

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 366
3098772

BETWEEN	THE PRIORY IN NEW ZEALAND OF THE MOST VENERABLE ORDER OF THE HOSPITAL OF ST JOHN OF JERUSALEM NEW ZEALAND Applicant
AND	FIRST UNION INC Respondent

Member of Authority:	Marija Urlich
Representatives:	Susan Hornsby-Geluk, counsel for the applicant Peter Cranney, counsel for the respondent
Investigation Meeting:	On the papers
Submissions received:	20 August 2020 from Applicant 7 September 2020 from Respondent
Determination:	11 September 2020

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 11 August 2020 which granted remedies sought by St Johns.¹ The claim arose within the context of the parties' bargaining for a collective employment agreement and considered the application of a statutory code of good faith to the parties and the services provided. The issue of costs was reserved and a timetable set for filing memoranda if costs were intended to be sought. St Johns applied for costs.

¹ *The Priory in New Zealand of the Most Venerable Order of the Hospital of St John of Jerusalem New Zealand v FIRST Union Inc* [2020] NZERA 313.

St Johns claim for costs

[2] Submissions filed on behalf of St Johns seek a costs award of \$4,500, the Authority notional daily tariff, because although the investigation meeting took less than a day and was conducted over the telephone, St Johns costs were significantly greater than the amount sought, costs were incurred in preparing for and attending the hearing, a direction was sought with regard to the statement in reply and the statement in reply which was filed was perfunctory, so increasing costs. Actual costs incurred by St Johns were not stated in the submissions and disbursements were not itemised or separately sought.

FIRST Union's response

[3] FIRST Union submits a costs award is not appropriate in this case because the Authority's determination reflects the statement in reply, St Johns position in respect of the relevant evidential issues was clarified after the filing of the statement of reply and time was taken during the hearing with St Johns altering the remedies sought. Given the hearing was short and by telephone, the usual approach would be a partial costs award. That both sides had a degree of success, no costs award would be a just result.

Costs principles

[4] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the Employment Court set out principles guiding the Authority's approach to costs which include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.

- Frequently costs are judged against a notional daily tariff.²

Costs analysis

[5] St John's was successful in its application; declarations (as the remedies sought were characterised in the statement of problem) were granted in the terms sought. The notional daily tariff is a starting point. The applicable daily tariff is \$4,500. The investigation meeting took less than half a day and was held by telephone.³ Given the late start, that attendance in person was not required and in the absence of a break, the starting point for costs is \$1500.

[6] There is no basis for uplift from that figure. It is true FIRST Union adopted a spare approach to the application but that approach was consistent. The filing of the statement of reply occurred during the first COVID-19 lockdown and after the Authority had taken steps to address St John's application for urgency including a direction to mediation and scheduling a case management conference.

[7] The Authority is not satisfied any unnecessary costs were incurred by St John by issues occasioned by the statement in reply. The Authority does not accept FIRST Union's approach required St John's to unreasonably incur additional costs. The claim was St John's to advance and sought to address concerns St Johns held, which included a degree of novelty, emphasised by the iterations of declarations sought during the hearing.

Conclusion

[8] FIRST Union Inc is ordered to pay St Johns \$1500 as a contribution to its costs within 21 days of the date of this determination.

Marija Urlich
Member of the Employment Relations Authority

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 8080, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.

³ The investigation meeting commenced at 11.30am, the scheduled start time having been delayed by 30 minutes to accommodate technology, and concluded at 1.45pm.