

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 361
5442125

BETWEEN EASTERN BAY INDEPENDENT
INDUSTRIAL WORKERS'
UNION 1995 INCORPORATED
First Applicant

WAYLON HEREWINI and
SIXTEEN OTHERS
Second Applicants

A N D TSNZ PULP & PAPER
MAINTENANCE LIMITED
Respondent

Member of Authority: T G Tetitaha
Representatives: L J Yukich, Advocate for Applicants
K Dunn, Counsel for Respondent
Investigation Meeting: On the papers
Submissions Received: 2016 from Applicant
2016 from Respondent
Date of Determination: 3 November 2016

COSTS DETERMINATION

**A. Eastern Bay Independent Industrial Workers Union Inc is to pay
TSNZ Pulp & Paper Maintenance Limited the sum of \$7,000
towards its costs.**

Employment relationship problem

[1] The Authority in its substantive determination dated 29 September 2016¹ dismissed the application for compliance of wage arrears orders. Costs were reserved.

¹ *Eastern Bay Independent Industrial Workers' Union 1995 Inc & Ors v. TSNZ Pulp & Paper Maintenance Ltd* [2016] NZERA Auckland 332

[2] TSNZ Pulp & Paper Maintenance Limited (TSNZ) seeks a costs contribution of \$10,500 legal fees and \$534.30 disbursements. Its actual costs were \$29,963.47.

What is the starting point for assessing costs?

[3] It is accepted determining costs in the Authority starts with the daily tariff for the appropriate number of hearing days followed by consideration of whether there should be an uplift in that figure or a reduction of it.

[4] This matter was originally set down for five days. TSNZ sought a starting point for 1 ½ days. This matter took only one day's hearing time spread over the course of two days. Accordingly, the starting point for assessing costs in the Authority is \$3,500.

[5] The tariff is intended to encompass all disbursements. The costs of a party instructing out of town Counsel does not warrant increased costs. I decline to make a separate award of costs of \$534.30 for travel disbursements of TSNZ Counsel.

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

[6] TSNZ seeks an uplift of the daily tariff to \$10,500. The basis for an increase in costs was that the application was without merit.

[7] I do not accept Eastern Bay Independent Industrial Workers' Union 1995 Incorporated (the Union) submission the adjournment was due to TSNZ's unpreparedness to give submissions. I directed an adjournment and for the respondent to provide a copy of relevant parts of the transcript and Mr Malcolm's sworn affidavit about these matters² from the *Harris* case.³

[8] Taking or pursuing an unnecessary step or an argument that lacks merit is a well-established basis for increased costs awards against an unsuccessful party.⁴ An argument lacking any evidential foundation must also lack merit. The applications including an earlier determination declining removal to the Employment Court⁵ were

² See above note 1 at para.[17].

³ *Weeraphong Harris v. TSNZ Pulp & Paper Maintenance Ltd* [2015] NZEmpC 43; ARC79/12

⁴ See District Court Rules 2014, R.14.6(3)(b)(ii); High Court Rules 2016 R.14.6(3)(b)(ii); Court of Appeal (Civil) Rules 2005 R.53F(f)(ii).

⁵ *Eastern Bay Independent Industrial Workers Union & Ors v TSNZ Pulp & Paper Maintenance Ltd* [2016] NZERA Auckland 207.

conducted without any proper evidential foundation. They lacked merit. TSNZ is entitled to seek an increased costs award.

[9] Given the applicant was forewarned on four occasions in advance and at hearing of the need to file further evidence or face costs awards,⁶ I am prepared to increase the daily tariff to \$7,000.

Should costs be visited upon both applicants?

[10] I have considered whether to make the order for costs against the Union only. The liability of each of 2 or more parties ordered to pay costs is usually joint and several, unless otherwise directed.⁷ Any liability of unsuccessful parties to pay costs would be joint and several unless it was considered that would be unjust.⁸

[11] It was plain Mr Herewini and others took a limited role (if any) in this proceeding. Mr Herewini attended of his own free will but did not appear to be present for instruction purposes. No evidence was deposed by Mr Herewini and others. Mr Herewini and others appeared to be present in name only. I saw little point in them being named at all in this proceeding.

[12] Mr Yukich sought the attendance of the Union secretary for instructions. Any fault in the conduct of the case lay with the Unions' instructions to Mr Yukich and not the second applicants.

[13] Costs are discretionary. I exercise my discretion to award costs against the Union only. If Mr Herewini and others wish to contribute to the costs award they may do so of their own free will. I can see no prejudice to the respondent given the Union will have access to funding from its fees.

[14] Accordingly there is an order the Eastern Bay Independent Industrial Workers Union Inc is to pay TSNZ Pulp & Paper Maintenance Limited the sum of \$7,000 towards its costs.

TG Tetitaha
Member of the Employment Relations Authority

⁶ See Minutes dated 21 and 28 July and 15 September 2016. The applicants were also invited on the first day of hearing to take the adjournment to consider deposing the witnesses present.

⁷ See Rule 14.14 High Court Rules 2016.

⁸ *Commissioner of Inland Revenue v Muir* [2015] NZHC 1573, (2015) 27 NZTC 22-014 at [17].

