

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 490  
3099936  
3100435  
3101452

BETWEEN

MATTHEW SCOTT  
MCQUILLAN  
Applicant 3099936

SACHIN CHANDAR RAJ  
Applicant 3100435

MOHAMMED  
MUZAMMIL RAFIQ  
Applicant 3101452

AND

DRIVESURE LIMITED  
Respondent

Member of Authority: Marija Urlich

Representatives: Ramendra Narayan, counsel for Applicants  
Rachael Chandra, counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 22 and 21 October 2021, from the Applicants  
29 October 2021, from the Respondent

Determination: 8 November 2021

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**DETERMINATION OF THE AUTHORITY**

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[1] The Authority issued a determination on 11 October 2021 in favour of Mr McQuillan, Mr Raj and Mr Rafiq (the applicants).<sup>1</sup> The applicants were found to have

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<sup>1</sup> *McQuillan, Raj and Rafiq v Drivesure Limited* [2021] NZERA 445.

been unjustifiably disadvantaged in their employment and each awarded \$8,000.00 in compensatory damages. The issue of costs was reserved and a timetable set for filing memoranda if the parties were unable to resolve costs themselves.<sup>2</sup> The applicants now apply for a costs award in their favour.

### **The applicants' claim for costs**

[2] The applicants filed separate applications which were heard jointly by consent. Joining the applicants was appropriate given the claims arose from the same redundancy situation. There were some differences and this is reflected in the total costs individually incurred. A time record detailing costs incurred has been provided - Mr Rafiq incurred total costs of \$3,600, Mr Raj \$4,800 and Mr McQuillan \$5,400. The costs incurred appear to be total costs in relation to all aspects of this matter including initial advice and preparation for filing.

[3] The applicants seek a total contribution to costs of \$13,225 (including a loading for GST) and recovery of total disbursements of \$284.68 made up of three filing fees at \$71.56 each and \$70.00 of photocopying. They say costs should follow the event and the costs incurred are reasonable given the circumstances of the case, because they are prorated and shared and the amounts are consistent with the Authority daily tariff amounts.

### **Drivesure's response**

[4] Drivesure submits costs should lie where they fall or in the alternative an award of no more than the first day notional tariff of \$4,500 should be awarded. It submits this is reasonable given the applicants' partial success – they were not successful in establishing they had been unjustifiably dismissed, Mr McQuillan's bonus claim was unsuccessful and the claim of breach of good faith was not upheld and the manner in which they pursued their claims unnecessarily extended the hearing and contributed unreasonably to costs incurred by both sides.

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<sup>2</sup> Above [93].

## Costs principles

[5] 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.<sup>3</sup>

## Costs analysis

[6] The applicants were the successful party. It is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party's costs. It is accepted the applicants have incurred actual costs in respect of this matter and the level of actual costs appears to be reasonable. They should receive a contribution to costs incurred. It is not accepted this is a case where costs should lie where they fall. This matter did not involve such novel aspects or the applicants' success so limited as to warrant no contribution to costs.

[7] In assessing an appropriate costs award the notional daily tariff is a starting point. The applicable daily tariff is \$4,500 for the first day and \$3,500 for every day thereafter. This matter required three hearing days. The total notional costs, applying the Authority tariff, is \$11,500.

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<sup>3</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 8080, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.

[8] The next step in the assessment is to consider whether there are factors which warrant an increase or decrease in the tariff.

[9] Degree of success is a factor which may warrant a reduction in the tariff. In this case there were matters pursued which were unsuccessful and other matters pursued in a way which, I am satisfied, unnecessarily extended the hearing time. This is a matter which could well have been completed in two hearing days but for matters which were doggedly pursued by the applicants in the face of clear evidence to the contrary. For example considerable time could have been saved if the applicants had conceded they were based at the Penrose site, a conclusion well supported by the evidence. There are no factors which would support an increase in the tariff.

[10] Weighing all the relevant factors I find a decrease of one day is reasonable and that a reasonable contribution to the applicants' costs is a total of \$8,000 to be divided between them in equal share. Total disbursements are reasonably recovered.

### **Outcome**

[11] Drivesure Limited is ordered to pay the applicants a total contribution to costs of \$8,000 to be divided between them in equal share and reimburse them total disbursements of \$284.68 within 21 days of the date of this determination.

Marija Urlich  
Member of the Employment Relations Authority