

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 227
5367414

BETWEEN

OXYGEN BUSINESS
SOLUTIONS LIMITED
Applicant

AND

EDUARDO MARTINEZ
GARCIA aka EDUARDO
MARTINEZ
Respondent

Member of Authority: R A Monaghan
Representatives: R Price, counsel for applicant
R Crotty, counsel for respondent
Memorandum received: 13 April 2012 from applicant
Determination: 4 July 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 13 April 2012 I ordered Mr Martinez to make immediate payment of certain sums I found were owed to his former employer Oxygen Business Solutions Limited (OBSL).

[2] OBSL had filed a memorandum of the same date in respect of costs. The determination contained a direction that Mr Martinez file and serve a reply within 14 days from the date of the determination.

[3] Nothing has been heard from Mr Martinez. Mr Crotty advised the Authority on 26 June 2012 that he would seek instructions on the matter, but there has been no further approach.

[4] The determination of 13 April also recorded the fact that Mr Martinez had failed to observe a previous timetabling direction of the Authority, despite a warning that the timetable would be adhered to strictly. Although Mr Martinez subsequently

provided certain material, the material did not address the subject matter of my direction and was unhelpful. That failure, and the failure to respond in respect of costs, means I now proceed to determine costs without further reference to Mr Martinez.

Application for costs

[5] OBSL sought costs on a full indemnity basis in the sum of \$15,818.58 (including GST and disbursements).

[6] OBSL relied in support on: Mr Martinez' failure to take any steps to repay the monies owed despite neither liability nor quantum being in dispute; failures to respond in a meaningful manner to its requests and correspondence; and failure to attend two mediations. It cited in further support a determination of the Authority's in *Whitten v Ogilvy New Zealand Limited*¹ where the Authority observed that indemnity costs may be awarded in the Authority, although in that case it declined to make such an order and instead increased the notional daily rate with reference to the principles in *PBO Limited v da Cruz*².

Determination

[7] Although applications for full indemnity costs are made from time to time in the Authority, such requests have not been made in reliance on an authoritative statement of the principles to be applied in determining them in the light of the special nature of the Authority and its proceedings. The Authority has instead tended to note that indemnity costs would not be awarded in any event, then proceed with reference to *da Cruz*.

[8] Similarly there are mixed views of the ability to recover costs associated with mediation, and even if such costs can be recovered in the Authority there remains a question of whether they can be recovered in full. It was apparent from the invoices provided that the costs sought included all costs associated with preparation for and attendance at mediation. I would not in any event award those costs in full.

¹ AA 200A/10.

² [2005] ERNZ 808.

[9] The Employment Court in *da Cruz* listed a number of principles applicable to costs in the Authority. I summarise the principles most directly relevant to the present application as:

- there is a discretion to make an award of costs, which must be exercised in accordance with principle;
- costs are considered on a case by case basis with reference to the equity and good conscience jurisdiction of the Authority;
- costs must not be used as a punishment, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award;
- it is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- awards will be modest; and
- the nature of the case can influence costs.

[10] OBSL was successful in its claim and should receive an order for costs in its favour.

[11] With reference to the third bullet point above I find this litigation could have been avoided if Mr Martinez had responded in a constructive and meaningful way to OBSL's attempt to secure from him either payment of the amount owed, or a satisfactory proposal for payment. Not only did Mr Martinez fail to make any such proposal when OBSL invited him to, but he failed to attend mediation and failed to respond to a further direction of the Authority requiring him to submit a proposal. His actions and failures to take action meant he caused OBSL to embark on litigation and to incur costs unnecessarily.

[12] Because the present matter was determined on the papers consideration of a notional daily rate does not assist in assessing costs. However my finding about Mr Martinez' conduct of the matter means I do not believe a nil or modest award would do justice between the parties.

[13] Regarding the quantum of the award, this was a simple claim particularly given that liability and quantum were not disputed. It should not have become as expensive as it did, although the expense was contributed to significantly by Mr Martinez' failures to engage constructively in a resolution of the problem. By the same token the covering letter suggests some research was carried out which need not sound in costs, and I have indicated I would not consider ordering the reimbursement in full of costs associated with mediation.

Determination

[14] For the above reasons I conclude that one half of the amount sought was reasonably incurred for the purposes of an order for costs in the Authority, but I round that amount down to \$7,500.

[15] Mr Martinez is ordered to contribute to OBSL's costs in the sum of \$7,500.

R A Monaghan

Member of the Employment Relations Authority