

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 289  
5354603

BETWEEN

BRUCE TAIAPA  
Applicant

A N D

TE RUNANGA O  
TURANGANUI A KIWA  
TRADING AS TURANGA  
ARARAU PRIVATE  
TRAINING  
ESTABLISHMENT  
Respondent

Member of Authority: Rachel Larmer

Representatives: Gregory Bennett, Advocate for Applicant  
Elizabeth Inger, Counsel for Respondent

Submissions Received: 07 August 2012 from Respondent

Date of Determination: 27 August 2012

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**DETERMINATION OF THE AUTHORITY**

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**A Mr Bruce Taiapa is ordered to pay Te Runanga O Turanganui A Kiwa trading as Turanga Ararau Private Training Establishment (Turanga Ararau) \$4,650 towards its costs and disbursements.**

**Employment Relationship Problem**

[1] The Authority determined on 25 July 2012<sup>1</sup> that Mr Bruce Taiapa's dismissal for serious misconduct was justified.

[2] The parties were encouraged to agree costs, but failing that a timetable was set for costs to be dealt with by an exchange of memoranda. Turanga Ararau has applied

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<sup>1</sup> [2012] NZERA Auckland 252

for an award of costs and disbursements in its favour. Mr Taiapa has not filed any costs submissions.

[3] Turanga Ararau says its actual costs were \$22,500 and it seeks an award of costs of \$11,000 plus GST together with full disbursements of \$579.26 and interest.

[4] It also asks the Authority to impose a penalty of \$400 on Mr Taiapa's advocate Mr Greg Bennett of Abbey Employment Services *for his handling of this matter*. Turanga Ararau requests that half of the proposed penalty be paid to it personally and not the Crown.

### **Issues**

[5] The following issues require determination:

- a. What approach should the Authority adopt when fixing costs?
- b. Should the notional daily tariff to be adjusted?
- c. What costs should be awarded?
- d. What disbursements should be awarded?
- e. Should interest be imposed on the amounts awarded?
- f. Should a penalty be imposed on Mr Bennett?
- g. If so, should the penalty or any part of it be paid to Turanga Ararau instead of the Crown?

### **What approach should the Authority adopt when fixing costs?**

[6] Turanga Ararau seeks half of its actual costs which it submits represents a reasonable contribution towards its costs.

[7] The full court of the Employment Court's decision in *PBO Ltd (formerly Rush Security Limited) v Da Cruz*<sup>2</sup> identifies the principles which apply to costs in the Authority. Bearing in mind those principles, I see no reason to depart from the Authority's usual tariff based approach to costs.

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<sup>2</sup> [2005] 1 ERNZ 808.

[8] The notional daily tariff is currently \$3,500. This matter involved a one day investigation meeting (IM) so I adopt \$3,500 as the starting point when assessing costs. I must then consider, on a principled basis, whether the notional daily tariff should be adjusted to reflect the particular circumstances of this case.

**Should the notional daily tariff be adjusted?**

[9] The Authority has not been informed of any factors which would warrant a decrease to the notional daily tariff.

[10] Turanga Ararau says Mr Taiapa's conduct of this matter *greatly increased* its costs. In particular it identified that Mr Taiapa continually failed to comply with timetable directions; he failed to provide information prior to the IM which had been identified by the Authority as relevant to its investigation; and Turanga Ararau had ongoing problems in obtaining the original recordings of the disciplinary meetings and Mr Taiapa's transcripts of the meetings from him.

[11] Mr Taiapa's first witness statement contained a paragraph which related to a different client of Mr Bennett's so it had to be amended and filed and served again. There were also problems with Mr Bennett not filing a witness summons for medical evidence in a timely manner which made the calling of that evidence more complicated and time intensive than it needed to be.

[12] Other factors which warrant an increase in the notional daily tariff include Mr Taiapa's failure to include evidence about his unjustified disadvantage claim in his witness statement and his inability when giving evidence during the IM to explain what his unjustified disadvantage grievance related to. That claim was quite rightly withdrawn by Mr Bennett after Mr Taiapa had given his evidence on the basis that there was no evidence to support it.

[13] Mr Taiapa pursued his reinstatement claim notwithstanding his evidence he had suffered serious health problems which had rendered him unable to work for a lengthy period of time. Surprisingly Mr Taiapa failed to produce any medical evidence about his current health status or fitness/ability to return to work.

[14] Mr Bennett withdrew Mr Taiapa's claim for reinstatement the day after the IM. Turanga Ararau's witnesses therefore had to address reinstatement in their witness statements and when giving evidence during the IM.

[15] All of these factors warrant an increase in the notional daily tariff by \$1,000. That increases the actual daily tariff to \$4,500 to reflect the particular circumstances of this case.

**What costs should be awarded?**

[16] Costs are discretionary. There is no reason to depart from the well established principle that costs usually follow the event. That means Turanga Ararau as the successful party is entitled to a contribution towards its actual costs.

[17] I find it is not appropriate to award Turanga Ararau half of its actual costs. I consider that requiring Mr Taiapa to contribute \$4,500 towards Turanga Ararau's costs is appropriate to do justice between the parties.

**What disbursements should be awarded?**

[18] Turanga Ararau seeks an award of \$579.26 to cover its claimed disbursements, namely:

- a. \$191.34 plus GST for car hire and petrol between Napier and Gisborne for its counsel;
- b. \$237.92 plus GST for accommodation and meals for its counsel;
- c. \$150 plus GST for photocopying and binding.

[19] I decline to reimburse Turanga Ararau for the disbursements associated with its decision to instruct out of town counsel. It is open to Turanga Ararau to select its own counsel but Mr Taiapa should not bear the costs of that choice in circumstances where Gisborne based counsel could have been instructed without incurring the disbursements which have now been claimed.

[20] I am prepared to reimburse Turanga Ararau for the costs associated with the preparation of the joint bundle for use at the IM. The preparation of the joint bundle enabled the IM to be run more efficiently. That in turn assisted witnesses when giving their evidence which I consider saved on hearing time to the benefit of the parties.

[21] Mr Taiapa is ordered to reimburse Turanga Ararau \$150 for disbursements which relate to the photocopying and binding of material placed before the Authority.

### **Should interest be imposed on the amounts awarded?**

[22] The Authority has discretion under clause 11, Schedule 2 of the Employment Relations Act 2000 (the Act) to impose interest on the whole or part of money awarded at the rate prescribed under s.87(3) of the Judicature Act 1908.<sup>3</sup>

[23] Turanga Ararau has already incurred its costs and disbursements. I therefore consider it appropriate to exercise discretion to impose interest on the costs and disbursements awarded in this determination at the prescribed rate of 5% per annum from the date of this determination until the amount awarded has been paid in full.

### **Should a penalty be imposed on Mr Bennett?**

[24] The Authority records its concern about the manner in which Mr Bennett conducted this matter. However, I am also mindful that, largely due to the co-operation of Turanga Ararau, the original IM date for this matter was not adjourned. That was notwithstanding Mr Taiapa's repeated timetable breaches and Mr Bennett's ongoing failure to respond in a timely manner to the Authority's and Turanga Ararau's attempts to contact him about these proceedings.

[25] I therefore do not consider it can be said the IM was obstructed or delayed in circumstances where the IM proceeded as per the original timetable. I therefore find that the essential elements of s.134A<sup>4</sup> of the Act have not been met, so I decline to impose a penalty on Mr Bennett.

[26] As an aside, I consider that if a penalty was held to have been appropriate then Mr Bennett would have to be offered an opportunity to be heard on the penalty claim because it was determined by the Authority because that issue did not form any part of the substantive IM into Mr Taiapa's personal grievance claims.

### **Summary**

[27] Mr Taiapa is ordered to pay Turanga Ararau \$4,650 being:

- a. \$4,500 towards its actual costs; and

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<sup>3</sup> The current interest rate is 5%.

<sup>4</sup> Namely the requirement that a person *obstructs or delays an Authority investigation*.

b. \$150 to reimburse its copying and binding disbursement.

**Rachel Larmer**  
**Member of the Employment Relations Authority**