

IN THE EMPLOYMENT RELATIONS AUTHORITY

AUCKLAND

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 71

3038898

BETWEEN

FIRST UNION INCORPORATED

Applicant

AND

RITCHIES MURPHY

TRANSPORT SOLUTIONS

LIMITED

Respondent

Member of Authority: Eleanor Robinson

Representatives: Grace Li, Counsel for Applicant
Gemma Mayes, Counsel for Respondent

Submissions: 8 February 2019 from the Applicant
8 & 11 February 2019 from the Respondent

Determination: 12 February 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 7 January 2019 ([2019] NZERA 4), the Authority declined an application for facilitation made by the Applicant, First Union Incorporated (First Union), on the basis that the situation between it and the Respondent, Ritchies Murphy Transport Solutions Limited (RMTS), had not reached the high threshold set out in the statute required to trigger facilitation.

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and the Respondent has filed a submission in respect of costs.

[3] Ms Mayes, on behalf of the Respondent, citing actual costs of \$5,162.06 (inclusive of GST and disbursements) in addition to \$345.00 (inclusive of GST and disbursements) is seeking a contribution to costs in the sum of \$4,500.00.

[4] Ms Li, on behalf of the Applicant, seeks a stay of the costs application on the basis that it has filed a statement of claim with the Employment Court seeking a hearing *de novo* in respect of the Authority's determination.

[5] Ms Mayes submits that the Respondent opposes the stay application on the basis that the Authority is best placed to determine costs as sought in this matter, and the Court may revisit the determination should it prove necessary to do so.

Respondent's Submissions

[6] Ms Mayes submits that the guiding principle when determining costs is that costs should follow the event. The Respondent was the successful party in this matter.

[7] Unlike other facilitation matters in which costs have been determined to 'fall where they lie' Ms Mayes submits that this matter did not proceed jointly by consent because the Respondent opposed the application for facilitation made by the Applicant.

[8] By letter incorrectly dated 18 October but actually emailed on 18 September 2018 the Respondent stated that it did not consider facilitation was necessary and noted that a date had been arranged for the parties to meet for the purposes of bargaining on 28 September 2018.

[9] The letter also placed the Applicant on notice that the correspondence would be put before the Authority in relation to costs if it proceeded with its application.

[10] Ms Mayes also submits that the Applicant opposed the Respondent's request to adjourn the Authority's proceedings in relation to the application for facilitation in order that the parties could focus on the bargaining.

[11] Ms Mayes further submits that although the application for facilitation was determined on the papers it nevertheless involved detailed written legal submissions from both sides, and the Respondent had to review the Applicant's submissions together with a

significant amount of supporting documentation in addition to preparing its own submissions and supporting documents.

Costs Award

[12] The Authority's power to award costs is at the discretion of the Authority pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[13] Although the Applicant states that it has appealed determination [2019] NZERA 4, in accordance with s 180 of the Act:

The making of an election under section 179 does not operate as a stay of proceedings on the determination of the Authority unless the Court, or the Authority, so orders.

[14] The Authority's practice is not to stay a determination on reserved costs pending the progress of a challenge. I do not consider there are grounds for doing so in this case.

[15] The principles the Authority applies in respect of costs are well-settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹. The principles include that costs generally follow the event and that costs will be modest and reasonable.

[16] While the matter was determined by the Authority on the papers by way of timetabled submissions and the parties were not put to the expense of attending at an investigation meeting, I accept that the Respondent was required to undertake a greater level of preparation than is usual in such matters which frequently proceed by way of consent between the parties.

[17] The Applicant was advised of costs implications if it proceeded in its application by the letter dated 18 October 2018 from the Respondent, and the parties were put on notice of the potential costs implications in the Authority Minute dated 14 November 2018.

[18] Having fully considered the matter, I think it appropriate that the Applicant make a contribution to the costs of the Respondent in the sum of \$3,000.00.

[19] First Union is ordered to pay RMTS the sum of \$3,000 costs, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson

Member of the Employment Relations Authority

¹*PBO v Da Cruz* [2005] 1 ERNZ 808