

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 160
5598339

BETWEEN THE NEW ZEALAND MEAT
WORKERS & RELATED
TRADES UNION
INCORPORATED
Applicant

AND LAND MEAT NEW ZEALAND
LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Peter Churchman QC, Counsel for Applicant
Graham Malone, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 27 October and 5 December 2016 from the Applicant
14 November from the Respondent

Determination: 22 December 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 22 September 2016 I found Land Meat New Zealand Limited (LMNZ) had breached its duty of good faith to the New Zealand Meat Workers & Related Trades Union Incorporated (the Union) pursuant to s.4 of the Act.¹ I ordered LMNZ to comply with s. 32(1)(a) of the Act, specifically by using its best endeavours to enter into a bargaining process arrangement (BPA) with the Union within six weeks of the date of my determination. I also ordered LMNZ to pay a penalty of \$15,000 under s.4A of the Act, with the penalty to be paid to the Authority for payment into a Crown Bank Account.

¹ [2016] NZERA Wellington 115

[2] The Union now seeks an award of costs and disbursements on an indemnity basis. It submits such an award is justified for a number of reasons including that NZLM was put on notice at an early stage that it had adopted an untenable position in refusing to sign a BPA; it had repeatedly refused to engage with the Union; and its failure to communicate with the Union and other institutions throughout the Authority's process unnecessarily delayed matters and added to the Union's legal costs.

[3] Those costs were \$21,150.80 plus \$557.68 in disbursements. Counsel for the Union provided the Authority with copies of invoices in which costs were itemised. The Union submits that, if the Authority is not minded to award indemnity costs, then a significant uplift on its notional daily tariff is warranted.

[4] LMNZ acknowledges the Union is entitled to seek costs following its successful application to the Authority but submits indemnity costs are not justified. It also submits the costs claimed by the Union are unjustified.

[5] Counsel for LMNZ cites the principles applying to costs², which are well known and do not require repeating here. Some of the principles he has highlighted are that costs are discretionary and that discretion should be exercised in accordance with principle; they normally, but not always, follow the event and in some cases should lie where they fall; and the starting point for considering quantum is the daily tariff.

[6] LMNZ submits the Union has provided nothing that justifies indemnity costs and the factors the Union has raised are relevant only to a consideration of whether an uplift to the daily tariff is warranted. It notes the proceedings were heard in a day with only three witnesses providing evidence and the starting point is therefore \$3,500.

[7] Following an analysis of various items on the invoices provided by the Union, LMNZ submits that, if the Authority were to consider an award above the daily tariff, the maximum sum justified would be \$4,249.73 inclusive of the Authority's filing fee.

² Set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmpC135

Determination

[8] Costs are not to be punitive or an expression of disapproval of a party's conduct, although conduct that has increased costs unnecessarily can be taken into account when considering an award.³ I have considered the parties' submissions carefully and, while I find this is not a situation where indemnity costs are justified, I accept the Union's alternative submission that an uplift to the daily tariff is warranted.

[9] In particular, I note LMNZ's delay in lodging a statement in reply and its failure to make itself available for mediation within the timeframe directed by the Authority. These actions resulted in communications from the Union that would have been unnecessary if the respondent had complied with the Employment Relations Authority Regulations and the Authority's direction. The increased communications resulted in increased costs for the Union.

[10] LMNZ has submitted that, while the Union is free to choose its counsel, when that choice results in unreasonably high fees, a reasonable hourly rate should be assessed and used to calculate costs. It submits time cannot be justified at more than \$275 an hour. The respondent also submits travel costs of counsel travelling from Wellington were unjustified given that the Authority's investigation was held in Wanganui which has a capable bar.

[11] I reject those submissions and adopt Member Crichton's comment that "...Mr Churchman QC has acted for this Union for over 30 years and there is little proper basis on which that longstanding relationship can be challenged".⁴ I find the hourly rate not unreasonable for senior counsel and the travel costs appropriate. Although the total cost to the Union is high in relation to a matter that was dealt with in a one day Authority investigation meeting, that reflects the importance accorded the issue by the Union.

[12] As the investigation meeting occupied one day, the starting point is \$3,500. I find an uplift of \$2,000 is warranted because of the additional costs incurred by the Union referred to above. Disbursements relating to travel, photocopying and binding are additional.

³ n2, *Fagotti* at [48]

⁴ *New Zealand Meat Workers & Related Trades Union Inc v South Pacific Meats Ltd & anor* [2016] NZERA Christchurch 37

[13] Land Meat New Zealand Limited is ordered to contribute \$5,500 to the legal costs of the New Zealand Meat Workers and Related Trades Union Incorporated. It is also ordered to reimburse the Authority's filing fee of \$71.56 and to pay travel, photocopying and binding disbursements in the sum of \$486.22.

Trish MacKinnon
Member of the Employment Relations Authority