

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 123  
5545853 and 5546273

BETWEEN                      BERNARD McINTYRE  
Applicant in 5545853  
Respondent in 5546273

A N D                              TTR AUTOMOTIVE LIMITED  
trading as PIT STOP NELSON  
Respondent in 5545853  
Applicant in 5546273

Member of Authority:        Helen Doyle

Representatives:              Luke Acland, Counsel for the Applicant  
Maree Kirk, Counsel for the Respondent

Submissions Received:      27 July 2015 from Bernard McIntyre  
3 August 2015 from TTR Automotive Limited

Date of Determination:      21 August 2015

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A      TTR Automotive Limited trading as PIT STOP Nelson is to pay to Bernard McIntyre the sum of \$1238.23 being costs and reimbursement of the filing fee of \$71.56.**
- B      Counsel are to confer as to payment by monthly instalment and failing agreement leave is reserved for Ms Kirk to return to the Authority.**

**Substantive Determination**

[1]      In my determination dated 6 July 2015 I found that the applicant, the respondent in file number 5546273, breached the confidentiality term of the settlement agreement he entered into with the respondent and he was ordered to pay a penalty of \$1,000. I also ordered that the respondent comply with the terms of the

settlement agreement and further the respondent was ordered to pay a penalty of \$300 for breaching the terms of settlement by failing to comply.

[2] All matters were by agreement investigated together and determined in the same determination.

[3] Costs were reserved and failing agreement a timetable set for submissions.

[4] Submissions have now been received from both counsel.

**Submissions on behalf of applicant (respondent in 5546273)**

[5] Mr Acland submits that the applicant is obliged to seek costs as he is legally aided. He submits that Mr McIntyre was successful because there was a compliance order for performance of the respondent's obligations under the settlement agreement and that the respondent was ordered to pay a penalty of \$300. He submits that the defence of the applicant's claim for compliance was untenable and that cancellation is no defence to performing a s 149 settlement agreement.

[6] Mr Acland submits that in wilful disregard of known facts and established law, the respondent refused to pay the applicant and honour the other terms of the settlement agreement. This put the applicant to the expense of lodging a claim and having it argued.

[7] Mr Acland seeks indemnity costs on behalf of the applicant for an untenable defence to the claim against it but submits that if the Authority is not minded to order indemnity costs, then costs be ordered at the daily tariff for one day's investigation meeting.

[8] Mr Acland submits that it would be wrong in principle for an award of costs on the applicant's successful application to be reduced because the respondent's action was also successful. He submits the two claims should be dealt with separately and the Ministry of Justice should recover full costs and the applicant should not be required to pay costs in the respondent's action.

[9] Mr Acland submits that an order that costs lie where they fall would overlook that the applicant was almost wholly successful.

**Submissions on behalf of respondent (applicant in 5546273)**

[10] Ms Kirk submits that the application for compliance was granted and has been complied with, but some of the matters in the settlement agreement, aside from payment, require steps to be taken by Mr McIntyre and these have not occurred.

[11] Ms Kirk submits it would be artificial to separate the two matters for costs determination as there was only one Authority determination from which costs can arise.

[12] She submits that the conduct of the respondent was not such to attract indemnity costs and submits costs should lie where they fall or that a costs order should be made in favour of the respondent under the s.45(3)(a) and (d) of the Legal Services Act 2011 (the Act) because exceptional circumstances prevail. Ms Kirk submits that such an order would recognise the respondent being put to additional and unavoidable costs for a realistic outcome of defending their position.

[13] If the Authority is minded to make an award of costs then Ms Kirk submits the Authority should consider the poor financial state of the respondent's finances and that any costs award be accompanied by a direction that it be paid in monthly instalments.

**Determination**

[14] Both parties have had a measure of success. I shall deal at the outset with the submission from Ms Kirk that an order for costs should be made against the applicant because of exceptional circumstances under s 45 (2) of the Act. I do not find conduct of the nature set out in s 45(3) (a) to (f) of the Act in this case that may result in an order for costs against an aided person. There is no award made against the respondent in 5546273 as he is legally aided.

[15] I then turn to Mr Acland's submission that there should be an award of indemnity costs and that there should be an award on the basis of a full days tariff. I do not find it appropriate to deal with the matter on the basis Mr Acland proposes of an indemnity award.

[16] The applicant was successful though and there is no reason why costs should not follow the event.

[17] It is not fair to make an assessment of costs on the basis Mr Acland proposes when most of the time was taken with hearing evidence about the breach of the confidentiality provision in file 5546273 where findings were made against the applicant, who was the respondent in that proceeding, that there was a breach of the confidentiality provision and a penalty was awarded.

[18] The successful application by the applicant for compliance with the settlement agreement and penalty did not occupy much of the time for investigation. Had that been the only matter in front of the Authority then it would not have taken much more than one hour.

[19] I do though take into account the applicant did have to go to the expense of completing and lodging the application for compliance and penalty and attending a telephone conference with the Authority which was in part about that application.

[20] I find that costs should be awarded on the basis of one third of a daily tariff of \$3500 for a six hour investigation meeting. That is the sum of \$1166.67 and a filing fee of \$71.56.

[21] I order TTR Automotive Limited trading as PIT STOP Nelson to pay to Bernard McIntyre the sum of \$1238.23 being costs and reimbursement of the filing fee of \$71.56.

### **Instalments**

[22] Ms Kirk wants payment of any costs awarded to be by monthly instalment. In the first instance she is to confer with Mr Acland about a proposed instalment amount. Mr Acland will no doubt have to discuss the matter with legal services who will be entitled to receive any costs awarded. I will reserve leave for Ms Kirk to come back to the Authority if there are any difficulties in reaching agreement about a suitable amount each month.

Helen Doyle  
Member of the Employment Relations Authority