these steps. There will also be some disbursements for copying, tolls and faxes. The applicants should meet most of these costs since they caused them ultimately for no purpose.

[7] I consider \$1,000.00 is an appropriate contribution to these costs. The applicants are ordered to pay that sum to the respondent.

Philip Cheyne
Member of the Employment Relations Authority