**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

AA 240A/10
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| | BETWEEN | THE NEW ZEALAND DAIRY WORKERS UNION TE RUNANGA WAI U INC<br>Applicant |
| | AND | FONTERRA CO-OPERATIVE GROUP LIMITED<br>Respondent |

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| Member of Authority: | Rachel Larmer |
| Representatives: | Helen White, Counsel for Applicants<br>John Rooney, Counsel for Respondent |
| Submissions received: | 29 June 2010 from Applicant<br>28 2010 from Respondent |
| Determination: | 14 September 2010 |

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## COSTS DETERMINATION OF THE AUTHORITY

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[1] The Authority (Member L Robinson) issued its determination on 24 May 2010. The applicant's claim that the respondent was acting in breach of clause 13.9 of the applicable collective agreement was not upheld. The respondent was successful, and in the normal course of events, is entitled to a contribution towards its actual costs.

[2] The parties were invited to resolve costs between them, and failing that a timetable was set for the respondent to file its costs memorandum, and for the applicant to file its memorandum in response.

[3] This matter involved two days of investigation meeting, with written submissions being submitted subsequent to that.

[4] The respondent referred to *Cavanagh v Fonterra Co-Operative Group Limited*, 3 May 2010, H Doyle, CA 29A/10 in which the Authority treated a one and a half day investigation meeting as two days, which it says was to account for the time spent on subsequent written submissions and urged me, on this basis, to treat this as a two and a half day matter for costs purposes.

[5] The respondent seeks an award of $10,000 towards its actual costs. It says this matter was both more important to the parties and more complex than the *Cavanagh* case, and required more preparation and far more detailed and comprehensive submissions. It submits that in line with *Chief Executive of the Department of Corrections v Tawhiwhirangi* [2008] ERNZ 73 a notional daily rate of $4,000 is appropriate.

[6] The Employment Court in *Tawhiwhirangi* did not apply a daily rate of $4,000, but rather it proceeded on the basis that the applicant was entitled to costs calculated at the rate of $3,000 per day for 9 days; 2 days for the investigation meeting; 1 day for submissions; and 6 days for preparation. Preparation time was allowed by the Court when assessing costs because it considered that the Authority matter had required "*considerable preparation*", including detailed analysis of closed circuit video footage.

[7] The Court's approach to costs in *Tawhiwhirangi* appears to me to be a sort of hybrid approach, which combines the Authority's usual tariff approach with the Court's practice when assessing costs of allowing a certain amount of preparation time per day of hearing time.

[8] It is not the Authority's usual practice to allow preparation time per day of investigation meeting. I do not accept that this matter required the same sort of preparation that was necessary in *Tawhiwhirangi*. I have therefore decided to exercise my costs discretion by adopting the Authority's usual tariff based approach when assessing costs.

[9] The applicant submits that costs should lie where they fall because the case involved clarification of the parameters of a clause in the collective agreement which had ongoing implications for a significant number of workers and a large employer. It

says it was reasonable for it to go to the Authority to seek a determination because the case involved law of some significance.

[10] It says it attempted to limit the expense of the proceedings by asking the Authority to assess the facts giving rise to the perception of a breach and the effect of the wording in the collective agreement on the facts as assessed by the Authority. It further says it offered to attempt to resolve quantification of loss post investigation.

[11] The applicant also criticises the respondent for failing to sufficiently account for its costs, because the invoices do not specify the hourly rate or amount of work required so "*do not establish justification of the amount of money spent*". It also says that whilst the case was important, it was not overly complex.

[12] Pursuant to clause 15, Schedule 2 of the Employment Relation Act 2000, the Authority has the power to award costs to the respondent in any amount which it thinks reasonable. The principles relating to costs in the Authority are well settled; see *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808.

[13] A successful party is usually entitled to a contribution towards its actual legal costs, and I find that there are no factors which would justify departing from that usual principle. I do not agree that costs should lie where they fall. This was not a joint application to the Authority nor was it in the nature of a test case. The respondent was wholly successful and is entitled to a contribution towards its actual costs.

[14] I recognise that the applicant is entitled to seek a determination from the Authority, but note that there are usually cost consequences for an unsuccessful party. The risk of a costs award is one of the factors which should be weighed up as part of the parties' normal risk assessment.

[15] I adopt a notional daily tariff of $3,000, which is consistent with the Employment Court's comment in *Chief Executive of the Department of Corrections v Tawhiwhirangi* [2008] ERNZ 73 that is an appropriate staring point, rather than an upper figure. I note that view was also adopted by the Employment Court in *Johnson v Gilligan Business School*, 03/04/09, Travis J, AC14/09. *Johnson* involved an

unsuccessful challenge against the Authority's award of $3,750 for a one day investigation meeting.

[16] Because I am adopting a tariff based approach towards an award of costs, I do not need to know the charge out rate or amount of work which was undertaken by the respondent's lawyer, because I do not have to assess whether what its legal costs were reasonable. Suffice to say I am satisfied that the respondent incurred actual costs which far exceed what it is claiming.

[17] This matter involved two days of investigation meeting. I am not prepared to accept the respondent's submission to extend that to two and a half days. I am not bound by *Cavanagh*, and in any event consider that the Authority's decision in that case to treat a one and a half day meeting as if it was two days when assessing costs, appears to have resulted from a desire to reflect that the first day of the investigation meeting was an unusually long day. This meant the actual investigation meeting time was likely to have been closer to two days than it was to one and a half days.

[18] I do not consider there are any factors in this case which would warrant an adjustment of the notional daily tariff, either upwards or downwards. I accept the applicant's submission that this matter was not unduly complex. Applying the daily tariff of $3,000 results in the applicant being ordered to contribute $6,000 towards the respondent's actual costs in relation to the substantive matter.

[19] The respondent has also claimed reimbursement of $615.84 in disbursements. In its costs memorandum it has claimed $433.84 in respect of telephone calls and copying and $182 for travel to and from the investigation meeting in Hamilton.

[20] I do not have sufficient information to determine whether the $433.84 for calls and copying is part of the respondent's lawyer's normal office expenses, or whether this relates to particular additional expenditure required in respect of this matter. I consider the former is not recoverable, whilst the latter may be.

[21] I am also not clear about what the travel costs relate to. The respondent's costs memorandum states that it is for travel to the investigation meeting, which was held in Hamilton, however the invoice dated 30 September 2009 records this as "local

travel". I do not consider travel to and from Hamilton local travel, so wonder whether this is just a drafting error on the invoice. I consider the former may be recoverable, whilst the latter probably is not.

[22] Whilst disbursements would normally be recoverable, in this case there is an absence of sufficiently precise information from the respondent to support its claim. This mean I cannot be clear that the disbursements claimed by the respondent were all actually incurred in respect of this matter, as opposed to being general expenses associated with the usual running of a law practice.

[23] It is clear from the file that some copying was done, because the respondent prepared a comprehensive bundle of documents. It is also evident that some travel costs were likely to have been incurred as a result of the matter being heard in Hamilton. I therefore consider that there should be some reimbursement towards these disbursements. I am satisfied that $400 would be an appropriate amount for the applicants to contribute.

[24] The applicants are ordered to pay the respondent $6,000 towards its legal costs and $400 towards its disbursements.

**Rachel Larmer**
**Member of the Employment Relations Authority**
**(Pursuant to clause 16 of Schedule 2 of the Employment Relations Act 2000)**