IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2019] NZERA 173
5417206

	BETWEEN	TONY ADAMS, KENNETH ALLEN, CHRISTINE APPERLEY, NICHOLAS DALTON, PIETRO ELENIO, KATHLEEN GRUSCHOW, JUSTINE HARWOOD, SIMON KARIPA, JOHN KIDD, TERENCE O'CONNOR, CHAYE PETTIGREW, SVEN PURRE, LLOYD SINGLETON Applicants
	AND	McDOUALL STEWART SECURITIES LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Jonathan Haig, counsel for the Applicant's Michael Leggat, counsel for the Respondent
Submissions Received:	1 February 2019 and 25 February 2019 from the Applicant 18 February 2019 from the Respondent
Date of Determination:	22 March 2019

COSTS DETERMINATION OF THE AUTHORITY

The Substantive Determination

[1] There have been two substantive determinations in this matter separated in time by some four years. The first is dated 4 September 2013 and this was followed by two decisions in August 2017, the first on 7 August 2017 and a second dated 15 August 2017.

[2] In the first substantive determination, issued as [2013] NZERA Wellington 107 Member Stapp mandated a process for the parties to seek to resolve questions primarily about outstanding wages and there was no consideration given by the Member to costs.

[3] By determination issued as [2017] NZERA Wellington 76, and dated 15 August 2017, I reissued the original 2013 determination without amendment save for the inclusion of the names of the parties.

[4] When Member Stapp issued his 2013 determination, he granted name suppression by consent on the footing that the parties were then embarking on an attempt to resolve the outstanding wages claims of the applicants by consent.

[5] Indeed in my second 2017 determination issued as [2017] NZERA Wellington 72 on 7 August 2017, I describe the progressing of this matter, and decided that the agreement between the parties, which effectively underpinned the name suppression, had been brought to an end by a fundamental breach effective 1 February 2017 and it is from that date that interest becomes payable because prior to that date, the agreement between the parties precluded any claim for interest by the applicants.

Submissions for the Applicants

[6] The applicants seek interest on the outstanding wages for each applicant individually at five percent per annum on and from 1 February 2017 such calculations being in reliance on the decisions that I have already made and communicated in my determination issued on 7 August 2017.[1]

[7] In addition, the applicants seek the fixing of costs in the sum of $12,350 plus GST ($14,202.50 inclusive of GST).

Submissions for the Respondent

[8] The respondent does not dispute the quantum owed to each claimant. It follows that interest can be calculated on a figure that in respect to each applicant, is agreed between the parties.

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1 [2017] NZERA Wellington 72.

[9] However, the respondent resists the claim for full indemnity costs which is the effect of the applicant's submissions.

Discussion

[10] By virtue of the settled agreement between the parties concerning the quantum of wages owed to each of the applicant parties, and my earlier determination awarding interest once the wages owed to each individual applicant was determined by agreement, I need make no further determination in respect to the matter of interest.

[11] The position is otherwise in respect to costs where there is a live argument. The applicants seek full solicitor/client costs and the respondent's position is that there is no reason to depart from the Authority's traditional position of applying the daily tariff at worst, and that there is an argument for the view that costs should lie where they fall given the observation that I made in the 7 August 2017 determination that costs should lie where they fall.

[12] To deal with that last point first, it is the case that I directed at the conclusion of the 7 August 2017 determination that costs should lie where they fall. That is because in respect to the circumstances dealt within that particular engagement between the parties, each party had had a measure of success and it seemed to me the proper view was that costs should therefore lie where they fell.

[13] But as I understand the applicants' claim for costs now, which as I have already noted is on a full solicitor/client cost basis, the claim contemplates the totality of the costs incurred by the applicants over the whole course of this matter and not just the exchange which resulted in my 7 August 2017 determination. Certainly it is the case that member Stapp made no award in respect to costs and no more he should have; when he presided, there was some realistic prospect that the matter could have been resolved by agreement and obviously, if that was in prospect then it was reasonable to leave costs undisposed of in the hope that the parties could deal with the costs issue by agreement as well.

[14] The principal difference between the parties now is the respondent's conviction that this is an ordinary case which ought to have the application of the daily tariff applied to it according to the usual procedure of the Authority, and that on that footing, a very modest amount would be awarded against the respondent if indeed anything at all.

[15] Conversely, the applicants say this is anything but an ordinary case and they are entitled to a fuller measure of costs because of the drawn out nature of the proceedings which have, they say, been drawn out by the behaviour of the respondent whose refusal to engage appropriately over significant periods of time has caused them to suffer additional legal costs which might not otherwise have had to be incurred.

[16] The starting point for any consideration of costs in the Authority must be the daily tariff. But it is not applied by rote but based on principle and the tariff can be moved up or down depending on the particular circumstances of the case. In this particular case, it seems to me inconceivable that any reasonable bystander looking at the matter with fresh eyes could reach any conclusion other than one that acknowledged the extraordinary and unusual nature of this proceeding.

[17] Afterall, this is a case where the Authority has had to reissue an existing determination in a different form and then had to engage again in the resolution of this employment relationship problem such that this very large number of applicants have some prospect of receiving payment for some of the wages that they have been owed for at least seven and in some cases nine years. Moreover, the Authority's investigation of the employment relationship problem has been spread over a four year period.

[18] I have concluded that this is an unusual case and while I might start with applying the daily tariff which at the moment is $4,500 for a day's proceeding in the Authority or its equivalent, I have to consider the number of applicants, all of whom have incurred legal costs, the behaviour of the respondent which I am satisfied has materially contributed to increasing the applicants' legal costs, and the passage of time.

[19] Against those factors I must place the fact that in my 7 August 2017 determination I excluded costs for that particular engagement between the parties.

[20] I think this is a case where a significant cost award is appropriate because of the behaviour of the respondent employer in increasing the recourse that the applicants have had to have to legal advice, but I also must take account of the fact that in respect to the exchange between the parties that are covered by my 7 August 2017 determination, I decided costs should lie where they fall.

[21] Accordingly, what I have decided is that it is appropriate to reflect the magnitude of the task for the applicant by increasing the daily tariff beyond the daily rate, which can only be a starting point in the consideration of the Member, and reflecting the number of applicants, the contributing behaviour of the respondent, and the length of time that this matter has run on, all of which the applicants are entitled to have some account taken of. Set against those factors is the limitation on costs required by my 7 August 2017 determination.

[22] I have decided that a total cost award of $10,000 is appropriate and I direct that McDouall Stewart Securities Limited is to pay to the applicants' counsel that sum as a contribution to the costs of his thirteen clients.

[23] I also direct that interest is to be paid on the outstanding amounts of wages owed to the applicants and referred to in the applicants' submission on costs dated 1 February 2019 as Appendix B.

James Crichton
Chief of the Employment Relations Authority