IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 85/08
5096809

	BETWEEN	THE NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGER TRANSPORT AUTHORITIES EMPLOYEES' IUOW (WELLINGTON BRANCH) Applicant
	AND	MANA COACH SERVICES LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Paul McBride and Tanya Kennedy, Counsel for Applicant Hugh Fulton and Bernard Banks, Counsel for Respondent
Submissions received:	17 April and 6 June 2008 from Applicant 16 May 2008 from Respondent
Determination:	19 June 2008

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination dated 20 December 2007 I upheld some of the applicant's claims and awarded it and some of its members various remedies. Costs were reserved. I have now received memoranda from the parties setting out their views about how costs should be determined.

[2] The first point made by the respondent is that costs should not be ordered as it is challenging the determination with that hearing imminent. It is said that it is more appropriate for costs to be dealt with by the Employment Court. I do not agree with that submission. The Authority is generally better placed than the Court to make a

first assessment of an appropriate award of costs relating to the Authority's investigation. Because there is a challenge here the Authority's costs determination is implicitly open to review by the Court depending on the outcome of the challenge. The better course is for the Authority to publish its determination now and leave it to the parties to challenge or ask the Court to adjust costs depending on the outcome of the substantive challenge.

[3] The respondent also says that costs should lie where they fall on the basis that both parties had elements of success. It is correct that not all the applicant's claims as to facts or remedies were upheld. In that, this applicant is no different from most successful parties. What was established is that the respondent should have paid employees rather than treating them as suspended striking workers when their strike notice was rescinded at short notice; that the respondent breached good faith in bargaining by communicating directly with employees; and that the respondent breached section 97 of the Employment Relations Act 2000 by the way it covered the work of striking employees. There was a substantial measure of success on the applicant's part and it is entitled to an award of costs as a result.

[4] The applicant says that it incurred solicitor-client costs of $38,000.00 (GST exclusive). I have not been given any breakdown. The applicant seeks an indemnity award or alternatively a substantial contribution amounting to two-thirds by analogy with the principle's applicable in the Court. This is not a case for an indemnity award of costs. To some extent the proceedings were tactical as part of bargaining. The applicant was not wholly successful and in some respects the respondent's arguments were tenable although ultimately some of its conduct was found to be unlawful. Nor would I accept a claim for two-thirds of solicitor-client costs without better detail.

[5] Principles guiding the Authority when considering costs are expressed in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. There the Court approved a daily tariff approach often applied by the Authority when assessing costs but cautioned against its rigid application without consideration of the particular characteristics of the instant case. There are a number of features of this case that mean that it is not typical of cases dealt with by the Authority.

[6] The problem was both factually and legally complicated. It was necessary to canvass a series of events involving a large number of people over a lengthy period of time. There was a fierce contest about nearly everything. There was also a

substantial volume of documentary evidence. Considerations of commercial sensitivity for the benefit of the respondent also added some complexity to the handling of the documentary evidence. The substantive claims were investigated as a matter of priority, the claims for interim remedies having been disposed of by undertakings. Two full days were required for the investigation meeting followed by an exchange of comprehensive written submissions. The issues were very significant for the parties so their urgency, complexity and importance meant that the applicant was represented by two counsel, as was the respondent. All of this means that the application of a standard daily tariff of $3,000.00 would not produce a just result.

[7] The applicant argues that in several ways the respondent caused it unnecessary costs by its conduct that caused the proceedings and its participation in the investigation process. I disagree. In response to the second point, the issues were very significant for both parties and both looked to advance their views vigorously. There was nothing improper in that. In response to the first point, the respondent's unlawful conduct has been met by penalties and other remedies and it is not appropriate to punish a party by an award of costs. However, nor do I accept that the applicant's conduct during the bargaining should be brought to account in determining costs. The strike action and the last minute withdrawal of a strike notice caused disruption no doubt intended as part of the applicant's bargaining tactics but its conduct was lawful.

[8] It remains to fix costs. In *Da Cruz*, the Employment Court dealt with costs for a one day investigation meeting. The earlier award of $2,000.00 was increased to $7,000.00. Successfully repelling a significant counter-claim resulted in a doubling of the original award and a further award was made in recognition of costs following a reasonable *Calderbank* offer. The *Calderbank* factor does not arise here but the added complexity caused by the counter-claim resulting in a doubling of the original award gives some guidance. It would not be inappropriate in the present case to double the daily tariff mentioned earlier resulting in an award of $12,000.00. That remains a modest award when compared with the applicant's solicitor-client costs and would not be an unreasonable imposition on the respondent. I note that it also includes disbursements.

[9] Accordingly, I order the respondent to pay the applicant the sum of $12,000.00 is costs.

Philip Cheyne
Member of the Employment Relations Authority