

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Asure New Zealand Limited (Applicant)
AND National Union of Public Employees (Respondent)
REPRESENTATIVES Jo Appleyard, Counsel for Applicant
Andrew McKenzie, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
SUBMISSIONS RECEIVED 6 April 2005
25 April 2005
26 April 2005
DATE OF DETERMINATION 24 May 2005

DETERMINATION OF THE AUTHORITY

[1] This determination resolves a disputed issue of costs, following the substantive determination dated 8 June 2004 in which Asure New Zealand Limited was held not to have acted unlawfully towards NUPE or NUPE's members when it offered to conclude a collective employment agreement on terms that differed from those concluded with another union (PSA).

[2] In the substantive determination, costs were reserved on the basis that if either party considered it was entitled to an order, it should lodge and serve a memorandum within 21 days. 14 days was given for any memorandum in reply. The first memorandum was lodged well outside that timetable. Asure's memorandum was lodged on 6 April 2005 and NUPE's reply was lodged on 25 April 2005. Asure has also lodged a reply dated 26 April 2005.

[3] NUPE objects to an order of costs on the basis that Asure is out of time. I do not accept the point. In a fax dated 24 June 2004 to the Authority, Asure advised that the parties had not been able to reach agreement about costs and suggested that the issue be reserved pending the outcome of NUPE's foreshadowed challenge. I approved that approach subject to any reasonable objection from NUPE. The file indicates that a phone message to that effect was left for counsel for NUPE on 24 June 2004. There was no response. As a result, the timetable for costs established by the original determination was changed so that costs were reserved pending the outcome of the challenge, now resolved.

[4] Before the time set in the original timetable had expired, Assure sought a change to the order which I approved. It is appropriate for the Authority now to resolve costs on the merits.

[5] Asure's actual legal costs are \$20,688.29 including GST and disbursements. A contribution of \$10,000.00 is sought. Asure says that it incurred significant internal costs which are not included in these figures. Asure also says that an award of costs in line with *the unofficial tariff of \$1,500 to*

\$2,000 per day of investigation would see an award of only \$3,000.00 to \$4,000.00 or between 15% and 19% of its actual costs. Put another way, Asure says that it would not be fair to leave it to bear the vast bulk of its external legal costs. It also says that the nature of the case required a level of preparation as might usually be reserved for Court proceedings.

[6] In reply, NUPE says that it was a test case and no costs award should be made. I was referred to cases such as *NZ Labourers IUOW v Fletcher Challenge Limited* [1990] 1 NZILR 557. In that case, a full bench of the Labour Court held that ... *a test case is a case of a kind which frequently comes before this Court and which, although decided as between two parties and perhaps in respect of a cause of action which is only a sample, is agreed or intended to affect not only those parties in respect of the sample cause of action but also those parties in respect of other similar occurrences and, in comparable circumstances, other parties bound by the same instruments. Another example of a test case is a case concerning the practice or procedure of this Court or some generalised ruling on a subject matter involving or affecting many parties.*

[7] Against that standard, this was not a test case. It was not representative of other parties or other situations involving the same parties nor was it a generalised ruling on a subject matter involving many parties. I see no reason not to adopt the usual approach that costs should follow the event on the basis of a reasonable contribution to costs reasonably incurred in the conduct of the proceedings.

[8] This matter is not typical of problems most frequently dealt with by the Authority. There was no dispute as to the main facts. However, the factual situation spanned separate industrial bargaining between Asure and two different unions spread over a number of years and agreements. The PSA participated by providing evidence and submissions but not as a party. There was a large amount of historical documentation that needed to be reviewed and compiled and substantial statements of evidence were provided for 6 witnesses. In addition, carefully reasoned submissions were provided. All that preparation by the representatives meant that an important case based on complex facts involving a large state owned enterprise and two unions over several years was able to be fully canvassed within a one day investigation meeting. It would be wrong to make an award of costs as if this matter was a typical personal grievance based on one main incident, being the type of case that often attracts costs awards at the level of the *unofficial tariff* referred to by counsel.

[9] I have only two issues about Asure's claim. First, GST should not be included in a costs claim, at least where the claimant is a GST registered entity that does not bear the final burden of that tax. Secondly, two counsel participated in much of the investigation meeting. That was no doubt beneficial but was not in my judgment reasonably necessary for the proceedings. After making an allowance for those two factors, I order NUPE to pay Asure \$7,500.00.

Philip Cheyne
Member of Employment Relations Authority