

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 26  
5159924

BETWEEN            NEW ZEALAND MERCHANT  
                         SERVICE GUILD INDUSTRIAL  
                         UNION OF WORKERS  
                         INCORPORATED  
                         First Applicant

                         DAVID BOURNE, JOHN  
                         CONRAD and JAMES KING-  
                         TURNER  
                         Second Applicants

A N D                REAL JOURNEYS LIMITED  
                         Respondent

Member of Authority:    M B Loftus

Representatives:        Paul McBride, Counsel for Applicants  
                         Janet Copeland, Counsel for Respondent

Submissions Received:    9 December 2013 and 27 January 2014 from Applicants  
                         23 December 2013 from Respondent

Date of Determination:    12 February 2014

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

[1]     On 10 May 2013 I issued a determination rejecting a claim the applicants pay damages to Real Journeys' ([2013] NZERA Christchurch 86). Costs were reserved and the Merchant Service Guild now seeks a contribution toward those incurred defending the claim on behalf of both itself and its three members (the second applicants).

[2]     This is a matter with a long history of which the damages application formed only a part. The damages claim emanated from an interim requirement Real Journeys continue paying the second applicants pending a substantive hearing of their claim the company be restrained from completing a restructuring exercise (*New Zealand*

*Merchant Service Guild IUOW Inc & Ors v. Real Journeys Ltd* NZERA Christchurch, CA74/09, 5 June 2009).

[3] The substantive decision favoured Real Journeys (*New Zealand Merchant Service Guild v. Real Journeys Ltd*, NZERA, Christchurch, CA74A/09, 5 October 2009). The decision allowed a continuation of the restructure and led to redundancy for the second applicants. It also gave rise to the question of damages as a result of the successful interim application though the Authority then noted it had *sparse information in relation to financial damage sustained by the respondent as the direct result of the interim injunction being determined in the applicants' favour*.

[4] The question of damages was put aside for later resolution with the process being delayed by a largely unsuccessful challenge in the Employment Court (*Bourne & Ors v. Real Journeys Ltd* [2011] NZEmpC 120, 28 September 2011). The question of damages was eventually addressed through the 13 May 2013 determination in which Real Journeys was, as already said, an unsuccessful applicant. That resulted in the Guild's application for costs in respect to that decision.

[5] Normally the Authority will use a daily tariff approach when addressing a costs claim (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[6] The investigation took a day so application of the above would see a contribution in the order of \$3,500.

[7] The Guild's costs totalled \$8,500 plus GST and disbursements of \$607. In seeking a contribution toward that amount the Guild refers to the daily tariff before arguing an increase is warranted.

[8] Real Journey's response is an argument as to why costs should lie where they fall in respect to the damages hearing, accompanied by the reinitiation of an earlier claim for costs in respect to both the interim and substantive hearings. This claim had earlier been placed in abeyance pending resolution of the damages claim. That decision was made after, I would add, some argument between the parties.

[9] While it raises a number of points the Guild's response contains one point that requires comment. It is argued a costs award in respect to both the interim and substantive decisions is inappropriate as the Court has already determined the matter.

[10] I disagree. The Court determined costs in respect to its hearing and there is no mention of costs in the Authority. In those circumstances and using as guidance the Court of Appeal's comments at paragraph 12 of *Charta Packaging Ltd v Howard* CA125/01, 15 July 2002, I conclude the question remains to be determined by the Authority.

[11] That raises the question of what occurred in respect to costs in the other hearings which, I must add, were conducted by another member of the Authority. They were reserved after the interim and there was no further comment. The Authority's substantive decision saw costs reserved *pending determination of the penalties / damages issue*. The Court concluded costs in respect to its hearing should lie where they fall and its substantive decision saw the issue of penalties resolved. That left damages as the only issue requiring determination before costs were addressed.

[12] Having considered the comprehensive submission of both parties I conclude costs should lie where they fall.

[13] While the Guild's claims were initially couched as both a dispute and grievances (and I note this was commented on by Judge Couch in his substantive decision) the underlying issue was Real Journey's restructuring and whether or not it was conducted in accordance with the terms of the CEA. This point was at the heart of all that followed. Essentially this is an argument about the interpretation, application or operation of the relevant provisions of the employment agreement between the parties. That is, by definition, a dispute (refer s.129 of the Employment Relations Act 2000).

[14] That this was essentially a dispute is reflected in the words used by both the parties (refer, for example, paragraph 1.3 of the Statement of Problem filed on 13 May 2009) and the Authority in its various decisions (see, for example, paragraph 15 of the interim decision and paragraph 2 of the substantive).

[15] It is well established that costs incurred in ascertaining an answer to a dispute should generally lie where they fall. Examples include *New Zealand Tramways*

*Union (Wellington Branch) v Wellington City Transport Ltd* [2002] 2 ERNZ 435 at [73] and *New Zealand Merchant Service Guild IUOW Inc. v Inter-Island Line* (unreported) EC Wellington, WC 21A/03, 18 December 2003 where the Court said:

*Parties ... should feel free to request assistance and ruling from the Employment Relations Authority and the Court where there are genuine disputes without fear of facing orders to pay the costs of the victor.*

[16] In the event the above conclusion is wrong I would still be reluctant to make an award. While their arguments were comprehensive, I was not convinced by either party to depart from the daily tariff. Essentially the Guild was successful in respect to two hearing days – the interim and the damages. Real Journeys was successful in the substantive hearing which took three days though their level of success was later reduced to a small extent by the Court. The change should be taken into account given s.183(2) of the Act, so I conclude the score is, in effect, two and a half each – a draw.

### **Conclusion**

[17] For the above reasons I conclude costs in respect to all matters before the Authority and on which they were reserved (NZERA Christchurch, CA74/09, 5 June 2009; NZERA Christchurch, CA74A/09, 5 October 2009 and [2013] NZERA Christchurch 86) should lie where they fall.

M B Loftus  
Member of the Employment Relations Authority