

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 318
3095072

BETWEEN FIRST UNION INCORPORATED
Applicant

AND BIDFOOD LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Oliver Christeller, counsel for the Applicant
Jeff Goldstein, counsel for the Respondent

Investigation Meeting: On the papers

Submissions [and further Information] Received: 3 August 2020 from the Applicant
21 July 2020 from the Respondent

Date of Determination: 12 August 2020

COSTS DETERMINATION OF THE AUTHORITY

A. The applicant, First Union Incorporated (First Union) must pay the respondent Bidfood Limited \$2,000 as a contribution to its reasonably incurred costs of successfully defending First Union's application for referral of collective bargaining to facilitation.

Substantive determination

[1] By determination dated 30 June 2020, the Authority declined First Union's application for referral of matters related to collective bargaining to facilitation.¹

¹*First Union Incorporated v Bidfood Limited* [2020] NZERA 263.

[2] Costs were reserved. The parties were invited to exchange memoranda as to costs.

Submissions as to Costs

[3] Mr Goldstein, counsel for Bidfood filed a memorandum as to costs. The total fees incurred by Bidfood according to the memorandum as to costs and invoices submitted on its behalf, amounted to \$5,000 plus GST.

[4] Bidfood seeks a contribution of \$4,500 towards its legal costs.

[5] In its memorandum as to costs in reply, First Union submits that the Authority's practice with respect to costs is to start with the notional daily tariff for an investigation meeting as the starting point for a costs award. As there was no investigation meeting, the submission is that no costs are payable. Even if the Authority is to apply its discretion and award costs, First Union considers a reasonable contribution to costs, given the lack of an investigation meeting, would mean a costs award not exceeding \$1,000.

Costs Determination

[6] The Authority's power to award costs against a party is set out in Clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which provides as follows:

15. Power to Award Costs

- (i) 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.
- (ii) 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.

The Authority has a discretionary power to award costs which must be exercised on a principled basis.

[7] With the agreement of the parties, First Union's application for referral of matters related to collective bargaining, to facilitation was dealt with on the papers. A statement of problem, statement in reply, affidavits and submissions were filed by the parties and considered by the Authority. There was no need for an investigation meeting.

[8] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.²

²[2005] 1 ERNZ 808.

Principles set out in *De Cruz* include that costs are to be modest, not used as a punishment and reasonable. As to quantification of costs, the principle is one of reasonable contribution to costs actually and reasonably incurred.

[9] The Authority's assessment of costs starts from the notional daily tariff which may be adjusted upwards or downwards to account for relevant factors or particular circumstances in the case. The applicable tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for each day thereafter. There was no investigation meeting in this case. However, the parties prepared and filed pleadings, affidavits and submissions.

[10] Bidfood is seeking a contribution to its costs actually incurred of \$5,000 (including GST). Bidfood seeks a contribution towards its costs of \$4,500 based on the Authority's notional daily tariff.

[11] First Union submits that costs should lie where they fall. However, if the Authority is minded to exercise its discretion to award costs, costs should not exceed \$1,000, because there was no actual investigation meeting.

[12] Having considered the submissions made by both parties, I find that Bidfood as the successful party is entitled to an award of costs. A full reimbursement of costs is not appropriate. There was no investigation meeting. However, it is acknowledged that there was work, time and effort put into the preparation of pleadings, affidavits and submissions.

[13] Accordingly, First Union is ordered to pay Bidfood the sum of \$2,000 costs being the equivalent of costs at the rate of almost half day investigation meeting in the Authority.

Anna Fitzgibbon
Member of the Employment Relations Authority