

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 218
3039371

BETWEEN

RUTH FRENCH
First Applicant

JACKSON WALKER
Second Applicant

JAKE WREN
Third Applicant

AND

HOYTS CINEMAS (N.Z.)
Limited
Respondent

Member of Authority: Jenni-Maree Trotman
Representatives: Duncan Allan, for the Applicants
Tim McGinn, for the Respondent
Submissions received: 14 March from Applicants
07 March from Respondent
Determination: 12 April 2019

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 26 February 2019 I issued a determination in which I found the Respondent, Hoyts Cinemas (NZ) Limited (Hoyts) had not breached the Collective Agreement or its duty of good faith to the Applicants. I further found that the Applicants did not suffer an unjustified disadvantage to their employment.

[2] Costs were reserved, with the parties encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions.

Application for costs

[3] Mr McGinn, on behalf of Hoyts, applies for increased legal costs in the amount of \$14,400, representing two thirds of Hoyts' actual costs. He also claims for reimbursement of airfares and accommodation relating to the second day of the investigation meeting totalling \$998.70. This is opposed by Mr Allan, the Applicants' Union Representative. He takes the position that the ordinary daily tariff ought to be payable by the Applicants.

Legal Principles

[4] The power of the Authority to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The principles and approach adopted by the Authority in respect of this power are well settled and were outlined by a full Court in *PBO Ltd v Da Cruz*.¹

[5] These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.² The principles include:

- a) There is a discretion as to whether costs will be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d) Equity and good conscience is to be considered on a case by case basis.
- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g) Costs generally follow the event.

¹ *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

² *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

Analysis

[6] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff for the first day of an investigation meeting is \$4,500.00 and for each day thereafter the daily tariff is \$3,500 per day.³ The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

[7] The investigation meeting took place over 2 days. Using the daily tariff the starting point for an award of costs is \$8,000.

Should the daily tariff be adjusted upwards?

[8] Mr McGinn put forward a number of grounds as to why Hoyts considers the daily tariff should be adjusted upwards. I have considered each of these grounds and the responses provided by Mr Allan.

[9] For the reasons that follow I am satisfied that the daily tariff ought to be adjusted upwards but not to the extent that Mr McGinn submits. As Chief Judge Inglis said in *Booth v Big Kahuna Holdings Limited*.⁴

Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particular apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues ...

Allegation of falsification of records

³ *Hines v Eastlight Port Limited* [2018] NZEmpC 111 at [25]; *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [35].

⁴ [2015] NZEmpC.

[10] The Applicants' Statement of Problem pleaded that Hoyts had "*falsified documents* to increase [name withheld] sales figures".⁵ It went on to allege that "it was not possible for the applicants to achieve the same sales figures without taking part in *fraudulent conduct*".⁶ Later it pleaded that Hoyts had "*falsified data* in order to favour the least qualified candidate".⁷

[11] In *Scarborough v Micron Security Products Ltd* the Court considered the impact of allegations of fraud on costs (citations removed).⁸

Decisions such as *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* and *Bradbury v Westpac Banking Corporation* refer to examples of where indemnity costs may be ordered. The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud have been held to be one example. Conduct causing loss of time to the Court and to the other party in commencing or continuing proceedings for some ulterior motive, wilful disregard of known facts or clearly established law applying to the proceedings, making allegations which ought never to have been made or unduly prolonging a case by making groundless contentions are other examples. If the case is truly hopeless the action taken will be presumed to have been commenced for some ulterior motive.

[12] The allegations made by the Applicants that Hoyts had falsified documents were serious allegations that were unfounded and without merit.⁹ The Applicants' beliefs were based on second-hand information and gossip. They did not form part of the initial personal grievances raised by the Applicants, nor were they supported by the documentation relied upon by the Applicants. Using the Court's words in *Scarborough* the allegations ought never to have been made and unduly prolonged the case.

[13] I am satisfied that the Applicants unnecessarily increased Hoyts' costs by making the allegations relating to falsification of records. While the time attendances during the investigation meeting are taken into account in the daily tariff, I am satisfied that Hoyts was required to attend to additional attendances outside of the investigation that were above the ordinary expectations taken into account when setting the daily tariff.

Evidence on availability

⁵ Statement of Problem at paragraph 41(c).

⁶ At n 5 at [41(d)].

⁷ At n 5 at [59].

⁸ [2015] NZEmpC 153 at [9] – [10].

⁹ *French & ORS v Hoyts Cinemas (NZ) Limited* [2019] NZERA 102 at [75].

[14] The Authority's investigation of the allegations of breach of the Collective Agreement, and unjustified disadvantage, required consideration of whether the Applicants were available to undertake the additional shifts offered to new staff members.

[15] The Applicants' written statements did not sufficiently address this issue. This led to extensive questioning by the Authority and Mr McGinn. This questioning did not achieve clarity. As the substantive determination records, Mr Wren could not recall his availability during term time and the only documentary evidence of his availability was dated several months after the new employees were employed. Ms French's recollection of her availability during term time conflicted with the availability forms I viewed.¹⁰

[16] Realising the gap in their evidence the Applicants produced a number of excel spreadsheets on the second day of the investigation meeting. These spreadsheets purported to show the shifts the Applicants worked at material times based on the records provided by Hoyts before the investigation meeting. They also purported to show the shifts worked by the 6 new employees that the Applicants alleged they could have worked.¹¹

[17] I accept that Hoyts was put to additional work analysing these spreadsheets.

Breach of Good Faith Argument

[18] The Statement of Problem pleaded that Hoyts failed to act in good faith by failing to be active and constructive in investigating the Applicants' personal grievances.¹² It alleged that Hoyts agreed, as an outcome to mediation, that it would conduct an investigation into the matters raised by the Applicants at mediation. It further alleged that Hoyts did not conduct that investigation in a timely manner, misled the Applicants as to the progress of the investigation, and did not provide the Applicants with a formal outcome of the investigation. I found any discussions held between the parties relating to an investigation took place during the course of the mediation and were therefore confidential pursuant to s 148.

[19] I am satisfied that the Applicants' claim led to the investigation meeting time being extended whilst the matter was discussed with the Representatives and through

¹⁰ At n 9 at [[45] – [49].

¹¹ At n 9 at [50].

¹² Statement of Problem at paragraphs [42]-[56].

questioning. This time is taken into account in the daily tariff award. However, I accept additional time was also incurred by the Respondent preparing written submissions following the completion of the investigation meetings that addressed this issue.

Other matters

[20] For completeness I did consider, but do not accept, that the other matters raised by Mr McGinn ought to result in the daily tariff being increased. As the Court said in *Johnston v Fletcher Construction Company Limited*:¹³

While there is, as Mr Drake says, authority for the proposition that increased or indemnity costs may be awarded against a party who takes or pursues an unnecessary step or an argument that lacks merit, or has pursued a wholly unmeritorious or hopeless case, it is equally evidence that the fact that a point has not previously been argued, or which has failed to succeed, will not automatically lead to an enhanced costs exposure.

[21] In the present case:

- a) The Applicants' decision not to request a penalty for breach of the employment agreement was one open to them. It was not a decision that increased costs.
- b) The substantive determination found that Hoyts had impliedly consented to the Applicants raising the personal grievances relating to the hiring of staff from February onwards out of time. The hiring of staff prior to this date was relevant background information. It did not increase costs unnecessarily.
- c) Both parties could have saved time by reviewing documentation available to them that would have shown when the Applicants became members of the Union, and thereby became bound by the Collective Agreement.

Quantum of upwards adjustment

[22] In the circumstances I am satisfied a sum of \$1,000 is a reasonable amount that takes into account the additional attendances that were needed to be undertaken by Hoyts. The daily tariff will be increased by this sum.

¹³ [2018] NZEmpC 18 at [11].

Should the daily tariff be adjusted downwards?

[23] Mr Allan put forward two grounds as to why the daily tariff ought to be adjusted downwards. I have considered each of these grounds. I am satisfied that a downwards adjustment is not warranted. While there was a short adjournment to the investigation meeting while the parties undertook settlement negotiations, this was for the benefit of both parties.

Disbursements

[24] Hoyts claims the cost of Mr McGinn's return airfares between Auckland and Christchurch for the second day of the investigation meeting. It also claims his accommodation costs. The Applicants do not address this claim in their submissions.

[25] It is not usual for travel and accommodation costs of out of town counsel to be paid in the Authority, a position that has been established in a number of cases. No reason has been put forward by Hoyts as to why Mr McGinn, a Barrister based in Christchurch, was engaged when there is a number of Counsel available locally of comparable experience.

[26] I decline to order reimbursement of the disbursements sought by Hoyts.

Outcome

[27] The overall outcome is:

- a) The Applicants are jointly and severally ordered to pay to Hoyts the sum of \$9,000 towards its legal costs.
- b) The sum of \$9,000 must be paid within 14 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority