

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 166  
5394644

BETWEEN	Maui Solomon Applicant
AND	The Hokotehi Moriori Trust First Respondent
AND	Lin Entwistle Second Respondent
AND	Amanda King Third Respondent
AND	Brian Solomon Fourth Respondent
AND	Dennis Solomon Fifth Respondent
AND	Shirley King Sixth Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Susan Hornsby-Geluk, Counsel for Applicant Paul McBride, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions received:	13 September 2013 from Applicant 16 October 2013 from Respondents
Determination:	23 December 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In my determination of 12 October 2012 I found that Mr Solomon had been unlawfully suspended from his position as General Manager of the Hokotehi Moriori Trust (the Trust) on 31 August 2012. I ordered the Trust to reinstate him to the full duties of his position and to reinstate his remuneration and other financial benefits from the date of his suspension.

[2] I also ordered the Trust to pay him \$8,000 as compensation for his personal grievance. I declined to award the penalties sought by Mr Solomon against the second to sixth respondents for inciting, instigating, aiding or abetting a breach of his employment agreement. I also declined to issue an injunction to prevent the respondents from progressing a disciplinary investigation, or from taking any disciplinary action against him related to the allegations that formed the basis of his suspension. I strongly noted my view, however, that it would be inappropriate for any disciplinary investigation to be instigated or progressed before an Annual General Meeting (AGM) of the Trust, scheduled to take place on 24 November 2012, had taken place. I reserved the issue of costs.

[3] Mr Solomon now seeks a contribution of \$30,000 plus GST towards his legal costs of more than \$60,000 plus GST. Counsel for Mr Solomon acknowledges that the Authority's standard approach is to apply a daily tariff which is currently \$3,500. Under that approach, costs of \$7,000 would normally be awarded for a two-day investigation.

[4] Ms Hornsby-Geluk submits that a greater contribution than normal is appropriate in the circumstances. Those circumstances are that the AGM resulted in a stalemate due to the political factions involved; there had been no review of the 2012 trustee elections; there was still no resolution over the legal status of the sixth respondent; and the employment issues in relation to Mr Solomon had not been resolved. The question of the payment of Mr Solomon's legal costs had been deferred and was unlikely to be considered again until the review of the 2012 elections had occurred. As it had not yet commenced, it was unlikely that there would be a timely outcome.

[5] Counsel argued additionally that the costs were higher than normal as the initial application had been an application for an interim injunction, although that changed by agreement to a substantive hearing. Interim injunction applications were, by their nature, more costly. A greater number of witnesses than might normally be expected had been called due to the significance and interest in the case within the Moriori community.

[6] Counsel for the Trust and the five named respondents submits that the outcome of the Authority proceedings "*was essentially 'a one all draw'*" and that no costs award should be made. Alternatively, Mr McBride submits that the well-known

principles from the in *Da Cruz*<sup>1</sup> judgment should be applied and that there is no reason to depart from the Authority's ordinary tariff-based approach.

[7] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000, which is set out below:

*(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*

*(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[8] Underpinning the award of costs are principles that have been developed and applied over several years. Those principles were referred to with approval by the Full Court in *Da Cruz*. Costs are discretionary and it is up to the Authority to decide whether they should be awarded and, if so, in what amount. They should be modest; will normally follow the event; and are considered in the light of the particular circumstances. They are frequently judged against a notional daily tariff but the tariff should not be applied rigidly without regard to the particular characteristics of the case. Where a party's conduct has unnecessarily increased costs, that may be taken into account in the award that is made, but costs are not to be used as a punishment.

[9] It is appropriate that costs should be awarded in this instance. I disagree with Mr McBride's assessment of a "one all draw", and note that Mr Solomon was largely successful in his claims before the Authority. He was found to have been unlawfully suspended, and to have been unjustifiably disadvantaged in his employment by that suspension.

[10] He did not succeed in obtaining an injunction to prevent his employer from progressing a disciplinary investigation, or taking disciplinary action against him, in relation to the matters for which he was suspended. However, I noted the dysfunctional nature of the Trust Board and its inability to act as a fair and reasonable employer until it had resolved its internal conflict.

[11] I am not persuaded that the reasons cited by counsel for Mr Solomon, including the underlying political and cultural factors, merit an increase to the

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<sup>1</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808

Authority's ordinary daily tariff. The investigation meeting was conducted over two days which results in an award of \$7,000.

**Determination**

[12] The Hokotehi Moriori Trust and the five individuals named as second to sixth respondents are ordered, jointly and severally, to pay \$7,000 in costs to Mr Solomon.

Trish MacKinnon  
Member of the Employment Relations Authority