

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 35
3030694

BETWEEN MANU TAEFU
 Applicant

AND ALLIED SECURITY LIMITED
 Respondent

AND ALLIED INVESTMENTS
 LIMITED

Member of Authority: Trish MacKinnon

Representatives: Geoff O'Sullivan, counsel for the Applicant
 Damian Black, for the Respondent

Investigation Meeting: On the papers

Submissions Received: 16 and 30 October 2018 from the Applicant
 23 October 2018 from the Respondent

Date of Determination: 28 January 2019

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 10 September 2018¹ I granted Mr Taefu's application to reopen the investigation that had resulted in my determination of 14 May 2018.² The reopening was granted solely for the purpose of adding Allied Investments Limited as second respondent. I reserved the issue of costs. Mr Taefu now seeks costs for the legal fees he incurred in bringing that application to the Authority.

[2] Allied Investments Limited denies that it should pay costs. Through a director, Damian Black, it says the error in naming the first respondent as the employer was made by

¹ *Manu Taefu v Allied Security Limited & Allied Investments Limited* [2018] NZERA Wellington 82.

² *Manu Taefu v Allied Security Limited* [2018] NZERA Wellington 40.

the applicant and the cost of rectifying that error should be borne by the applicant and not by it.

[3] Mr Taefu disagrees and submits, through counsel, that the second respondent had made clear in its submissions it had always considered itself a party to the proceedings as the correct employer. However, when counsel for Mr Taefu attempted to enforce the Authority's substantive determination Mr Black, who is also the sole director of Allied Security Limited, denied any liability on behalf of Allied Investments Limited.

[4] Mr Black advised Mr Taefu would have to "...apply to the courts" for a name change in regard to the Authority's determination. In light of that response, Mr Taefu submits he had no option other than to apply for a reopening of the matter as both Allied Security Limited and Allied Investments Limited denied liability and he had no other way of obtaining the remedies awarded against his employer by the Authority.

[5] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000, which provides as follows:

- (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.

[6] The Authority is to take a principled approach to the award of costs. The applicable principles are well established.³ They include that costs are discretionary and it is up to the Authority to determine whether they should be awarded and, if so, in what amount. Costs should be modest; will normally follow the event; and are considered in the light of the particular circumstances.

[7] Costs 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. A party's conduct

³ *PBO Ltd (formerly Rush Security Ltd v Da Cruz* [2005] ERNZ 808, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

that has unnecessarily increased costs may be taken into account in the award that is made, but costs are not to be used as a punishment.

[8] In this instance, the reopening application was necessary to prevent a miscarriage of justice. I accept Mr Taefu's submission that, without the reopening, he would not have been able to claim the awards made in his favour against his employer. I have considered the position of the parties as to costs and have determined this is a case where costs should follow the successful application.

[9] Mr Taefu, whose employment agreement named his employer as Allied Security, cited Allied Security Limited as the respondent in his original application to the Authority. Chris McDowell, General Manager Operations for Allied Investments Limited, which trades as Allied Security, lodged a statement in reply on behalf of the employer and represented the employer in the Authority proceedings. Mr McDowell, who is a director of Allied Investments Limited, did not otherwise draw attention to the change in citation. I referred in more detail in my determination on the reopening application to this and it is not necessary to repeat it here.

[10] In response to Mr Taefu's application for reopening the Authority's investigation, Allied Investments Limited requested a reopening of the matter as Mr Black claimed that company had not attended mediation with Mr Taefu nor had it been present at the Authority's investigation of Mr Taefu's claims. He also claimed Mr Taefu had not raised a personal grievance against his employer, which I rejected in my determination of 10 September 2018.⁴

[11] In short, Allied Investments Limited wished to relitigate Mr Taefu's claims on the basis that it had not been represented in any previous forum in which Mr Taefu's claims were discussed or investigated. I rejected that in my determination of the reopening application on the basis that Mr McDowell, one of the two Allied Investment Limited directors, acknowledged he had represented the employer in mediation and he also represented it in the Authority's investigation meeting.

[12] The stance taken by Allied Investments Limited prolonged the investigation of the reopening application and added to the costs Mr Taefu incurred in sheeting responsibility for

⁴ n1 at [21].

the payment of awards made in his favour to the right employer. In the circumstances I find an award of costs to Mr Taefu to be warranted.

[13] Mr Taefu seeks indemnity costs of \$3,507.90 in respect of the costs he incurred for the reopening application. Mr Taefu submits this is justified on the basis that he had no option but to seek a reopening after both Allied Investments Ltd and Allied Security Limited refused to accept liability for the payments awarded against the latter company. I do not find an award of indemnity costs is justified and find it preferable to adopt the notional daily tariff in a manner that achieves an outcome fair to the parties. As this matter was determined on the papers I take as a starting point the tariff for a half day investigation meeting, which is \$2,250.

[14] That sum may be adjusted upwards or reduced depending on the circumstances. In this instance I find there are factors that indicate both an upwards adjustment and a reduction. Allied Investment Limited's seeking of a reopening that would entail a relitigation of Mr Taefu's application persuades me an adjustment upwards is appropriate. However, the initial error in identifying the employer was made by Mr Taefu, which indicates a reduction. Balancing those factors I find it reasonable to adjust the tariff by \$750, resulting in an award to Mr Taefu of \$3,000.

[15] Mr Taefu also seeks a further \$529 for the preparation of submissions in relation to costs. As noted in my determination of costs relating to the substantive investigation,⁵ it is not the practice of the Authority to award costs for the preparation of costs submissions and his submission in that regard is rejected.

Orders

[16] I order the second respondent, Allied Investments Limited, to pay Mr Taefu \$3,000 as a contribution to the costs he incurred in his successful reopening application.

Trish MacKinnon
Member of the Employment Relations Authority

⁵ [2019] NZERA 30.