

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 395  
5351709

BETWEEN                      ALLAN ROCKELL  
   Applicant

A N D                              RAINBOW FALLS ORGANIC  
   FARM LIMITED previously  
   BRIDGETHORNE HOLDINGS  
   LIMITED  
   Respondent

Member of Authority:      T G Tetitaha

Representatives:            R B Quarrie, Counsel for Applicant  
   R Mark, Counsel for Respondent

Submissions Received:    25 June 2013 from Applicant  
   15 July 2013 from Respondent

Date of Determination:    4 September 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A.      Rainbow Falls Organic Farm Limited shall pay to Allan Rockell costs of \$7,500.**

**The application for costs**

[1]      Mr Allan Rockell has applied for costs following his successful claim for unjustified dismissal and wage arrears. He deposes to incurring costs of \$17,400 including GST for the 2 ½ day hearing. He seeks uplift in any costs award due to having to defend an unsuccessful counterclaim. He does *“not see why I have to pay to get money that was rightfully mine anyway.”*

[2]      Rainbow Falls Organic Farm Limited (Rainbow Falls) opposes the application. It states Mr Rockell was only partially successful and denies the

counterclaim took any greater time than the other matters. He submits one witness was required to attend for a half day unnecessarily which should reduce costs.

### **Issues**

[3] The following issues are to be determined:

- (a) What is the starting point for assessing costs;
- (b) Are there any factors that warrant a reduction or uplift in costs?

### **What is the starting point for assessing costs?**

[4] The starting point for costs in the Authority is its notional daily tariff of \$3,500. This matter involved a 2½ day investigation meeting. The starting point for assessing costs is therefore \$8,750.

### **Are there any factors that warrant adjusting the notional daily tariff?**

#### *Factors which warrant a reduction in the notional daily tariff*

[5] Rainbow Falls submits costs generally follow the event but should be modest and referred to the Authority's notional daily rate. It disputes that the greater part of the investigation meeting dealt with the respondent's counterclaims. Costs should reflect Mr Rockell's partial success and contributory conduct. The requirement for the appearance of a witness, Mr Roger Barnard, unnecessarily elongated the hearing given the applicant did not cross-examine him.

[6] Costs are not to be used as a punishment, although conduct that unnecessarily increases costs may be taken into account in reducing or increasing an award of costs.<sup>1</sup> Where contributory conduct is taken into account to reduce or deny remedies, it cannot also be taken into account in determining the issue of costs<sup>2</sup>.

[7] Mr Rockell was not partially successful. He was successful in both his applications. He was not awarded any remedies due to his contributory conduct. This cannot be taken into account (again) to reduce any order for costs.

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<sup>1</sup> *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808 (EmpC at [35])

<sup>2</sup> *White v. Auckland District Health Board* [2008] NZCA 451, [2008] ERNZ 635

[8] Mr Barnard was required to attend for a half day for cross-examination which did not occur. This is conduct which has unnecessarily increased the parties' overall costs. Accordingly, costs of \$1,750 shall be deducted.

*Factors which warrant an increase in the notional daily tariff*

[9] Mr Rockell seeks an uplift on the basis he was wholly successful. He submits the unsuccessful counterclaim totalling \$446,050 occupied the greater part of the investigation meeting incurring the majority of legal costs in preparation. Both Counsel have incurred similar legal costs of \$17,400 including GST for the 2 ½ day hearing.

[10] The fact of success is not a matter to warrant uplift in the notional daily tariff. Costs follow the event. Both Counsel have incurred reasonable costs and have dealt with this matter in an efficient and cost effective manner.

[11] Indemnity costs require “*exceptionally bad behaviour*” or may be awarded where a party has behaved very unreasonably.<sup>3</sup> Whilst the Authority understands Mr Rockell's frustration, it is not a factor which warrants an increase in the notional daily tariff. Neither party has, in their conduct in this proceeding, exhibited exceptionally bad behaviour.

[12] The matter was not overly complex. No expert evidence was called. The evidence of the counterclaims was sparse and ultimately took no more time to deal with than the personal grievance.

[13] There is the matter of Rainbow Falls non-compliance with the timetabling for filing costs. Mr Rockell filed a further memorandum protesting the late filing. The Authority accepted the late filing of Rainbow Falls cost submissions. An increase of \$500.00 to reflect Rainbow Falls non-compliance with the timetabling is allowed.

[14] Accordingly, Rainbow Falls Organic Farms Limited shall pay to Mr Rockell costs of \$7,500.

T G Tetitaha  
Member of the Employment Relations Authority

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<sup>3</sup> *Bradbury & Ors v. Westpac Banking Corporation* [2009] NZCA 234