

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 217
5404922

BETWEEN AMALGAMATED
WORKERS' UNION OF NEW
ZEALAND INC
Applicant

A N D COUNTIES MANUKAU
DISTRICT HEALTH BOARD
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Helen White, Counsel for Applicant
Anthony Russell, Counsel for Respondent

Submissions Received: 23 May 2013 from Applicant
23 May 2013 from Respondent

Date of Determination: 29 May 2013

COSTS DETERMINATION OF THE AUTHORITY

A. The Amalgamated Workers Union of New Zealand is ordered to contribute \$3500 towards Counties Manukau District Health Board's legal costs.

[1] In a substantive determination dated 9 May 2013¹ the Authority determined that employees of the respondent, Counties Manukau District Health Board ("Counties Manukau") who are members of the applicant, Amalgamated Workers' Union of New Zealand (AWUNZ) unreasonably withheld their agreement to the inclusion of the 11.30am shift in the roster

¹ [2013] NZERA Auckland 177

[2] A timetable was set for costs to be dealt with by an exchange of memoranda. Ms White for AWUNZ and Mr Russell for Counties Manukau both filed and served memoranda as to costs.

[3] The Authority's power to award costs arises from Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act). This confers a wide discretion on the Authority to award costs, on a principled basis.

[4] The principles guiding the Authority's approach to costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808. Those principles are so well recognised I do not need to restate them.

[5] The general principle is that costs follow the event. However, one of the principles set out in *PBO Ltd* is that... "*The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.*"

[6] The Employment Court in *Carter Holt Harvey v. Eastern Bays Independent Industrial Workers Union & Ors*² observed that a notional daily tariff approach, which was to be adjusted in a principled way, was best suited to the Authority's unique jurisdiction. I adopt that approach.

[7] The normal starting point for costs in the Authority is \$3500 per day, *Fifita (aka Bloomfield) v. Dunedin Casinos Limited*³.

[8] This matter involved an investigation meeting of one full day. I have adopted a notional daily tariff of \$3500 as my starting point and now consider whether there are any factors which would warrant adjusting that notional tariff.

[9] Ms White for AWUNZ submitted costs should lie where they fall largely because this case was a dispute over the interpretation of terms contained in the AWUNZ collective agreement. Ms White submitted that much time was spent by Counsel preparing for complex issues concerning the lawfulness of a restructuring proposal by Counties Manukau. Because of the Authority's finding that employees had unreasonably withheld their agreement to include an 11.30 am shift in the roster, it was not necessary for the Authority to determine the lawfulness of Counties

² [2011] NZEmpC

³ [2012] NZEA Christchurch 2019

Manukau's restructuring proposal. Therefore, Ms White submitted the legal issues arising in respect of the restructuring proposal remain unresolved.

[10] Mr Russell accepted that the case involved a dispute about the provisions of a collective agreement and that often in such cases lower awards of costs are made by the Authority. However, Mr Russell submitted the dispute included a factual dispute as well as a legal interpretation of the collective agreement and therefore as the successful party, an award of costs should be made in favour of Counties Manukau.

[11] The employment relationship problem raised the issue of whether employees of AWUNZ employed by Counties Manukau had unreasonably withheld their agreement to changes to work hours sought by Counties Manukau. This issue required an interpretation of clause 4.4.1 of the AWUNZ collective agreement. The issue of whether in the event such agreement was not obtained, Counties Manukau could in any event restructure and alter positions was also raised in the employment relationship problem. AWUNZ sought the following relief:

- *An urgent investigation;*
- *A determination;*
- *An order for compliance with the AWUNZ collective agreement;*
- *A permanent injunctive order that the respondent refrain from its purported restructure and termination of the employment of the affected members in order to employ others willing to work the shift...*

[12] The Authority was required to investigate whether agreement had been unreasonably withheld and if the answer to that question was no, whether Counties Manukau could restructure its operations and introduce a new roster pattern. The Authority was required to investigate and make both factual and legal findings. Counsel necessarily had to brief witnesses and provide evidence in respect of both issues and to give legal submissions addressing both issues.

[13] The employment relationship problem involved more than a dispute under the Employment Relationships Act. I see no reason to depart from the principle that the successful party is entitled to a contribution towards its legal costs.

[14] Mr Russell submits that the investigation meeting took 1 day but that taking into consideration written submissions following the meeting, the time equated to 1 ½ days, which totals \$5250 based on the daily notional rate of \$3500.

[15] I do not accept Mr Russell's submission, it is not uncommon in cases in the Authority for submissions in writing to be filed following the investigation meeting. I consider the daily notional tariff of \$3500 without adjustment is appropriate in this case.

[16] I order costs in the sum of \$3500 in favour of Counties Manukau.

Anna Fitzgibbon
Member of the Employment Relations Authority